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**Digest**  
OF  
**THE LAWS OF ENGLAND.**

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VOL. VIII.



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**Digest**  
OF  
**THE LAWS OF ENGLAND.**

BY  
THE RIGHT HONOURABLE  
**SIR JOHN COMYNS, KNIGHT,**  
LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

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**The Fifth Edition, Corrected,**  
(WITH CONSIDERABLE ADDITIONS TO THE TEXT)  
AND CONTINUED  
FROM THE ORIGINAL EDITION TO THE PRESENT TIME;  
TO WHICH IS ADDED,  
A DIGEST OF THE CASES AT NISI PRIUS,  
**By ANTHONY HAMMOND, Esq.**  
OF THE INNER TEMPLE.

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**VOL. VIII.**  
**APPENDIX TO TITLE "CHANCERY."**

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**APPENDIX**  
**TO THE**  
**TITLE "CHANCERY."**





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2. As consequential on discovery.

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Laches.

### I. Of the equitable jurisdiction in account.

#### 1. Its original.

The equitable jurisdiction in account arose, from the writ of account not affording so complete a remedy. *Carlisle Corporation v. Wilson*, 13 Ves. 276.

#### 2. As consequential on discovery.

Account consequential upon discovery, though there may be a proceeding at law. 6 Ves. 688.

### II. Essentials to the right to an account.

#### 1. A legal right.

Equity will not relieve, unless the party has a *legal* right. *Carlisle Corporation v. Wilson*, 13 Ves. 276.

#### 2. Mutual demands.

1. Mutual demands are essential to sustain an account. The cases of a steward and of dower stand upon their own specialties. 6 Ves. 88, 89, 90, 141.

2. Mutual demands not essential in the cases of a steward and of dower. 6 Ves. *ibid*.

### III. Subjects of the equitable jurisdiction in account.

#### 1. Matters cognizable at law.

Complicated accounts, though cognizable at law, are likewise cognizable in equity. 1 Sch. & Lef. 309.

#### 2. A settled account on the one side; a debt for agency in equity on the other.

It is not such matter of account, between the parties, as will operate to give a defendant at law an equity to restrain proceedings for the balance of a previous account stated and settled, that the plaintiff at law was, at the time of such settlement, and had subsequently become indebted to the plaintiff in equity, for business done as his agent. *Hirst v. Peirse*, 4 Price, 339.

#### 3. A note given upon a former balancing upon the one side; subsequent items on the other.

Where a balance of accounts is taken, and a note given for it, that must be paid, although there are subsequent accounts upon which the payee may eventually be in arrear. And the court in such a case refused an injunction from proceeding on the note. *Preston v. Stratton*, 1 Anst. 50.

#### 4. Breach of covenant not to trade.

1. Bill for an account, under covenant, upon sale of goodwill, not to carry on the trade. *Scott v. Mackintosh*, 1 Ves. & Beam. 503.

2. The usual course, a bill of discovery for an action. *Scott v. Mackintosh*, 1 Ves. & Beam. 503.

5. A

5. A marriage contract.

Account decreed of defendant's personal estate, and of what he had given or agreed to give to another with his daughter, he having, on the marriage of one of his daughters with the plaintiff, engaged to make his daughters equal. *Fell v. Hornby*, Dick. 452.

6. A share under an intestacy.

A. died intestate, entitled to personal estate, part consisting of bank annuities in a trustee's name, the dividends whereof were payable to B., the intestate's widow for life; administration was granted to B.; C., one of the next of kin, by letter addressed to B., after mentioning the intestate's property, expressed himself thus: "My share I shall relinquish to you for your benefit only." A deed of release and assignment from C. to B., of all C.'s interest in A.'s effects, was afterwards, by C.'s direction, prepared for his execution, but never executed, C. having died the day before that upon which he had directed his solicitor and a witness to attend him to attest the execution of the release. But having joined with B. and the other next of kin of A., in executing a release to the trustee of the bank annuities, upon the trustee's transferring them to B.; on a bill by C.'s executors against B., for an account and payment of B.'s distributive share, it was decreed as to the general personal estate, but refused as to the bank annuities and their produce. *Hooper v. Goodwin*, 1 B. C. C. 212.

7. Dealings between tradesman and customer.

Dealings between tradesman and customer may be the subjects of account; especially in case of securities obtained from an extravagant young man, on misrepresentation, &c. *Lord Courtney v. Godsall*, 9 Ves. 473.

8. Equitable waste by a deceased tenant.

Demurrer to a bill against the representative of a deceased tenant for life, for an account of equitable waste committed by him, overruled. *Marquis of Lansdowne v. Marchioness of Lansdowne*, 1 Mad. 116.

9. Mesne profits — for the heir.

No bill for mesne profits by heir, merely as such, unless some impediment at law. 6 Ves. 88, &c.

10. Mesne profits — for an infant.

Bill by infant for mesne profits rests upon the ground of infancy. 6 Ves. 88, &c.

11. Mesne profits — upon the ground of the death of the occupier.

The death, simply, of the occupier is no ground for account of mesne profits. 6 Ves. 88, &c.

12. Mesne profits — in the case of mines.

Account in case of mines, rests upon being in nature of a trade. 6 Ves. 88, &c.

13. Mesne profits — in the case of timber.

1. Account of timber depends upon the jurisdiction for an injunction. 6 Ves. 88, &c.

2. Admission that any timber has been wrongfully cut, gives a right to an account. 1 Ves. 82.

14. Mesne profits — in the case of tithes.

Account of tithes turns upon the property in tithes. 6 Ves. 88, &c.

15. Mesne profits — upon a bill to put a term out of the way.

Under a bill to put a term out of the way, in some cases an account of the past rents given. 2 Ves. & Beam. 253.



#### 16. Mesne profits — under special circumstances.

Account of mesne profits since the title accrued, decreed against executors, upon the special ground, that the plaintiff was prevented from recovering in ejectment by a rule of the court of law, and by an injunction, at the instance of the occupier, who ultimately failed both in law and in equity. *Pulteney v. Warren*, 6 Ves. 73.

### IV. Of the mode of taking the account.

#### 1. Of the period of limitation.

1. An account of rent, only ordered for six years prior to the bill being filed. *Hercy v. Ballard*, 4 B. C. C. 468.

2. The account of rents and profits in a doubtful case, only directed from the time of the bill being filed. *Forder v. Wade*, 4 B. C. C. 520.

3. Account of rents and profits confined to the filing of the bill, filed upon grounds of equitable relief against a mere adverse possession, without fraud. 6 Ves. 93.

4. Limited in like manner under special circumstances; as laches in cestui que trust in not asserting his right. *Pettward v. Prescott*, 7 Ves. 540.

#### 2. In the absence of the party to be charged.

Where the party who might resist the claim does not attend, the Master ought to take the account as carefully as if he did. *Carew v. Johnston*, 2 Sch. & Lef. 300.

#### 3. In regard to vouchers.

In an account against an executrix, the Master was directed to allow items, the vouchers for which, it should be verified by affidavit, were impounded in the Ecclesiastical Court. *Nielson v. Cordell*, 8 Ves. 146.

#### 4. Of using the credit side of an account furnished.

When an account furnished by a party, before any suit instituted, is produced, to charge him with the items on the debit side; he is entitled to resort to the credit side in support of his discharge. *Boardman v. Jackson*, 2 B. & B. 382.

#### 5. Against an executor.

There may be a decree for an account, without declaring the will well proved. *Fitzherbert v. Fitzherbert*, 4 B. C. C. 231. 1 Cox, 23.

#### 6. In the case of guardians, receivers, and committees in Ireland.

How guardians, receivers, and committees, shall account in Ireland. 2 Sch. & Lef. 732. Gen. rule, 6 Aug. 1804.

#### 7. In the case of a wilful confusion of property.

Corresponding with the rule in equity to charge an accounting party, who has wilfully confounded the fund with his own property, with the whole, throwing upon him the discharge; instances at law, where the defendant having wilfully prevented the plaintiff's proving the real value of his property, damages to the utmost value the article could bear were given; whether that should have been carried far beyond the possible value. *Quare*. 15 Ves. 439.

### V. Of the decree for an account.

Is an implied injunction against proceeding at law.

1. After an account taken under a decree, a party shall not be allowed to overhaul the account, by bringing an action at law on the same subject matter. *Bell v. O'Reilly*, 2 Sch. & Lef. 430.

2. As

2. As to the mode of proceeding in such a case; see *Bell v. O'Reilly*, 7 Sch. & Lef. 480.

## VI. Of opening an account.

### 1. The principle of the practice.

Settled account not to be set aside, but for fraud; or surcharged and falsified, but for error. 9 Ves. 265.

### 2. After signature.

The court will not open a settled account, where it has been signed, or a security taken on the foot of it, unless for fraud or errors distinctly specified in the bill, and supported by evidence. *Drew v. Power*, Scho. & Lef. 182. 192.

### 3. After security taken on the foot of it.

S. & L. Ibid.

### 4. After receipt in full for the balance given.

A verbal statement of an account, and a receipt in full given for the balance then agreed to be due, are no bar to a bill for opening the account, if there have been mistakes in the transaction. *Walker v. Consett, Forrest*, 157.

### 5. Strong grounds essential to.

A strong ground necessary to set aside settled accounts; or error to surcharge and falsify. 5 Ves. 837.

### 6: The right is lost by laches.

1. An old account shall not be unravelled, though settled upon an erroneous principle. *Gray v. Minnethorpe*, 8 Ves. 103.

2. An account settled ten years before the bill filed, though containing very gross items, shall not be opened; but the plaintiff permitted to surcharge and falsify. *Brownell v. Brownell*, 2 B. C. C. 62.

## VII. Of the modes in which the right to an account may be lost.

### Laches.

1. Where a party has laid by a great length of time, and suffered an estate to be distributed, he shall not have an account. *Hercy v. Dinwoody*, 4 B. C. C. 257.

2. Account against a confidential agent, in possession of estates since 1780, without giving any account to his principal, residing in Ireland; and inquiries into the circumstances of a lease, granted under his direction, and in which he took an interest, and a reversionary lease to himself. *Lady Ormond v. Hutchinson*, 16 Ves. 94.

## AMERICA, UNITED STATES OF,

### Effects of the Revolution upon property in America.

1. The property of an American loyalist having been confiscated during the American war, subject to the claims of such of his creditors as were friendly to American independence, to be made within a limited time, and, in fact, according to the evidence farther restrained to the inhabitants of the

the particular State; a bill to have bonds delivered up, or to compel the creditor to resort, in the first instance, to the fund arising from the Confiscation, was dismissed; on the ground, that it did not appear that the creditor had the clear means of making his demand effectual against that fund: the Lord Chancellor also expressing an opinion in favour of the right to sue personally, even in that case, against the authority of *Wright v. Nutt*, 3 Bro. C. C. 326. 1 Hen. Black. 136. *Wright v. Simpson*, 6 Ves. 714.

2. Stock in this country, in trust for the colony of Maryland, before the American Revolution, not affected by a transfer during the war. 11 Ves. 294.

## ARBITRATION.

### I. Relative to an agreement to refer to arbitration.

1. It cannot be pleaded to a bill in equity for the same subject.
2. Nor can it take away the jurisdiction of any court.
3. The court will not substitute itself for the arbitrators, and make the award.

### II. Relative to a reference.

1. The effect of a reference is, that the court divests itself of all judgment upon the facts.
2. Of substituting an arbitrator for the master.
3. Arbitrator, on general reference, may go farther than the court could, to do complete justice.
4. Admission of assets by mistake, a clear subject of the jurisdiction of an arbitrator, under a general reference.
5. Arbitrator, on reference to enquire into facts, &c., is as a master.
6. A case in which a reference was held not to be in nature of a reference to the master.
7. A case in which an award was held a due execution of a reference touching machinery.

### III. Relative to an award.

1. Whether it concludes the parties upon questions of law.
2. Whether it concludes the parties upon questions of fact.
3. Whether conclusive when contrary to law.
4. Corruption, misbehaviour, excess of power, and mistake admitted by arbitrators, are the only grounds of impugning their award.
5. It cannot be pleaded to a bill impugning it for misbehaviour in the arbitrators.
6. Whether conclusive, where the arbitrators receive evidence after notice to the parties that they will receive no more.
7. Whether conclusive, where the arbitrator makes use of another's judgment.
8. Whether it concludes the parties, when obtained by misrepresentation of facts unknown at the time.
9. Whether

9. Whether it concludes the parties, when obtained through the want of a letter mislaid at the time.
10. Whether final as to matters not provided for.
11. Validity of an award made upon the day to which the time for making it was enlarged.
12. Effect upon existing suits, of an award that suits shall cease.
13. General rule of construction.

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2. It may be done after the award is made.

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1. Whether it lies where the award has been made a rule of a court of law, under the statute.
2. Where the objections may be taken in a court of law, of which the submission has been made a rule.
3. Where the award is legally defective, and has been made a rule of a court of law.
4. Upon an award made a rule of a court of law, one term being, that no bill in equity shall be filed, the court of law has a discretion to enforce that term or not.
5. An award in a cause depending is not within the statute of William.

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1. Upon a petition of appeal.

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1. By a bill.
2. By exceptions.

**IX. Of an injunction against legal proceedings on an award.**

1. Where the award has been made a rule of a court of law.

**X. Relative to an arbitrator.**

1. An arbitrator is not to consider himself agent for the person who appoints him.
2. An arbitrator may proceed ex-parte on the non-attendance of one party.
3. Jurisdiction under a reference, to oblige the arbitrator to proceed.
4. Whether he may purchase the claims under reference.



### I. Relative to an agreement to refer to arbitration.

1. It cannot be pleaded to a bill in equity for the same subject.
  1. Covenant to refer to arbitration only entitles to damages; but is no bar to a suit or action; as covenant that there should be no suit at law or in equity, would be. 2 Ves. 132.
  2. Agreement to refer to arbitration no bar to relief in equity. 4 Ves. 270.
  3. To a bill for parties to account, plea that there was an agreement, that all matters in dispute should be referred to arbitration, over-ruled. *Michell v. Harris*, 4 B. C. C. 311. over-ruling 2 B. C. C. 336. Dick. 702.
  4. To a bill for discovery and relief, plea of an agreement to refer to arbitration, over-ruled. *Street v. Rigby*. 6 Ves. 815.
  5. Although an agreement to refer disputes to arbitration is generally no objection to a suit in a court of equity, yet upon the nature of the subject, the management of the opera-house, and the anxious provision of the parties for arbitration, the court refused upon motion to interfere, before they had taken that course. *Waters v. Taylor*, 15 Ves. 10.

#### 2. Nor can it take away the jurisdiction of any court.

1. Mere agreement to refer to arbitration, where no reference has taken place, cannot take away the jurisdiction of any court. 2 Ves. 136.
2. Agreement to refer to arbitration does not bar an action. 6 Ves. 822.
3. The court will not substitute itself for the arbitrators, and make the award.

1. Upon a reference to arbitration, if the award is not made in the time and manner stipulated, no case at law or in equity that the court has substituted itself for the arbitrators, and made the award; even where the substantial thing to be done is agreed between the parties; still less, where any thing substantial is to be settled by the arbitrators. 6 Ves. 34.

2. No case at law or in equity, that, if an award is not made at the time, and in the manner stipulated, the court have substituted themselves for the arbitrators, and made the award; even where the substantial thing to be done was agreed by the parties, but the time and manner left to others to prescribe. 17 Ves. jun. 242.

### II. Relative to a reference.

1. The effect of a reference is, that the court divests itself of all judgment upon the facts.

By reference to arbitration, both at law and equity, the court divests itself of all judgment upon the facts. 2 Ves. 24.

#### 2. Of substituting an arbitrator for the master.

Parties may, if they choose, take arbitrators instead of the master; and then they must proceed as the master, and make the same report. *Dick v. Milligan*, 2 Ves. 23.

3. Arbitrator, on general reference, may go farther than the court could, to do complete justice.

Arbitrator on general reference of all matters, &c. may go farther than the court could, to do complete justice; and may therefore relieve against a harsh right, which in a court of justice would prevail: a party may impeach the award for corruption or gross mistake, not for erroneous judgment; in case of mistake the arbitrator must be convinced of it, and that he acted upon it. But arbitrator, on reference to inquire into facts, &c. is as a master; and the court will draw the conclusion; or if he has, will see that it is right. *Knox v. Symmonds*, 1 Ves. 369.

#### 4. Admission

4. Admission of assets by mistake, a clear subject of the jurisdiction of an arbitrator under a general reference.

Admission of assets by mistake, a clear subject of the jurisdiction of an arbitrator under a general reference. *Young v. Walter*, 9 Ves. 364.

5. Arbitrator, on reference to inquire into facts &c., is as a master.  
Vide 1 Ves. 369.

6. A case, in which a reference was held not to be in nature of a reference to the master.

Accounts referred to the master; afterwards an order of reference was made to arbitrators to take an account of all dealings and transactions in like manner as if the same were referred to the master, and that the parties should be concluded and bound by the award, and should observe it; and farther directions were reserved; this reference is not in nature of a reference to the master; therefore the parties are bound by a general award of a balance due, without particulars stated; the decision being final, because upon matter of fact, and no corruption or misconduct imputed; and the court will not require particulars merely as a ground for costs. *Dick v. Milligan*, 2 Ves. 23.

7. A case in which an award was held a due execution of a reference touching machinery.

Under a reference to settle the matter in difference, and award such alterations in the defendant's works as to the arbitrator should seem necessary, regard being had to their state at a particular period; an award directing no other alteration than that parts of the machinery, which were made of wood, should be made of cast-iron, was held a due execution of the authority. *Walker v. Frobisher*, 6 Ves. 70.

### III. Relative to an award.

1. Whether it concludes the parties upon questions of law.

1. An award cannot be disturbed for mistake upon a question of law referred. *Ching v. Ching*, 6 Ves. 282.

2. Though, if an arbitrator, under a general reference, meaning to decide according to law, mistakes, the court will set that right; yet, if the parties choose to refer matters of law, meaning to have the judgment of the arbitrator upon them, instead of that of the court, the award, though not agreeable to law, cannot therefore be impeached. *Young v. Walter*, 9 Ves. 364.

3. An award made on a reference of a point of law is binding, though the arbitrator mistakes the law. *Steff v. Andrews*, 2 Mad. 6.

4. The courts will abide by the decision, though erroneous, of judges chosen by the parties to decide a question of law. *Wood v. Griffith*, Swanst. 55.

5. Award upon a general reference cannot be impeached for erroneous judgment upon facts; but may for corruption, misbehaviour, excess of power, and mistake admitted by the arbitrators; in the three first cases, there must be satisfactory evidence against them; for the court favours awards. *Morgan v. Mather*, 2 Ves. 15.

2. Whether it concludes the parties upon questions of fact.

1. Parties to an award bound by it. *Price v. Williams*, 1 Ves. 365.

2. Award pleaded would be examined in a court of law as well as equity. 2 Ves. 136.

3. Plea of an award and release to a bill to open an account, ordered to stand for an answer. *Burton v. Ellington*, 3 B. C. C. 196.

3. Whether conclusive when contrary to law.

1. Award contrary to law may be impeached; for that is excess of power. *Morgan v. Mather*, 2 Ves. 15.

2. Where

2. Where legal rights are referred to arbitration, the award must be according to law, otherwise it is not binding. *Blennerhassett v. Day*, 2 B. & B. 120.

4. Corruption, misbehaviour, excess of power, and mistake admitted by arbitrators, are the only grounds of impugning their award.

1. Award not to be set aside, but for partiality and misbehaviour of the arbitrators, or for their exceeding their commission. *Sumpter v. Life*, Dick. 497.

2. Vide 2 Ves. 15.

5. It cannot be pleaded to a bill, impugning it for misbehaviour in the arbitrators.

1. To a bill charging corruption of arbitrators, plea of the award merely not sufficient. 2 Ves. & Beam. 364.

2. To a bill to be relieved against an award, upon suggestion of misbehaviour, &c. in the arbitrators; a plea by the arbitrators of the submission and award, with an averment of impartiality, &c. over-ruled. *Rybolt v. Barrell*, 2 Eden. 131.

6. Whether conclusive, where the arbitrators receive evidence after notice to the parties that they will receive no more.

Award set aside: the arbitrator having received evidence after notice to the parties that he would receive no more, in which they acquiesced. *Walker v. Frobisher*, 6 Ves. 70.

7. Whether conclusive, where the arbitrator makes use of another's judgment.

Award not to be set aside, because the arbitrator made use of the judgment of another person. 5 Ves. 848.

8. Whether it concludes the parties, when obtained by misrepresentation of facts unknown at the time.

A submission to arbitration was made a rule of court, and an award made; the bill stated the award to have been obtained by misrepresentation of facts not then known to the plaintiff. Plea, the award alone, and no answer. The plea is bad. *Gartside v. Gartside*, 3 Anst. 735.

9. Whether it concludes the parties, when obtained through the want of a letter mislaid at the time.

Declaration of one of the arbitrators, that had he seen a letter, of which, being mislaid at the time, the contents were proved, he would have acted otherwise, not sufficient against an award on the ground of mistake admitted evidence, and injunction from proceeding thereon dissolved. *Anderson v. D'Arcy*, 18 Ves. jun. 447.

10. Whether final as to matters not provided for.

The bill stated an award between the parties, and that it had not provided for a particular event, by which the plaintiff was damnified, viz. by the partnership-fund proving deficient, and the plaintiff being compelled to make up the deficiency. Plea, the award. The court thought the award should be considered as final, unless specific payments by the plaintiff to creditors had been stated; and allowed the plea. *Rowth v. Peach*, 2 Anst. 519.

11. Validity of an award made upon the day to which the time for making it was enlarged.

The time for making an award was on or before the first day of Michaelmas term; it was afterwards enlarged till the first day of Hilary term.

term: an award made on the first day of Hilary term is good. *Knox v. Sammonds*, 4 B. C. C. 358.

12. Effect upon existing suits, of an award that suits shall cease.

All matters in difference in law and equity being referred to arbitration, and made a rule of court in K. B., the award directed that all suits between the parties should be discontinued; the defendant in equity, thereupon, moved that the bill might be dismissed. This was refused, for the court cannot act on the award. *Hutchinson v. Hodgson*, 2 Anst. 361.

13. General rule of construction.

In construing an award, it is the duty of the court to favour that construction which renders the award certain and final. *Wood v. Griffith*, Swanst. 52.

IV. *Of making a submission a rule of court.*

1. A parol submission is not within the statute of William.

Parol submission to arbitration not within the statute 9 & 10 W. & M. c. 15. ——— *v. Mills*, 17 Ves. jun. 419.

2. It may be done after the award is made.

1. Submission-bond under the statute 9 & 10 W. 3. not to be made an order of court after the award is made. *Spettigue v. Carpenter*, Dick. 66.

2. Order after an award to make the submission a rule of court. *Powell v. King*, 6 Ves. 10.

3. No objection to an award, that the reference was not made a rule of court till after the award; or, that the award was prepared by the solicitor of one of the parties. *Fetherstone v. Cooper*, 9 Ves. 67.

V. *Of a bill in equity to enforce the specific performance of an award.*

1. The specific performance of an award may be compelled in equity.

The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous agreement between the parties: and although the illegality of the acts of which it directs the execution, will afford a ground for refusing to decree the performance, the court, considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable. *Wood v. Griffith*, Swanst. 43.

2. Principle upon which the specific performance of awards is decreed.

Principle on which the court decrees the specific performance of awards. *Wood v. Griffith*, Swanst. 54., etiam supra, div. 1.

VI. *Of a bill in equity for relief against an award.*

1. Whether it lies where the award has been made a rule of a court of law under the statute.

1. Bill lies to set aside for fraud an award made a rule of a court of law under 9th and 10th Will, 3. c. 15. *Lord Lonsdale v. Littledale*. 2 Ves. 451.

2. As to the jurisdiction in equity against an award under a reference, made a rule of a court of law, for misconduct of the arbitrators, &c. where the bill was filed before the rule made in the court of law: quære. ——— *v. Mills*, 17 Ves. jun. 419.

2. Where

2. Where the objections may be taken in the court at law, of which the submission has been made a rule.

Vide 9 Ves. 67.

3. Where the award is legally defective, and has been made a rule of a court of law.

General reference to arbitration by parties in a suit, then depending in chancery, made an order of a court of law. Whether that is an order within the statute 9 and 10 Wil. 3. c. 15. excluding the equitable jurisdiction to affect the award for mistake of the law, apparent, and to restrain an application to the court of law to enforce it. *Quære*. *Nicholas v. Chalie*, 14 Ves. 265.

4. Upon an award made a rule of a court of law, one term being, that no bill in equity shall be filed, the court of law has a discretion to enforce that term or not.

Upon an award made a rule of a court of law, one term being, that no bill in equity shall be filed, the court of law has a discretion to enforce that term or not. 2 Ves. 453.

5. An award in a cause depending, is not within the statute of William.

An award in a cause depending, is not within the statute. *Lord Lonsdale v. Littledale*, 2 Ves. 451.

## VII. Of ordering money awarded to be paid into court.

1. Upon a petition of appeal.

The court will not order money awarded to a party, to be paid into court on a petition of appeal being signed by counsel; but *semble*, *secus* if the appeal had been received. *Lewis v. Harber*, 1 Price. 132.

## VIII. Of the mode of impugning an award.

1. By a bill.

There is no way of getting rid of an award in the court of chancery, but by bill. *Sumpter v. Life*, Dick. 474.

2. By exceptions.

1. Though considered in this case, that exceptions do not lie to an award. *Price v. Williams*, 3 B. C. C. 163.;

2. Yet afterwards it was held, that exceptions will lie to an award where the original reference was to a master, with a reservation of further directions, and the arbitrator was afterwards substituted in lieu of the master; but not where the reference is originally made to the master of all matters in difference. *Ford v. Gartside*, 2 Cox. 368.

3. Exceptions will lie to an award: but they must be to matters on the face of it. *Dick v. Milligan*, 4 B. C. C. 117. Vide *Id.* 536.

4. Award on general reference not to be impeached by exceptions, but by cross motions to set aside and confirm it. *Knox v. Symmonds*, 1 Ves. 369.

5. Exceptions may, with leave of the court, be taken to an award, upon reference to inquire into facts; if allowed, the court will refer it to a master, but not back to the arbitrator without consent, 1 Ves. 370. n.

6. Matter of exception to an award must be confined to what arises upon the face of it, compared with the proceedings in the cause, and cannot be introduced by affidavit; any thing *dehors*, charging misconduct, &c. must come

come upon motion to set it aside; and there cannot be a partial inquiry. *Dick v. Milligan*, 2 Ves. 24.

#### IX. Of an injunction against legal proceedings on an award.

1. Where the award has been made a rule of a court of law.

No jurisdiction in equity by injunction to stay process of a court of law upon an award, made a rule of court under the stat. 9 and 10 Wil. 3. c. 15. which confines the jurisdiction to set aside the award, obtained by corruption, &c. to the court of which the submission is made a rule. *Gwinett v. Bannister*, 14 Ves. 530.

#### X. Relative to an arbitrator.

1. An arbitrator is not to consider himself agent for the person who appoints him.

Arbitrator is not to consider himself agent for the person who appoints him. 1 Ves. 226.

2. An arbitrator may proceed ex-parte, on the non-attendance of one party.

Arbitrator has a power, subject to his discretion, to proceed *ex parte*, if one of the parties will not attend. *Wood v. Leake*, 12 Ves. 412.

3. Jurisdiction, under a reference, to oblige the arbitrator to proceed.

A cause having been referred to arbitration, under an order by consent, the court will not make an order on the arbitrators to proceed. The parties having proceeded under an order made by consent for referring a cause to arbitration, whether it is competent to either to withdraw: *quære*. *Crawshaw v. Collins*, Swanst. 40.

4. Whether he may purchase the claims under reference.

A purchase by an arbitrator of claims under reference, cannot be supported. *Blennerhasset v. Day*, 2 B. & B. 116.

### BARON AND FEME.

#### I. In relation to transactions previous to marriage.

1. Settlements in derogation of marital rights.
2. Bond delivered as an escrow.

#### II. Of the husband's rights.

1. Foundation of his marital rights.
2. To the income of his wife's equitable interest.

#### III. Of the husband's obligations.

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1. For the wife's waste when sold.
2. Presumption that the wife administered to an estate with his assent.
3. Husband of executrix administering assets makes the debt his own.

4. For

4. For a devastavit during coverture.
5. Whether a covenant to pay his wife's debt makes it his own.
6. Admissibility of parol evidence to prove that a covenant was for the wife's debt, not his own.

**V. Of the wife's rights.**

1. To the guardianship of her illegitimate child.

**VI. Of the wife's liabilities.**

1. For a devastavit during coverture.

**VII. Of the protection which courts of equity throw around married women.**

1. They will allow their rights to be referred.
2. And make the husband a trustee for his wife.

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**XV. Of the wife's equities.**

1. Husband's interest therein.

**XVI. Of**

**XVI. Of the wife's separate estate.**

1. Of property to the separate use of married women.
2. Of the words necessary to constitute a trust of property for the separate use of a married woman.
3. Of the separate property of married women, arising from their savings out of their separate provisions.
4. Of gifts by the husband to her separate use.
5. Of the modes in which married women may dispose of their separate property, where it has been given to them with a power of disposing of it, without any prescribed form.
6. Of the power of married women over their separate property, where it is limited to them with a prescribed form of appointment.
7. Of the disposition, by married women, of their separate property, which has been limited to them without any express power to appoint.
8. Of settlements to the separate use of married women, with a power to appoint from time to time.
9. Priority of bond creditors under a distribution thereof as assets.
10. Of the persons with whom married women may deal with respect to their separate estate, and of the account of it to which they are entitled, and against whom.
11. Of the separate character which a feme covert acquires with respect to her separate property.
12. Of the wife's equity, as it is administered to her against her husband.
13. Of her lien upon estates purchased by the husband with her separate property.

**XVII. Of the wife's choses in action.**

1. Husband's interest therein.
2. Of the wife's equity, as it is administered to her against her husband.
3. Of the wife's equity, as it is administered to her against the general assignees of her husband.
4. Of the wife's equity, as it is administered to her against the particular assignees of her husband.
5. Of the wife's equity, as it is administered to her against the creditors or representatives of her husband.
6. Of the settlement by which the wife may be barred of her equity.
7. Of the forms in which the wife waives her equity.
8. Of the wife's right by survivorship to her equitable choses in action.

**XVIII. Of separate maintenance.**

1. Of the jurisdiction of courts of equity in relation to.
2. Of the direct jurisdiction of courts in general to decree.
3. Mode of enforcing articles of separation.
4. Of the specific performance of an agreement between hus-



band and wife for a separate maintenance, upon an intended immediate separation.

5. Of the specific performance of an agreement between husband and wife for a separate maintenance, in contemplation of a future separation.
6. Construction of articles of separation.
7. Determination of articles of separation.
8. Of the wife's power of alienation over.
9. Of the grounds for a sentence of divorce *a mensâ et thoro*.
10. Of the grounds upon which a separate maintenance will be decreed or be refused.
11. Of the effect of separation and separate maintenance upon the duties of marriage.

### **XIX. Judicial proceedings.**

1. Preliminaries to.
2. Parties to.
3. The wife must be served in proceedings against her separate estate.
4. Process against the husband for his wife's default.
5. The wife, when not entitled to summary relief.
6. The wife considered as sole, when the marriage was fraudulent upon the husband.
7. Of execution against the wife's separate estate.
8. Of execution against the wife's person.
9. Of suits for discovery against the wife.
10. Right of husband to answer separately, from his wife living in adultery with the plaintiff.
11. Of the wife's answering separately from the husband.
12. Separate examination of the wife.
13. Effect of the wife's refusal to join in swearing to a plea.
14. Suit by husband against wife.
15. Of compelling the wife to answer her husband's bill.
16. Whether the wife's evidence is admissible against her husband.
17. Order by consent, disposing of wife's separate estate, how far obligatory.
18. Wife's obligation to follow up a suit after the husband's death.
19. A decree, how far obligatory on a married woman.
20. Of refusing, after the husband's death, a bill taken *pro confesso* against both.
21. Expenses of, how liquidated.
22. Suit at law for wife's legacy.
23. Supplicavit.

### **XX. Of the description under which a husband may take from his wife.**

The description of next of kin.

### **XXI. Of**

**XXI. Of the description under which a married woman may take from her husband.**

The description of next of kin.

**XXII. Of the wills of married women.**

1. When valid.
2. Probate, when essential.
3. Probate, to what extent efficient.
4. Revocation of.

**XXIII. Of mutual wills by husband and wife.**

Revocation of.

**XXIV. Of the husband's right of survivorship.**

1. To the wife's separate estate.
2. To the wife's residuary share.

**XXV. Of the husband's liabilities of survivorship.**

They are partial only, not universal.

**XXVI. Of the wife's right of survivorship.**

1. Analogy between the rules of law and equity respecting survivorship.
2. To her choses in action not reduced to possession during coverture.
3. Of her right to redeem a mortgage suffered by the husband to become absolute.
4. Of her right to her paraphernalia.

**I. In relation to transactions previous to marriage.****1. Settlements in derogation of marital rights.**

1. Conveyance by a woman under any circumstances, and even the moment before marriage, good *prima facie*: bad only, if fraud; as where made pending the treaty without notice. 1 Ves. 28.

2. Hence, where a widow, before her second marriage, conveys her estates to trustees, to her own separate use, without the knowledge of her second husband. This deed is good against the second husband. Countess of Strathmore v. Bowes, 2 Cox. 28. 2 B. C. C. 345. 2 Ves. jun. 194.

**2. Bond delivered as an escrow.**

Bond by feme delivered to a stranger before her marriage, to be delivered on condition, good, though condition performed after marriage. 1 Ves. 275.

**II. Of the husband's rights.****1. Foundation of his marital rights.**

The burthens, to which a husband is liable, are a consideration for his marital rights, upon which therefore fraud may be committed. 1 Ves. 28.

**2. Of his right to the income of his wife's equitable interest.**

1. The husband is entitled to the income of his wife's equitable interest, unless he has received some fortune with her; or has misbehaved, as, by running away with a ward of the court. Macaulay v. Philips, 4 Ves. 15.

2. So likewise, an application by a husband for the interest of his wife's money in Court was refused, on her affidavit of ill-treatment. 10 Ves. 56.

### III. Of the husband's obligations.

To procure the joinder of his wife in a conveyance.

1. Husband, under the circumstances, decreed to procure his wife to join in a surrender of copyhold estate. *Stephenson v. Morris*, 7 Ves. 474.

2. But, whether under a contract by a husband to sell the estate of his wife, the Court will decree him to procure her to join, *Quære*. *Emery v. Wase*, 8 Ves. 505.

### IV. Of the husband's liabilities.

#### 1. For the wife's waste when sole.

Feme executrix commits waste before coverture; the husband shall not be charged at law after coverture; and equity will not vary this rule at law on the ground of his having received a portion with his wife. 1 Sch. & Lef. 263.

2. Presumption that the wife administered to an estate with his assent.

Administration taken by a feme covert must be presumed taken with the privity and assent of the husband. 1 Sch. & Lef. 266.

3. Husband of executrix administering assets, makes the debt his own.

Executrix marries, and she and her husband admit assets in answer to a bill filed against them. The assets become a debt of the husband in respect of this admission, and may be proved under a commission of bankruptcy issued against him. In *re Williams*, 1 Sch. & Lef. 173.

#### 4. His liability for a devastavit during coverture.

1. Feme covert obtains administration, and the goods are wasted during the coverture; the husband dies; his assets are chargeable in equity for the waste committed during the coverture. *Adair v. Shaw*, 1 Sch. & Lef. 243.

2. The law has no form of action by which the assets of the husband of a feme executrix are chargeable for a devastavit committed by him during the coverture. 1 Sch. & Lef. 261.

3. But equity will relieve in such case, on the principle that the property came into the husband's possession bound by a trust. 1 Sch. & Lef. 261.

4. And if the assets of the original testator remained in the hands of the husband, and went to his executors in specie, an action at law might be maintained for them. 1 Sch. & Lef. 262.

#### 5. Whether a covenant to pay his wife's debt makes it his own.

Where the debt is not originally the husband's, his covenant to pay is only collateral, and will not make it his; but, *Quære*, whether so against creditors. 1 Ves. 187.

6. Admissibility of parol evidence, to prove that a covenant was for the wife's debt, not his own.

Not necessary to appear on the instruments that it is the debt of the wife, but may be proved *aliunde*. 1 Ves. 187.

### V. Of the wife's right.

To the guardianship of her illegitimate child.

A married woman appointed guardian of an illegitimate child; and payment ordered to her upon her separate receipt. *Wallis v. Campbell*, 13 Ves. 517.

### VI. Of

## VI. Of the wife's liabilities.

1. On a devastavit by the husband of an executrix, or administratrix, of the estate of her testator or intestate, this court will charge the wife after the death of her husband. *Benyon v. Collins*, Dick. 697. 1 S. & L. 248. 257.

2. But where the husband of a feme covert executrix, having committed a devastavit, becomes bankrupt; the wife surviving is not liable. *Benyon v. Collins*, 2 B. C. C. 323.

## VII. Of the protection which courts of equity throw around married women.

1. They will not allow their rights to be referred.

The court would not permit a reference to arbitration, one of the parties being stated to be a feme covert, interested in real estate; not even a reference to the master, whether it would be for her benefit, as in the case of an infant; distinguishing the case of election, upon the condition imposed. *Davis v. Page*, 9 Ves. 350.

2. They will make the husband a trustee for his wife.

1. Accord. *Rich v. Cockell*. 9 Ves. 369.

2. And where testator gave leasehold premises to his daughter for life, if his term or terms and interest therein should so long subsist, for her sole and separate use, notwithstanding her present or future coverture; and after her decease to her children equally, their executors, &c. during all the remainder of the estate, term or terms, and interest therein, which should be then to come and unexpired. No trustees being interposed, the husband, having possession, was held accountable according to the uses of the will, both as to the original leases and also as to reversionary leases, granted to him, as the person entitled under the will of the former tenant, upon favourable terms; and the equity was established against a purchaser from him with notice. *Parker v. Brooke*, 9 Ves. 583.

## VIII. Of the wife's legal and equitable interests, whether in relation to, or distinct from each other.

Husband's interest therein.

Difference between legal and equitable interests of the wife as to the right of the husband. 4 Ves. 18.

## IX. Of the wife's freehold estate.

1. Chargeable by husband to the amount of incumbrances satisfied by him.

Husband having paid part of mortgage upon wife's estate, in which she had joined, may by his indorsement charge it again to the same amount, but not *ultra*. 1 Ves. 185.

2. Charge upon a satisfied mortgage term, assigned to the husband's use.

Husband and wife levy a fine on the wife's estate, and settle the same with power to revoke and create new uses; they join in a mortgage term to secure a sum, redeemable by the husband; the mortgage was paid off, and the term assigned to a trustee to such uses as the husband should appoint; he afterwards, without the wife, borrows a further sum, and makes the term a security, and the trustee joins him in the assignment; the husband, by will, orders

orders his personal estate to be applied in payment of debts, except those secured by the mortgaged estates: this is the husband's debt, and shall be paid out of his personal estate, not by the mortgaged term. *Astley v. Earl of Tankerville*, 3 B. C. C. 545.

3. Assignment by the husband of her reversionary interest.

Wife's reversion, which cannot fall into possession during the husband's life, as if it is upon his death, not assignable by him. 16 Ves. 122.

4. Fine of her estate tail *ex provisione viri*.

No objection under the statute of Hen. 7. to a fine of lands taken by a feme covert, *ex provisione viri*, if the heir in tail joins. *Curtis v. Price*. 12 Ves. 89.

5. Of the wife's equity, as it is administered to her against the creditors or representatives of her husband.

1. Where a wife's estate is mortgaged for the benefit of the husband, she has a right to stand as a creditor; but this may be repelled by parol evidence, to shew her intention to the contrary. *Clinton v. Hooper*. 3 B. C. C. 201.

2. A feme covert being entitled to the interest of funds for life, her husband makes a general assignment for the benefit of creditors; the assignees shall not take the dividends without making a provision for the wife. *Pryor v. Hill*, 4 B. C. C. 139.

3. Wife's fortune was settled, but no provision made for payment of the interest during coverture. She left his house, and afterwards lived in adultery; bill filed by the husband to be paid the dividends; the court would not decree payment without a provision for the wife, but ordered future dividends to be paid into court. *Ball v. Montgomery*, 4 B. C. C. 339.

4. Wife held to be entitled to a provision, against the particular assignee of the husband for valuable consideration, of the whole of her equitable interest. *Lord Salisbury v. Newton*, 1 Eden 370.

5. Legacy decreed to feme covert: settlement directed. *Green v. Scott*, 1 Ves. 285.

X. Of the wife's copyhold estate.

Surrender thereof.

*Quære* whether a copyhold will pass by the surrender of a feme covert, empowered under deeds of separation to dispose of her estate. *Compton v. Collinson*, 2 B. C. C. 377.

XI. Of the wife's chattel interests.

1. Assignment thereof by the husband.

1. Husband may forfeit or dispose of his wife's chattel real during her life: if he does not, it survives to her: if he survives, it goes absolutely to him. 7 Ves. 183.

2. So it may be taken in execution for his debt. 9 Ves. 177.

3. But an assignment for valuable consideration of the wife's equitable interest by the husband, does not bar her equity. *Qu.* as to a trust of a term for years of land. 4 Ves. 19.

2. Whether bound by the husband's contract for a lease.

Whether an agreement by a husband for a lease of part of his wife's term, will bind her after his death, as an actual lease does, and if so, whether the rent is his property, or survives to her with the reversion, *Quære*, *Druce v. Denison*, 6 Ves. 385.

XII. Of

**XII. Of the wife's personal estate.**

Husband's interest therein.

Husband's interest by marriage in his wife's personal property, chose in action, or equitable interest. 3 Ves. 469.

**XIII. Of the wife's orphanage share.**

Release thereof by the husband.

Right of husband to release the orphanage share of his wife, a freeman's daughter. *Salkeld v. Vernon*, 1 Eden, 64.

**XIV. Of the wife's settled estate.****1. Resulting trust on a fine levied thereof.**

Husband and wife seised under a settlement for their lives successively with remainders in strict settlement, and to the heirs of the wife, having no issue, joined in a mortgage, by fine, declaring the ultimate use to the survivor. Declaration, or clear intention, equivalent to it, is necessary to change the use; and, no purpose appearing beyond the mortgage, the title of the wife was established against a claim under the husband surviving. *Innes v. Jackson*, 16 Ves. 356.

**2. Of the wife's equity as it is administered to her against the creditors or representatives of her husband.**

In what case the settled estate of the wife shall be exonerated from the mortgage made by husband and wife, for use of husband, out of husband's personal estate. *Astley v. Ld. Tankerville*, 1 Cox, 82.

**3. Adultery, whether a bar to performance of a contract or jointure.**

Adultery by the wife is no bar to the specific performance of articles executed previous to marriage, providing a jointure for her. *Buchanan v. Buchanan*, Ball v. Beatty, 203.

**XV. Of the wife's equities.**

Husband's interest therein.

See 3 Ves. 469.

**XVI. Of the wife's separate estate.****1. Of property to the separate use of married women.**

A married woman, living in trade without the interference of her husband, residing in a different part of the kingdom, advanced money for the purchase of a share in the lottery; upon an agreement with the plaintiff, that half should be considered a loan to him; and they should be jointly concerned in the adventure. Held, that the money belonged to the husband, the produce was his; and the bill was dismissed. *Lamphir v. Creed*, 3 Ves. 599.

**2. Of the words necessary to constitute a trust of property for the separate use of a married woman.**

1. Legacy to a feme covert, "her receipt to be a sufficient discharge," is equivalent to saying "to her sole and separate use." *Lee v. Pricaux*, 3 B. C. C. 362.

2. So is a bequest of two bonds and a mortgage to a married woman,  
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with a direction that they should be delivered up to her, whenever she should demand or require the same. *Dixon v. Olmius*, 2 Cox, 414.

3. So is a bequest in trust to pay the annual produce into the proper hands of a married woman. 5 Ves. 545.

4. So a settlement by a lady about to marry, of her property in trustees, for her own sole use, benefit, and disposition, gives a separate estate. *Ex parte Ray*, 1 Mad. 199.

5. But to prevent the marital right in property of a married woman, a clear intention, that it shall be to her separate use, must appear: a mere trust to pay the interest to her for life was held not sufficient; the capital being bequeathed according to her appointment, whether covert or sole, and in default of appointment, to her representatives, including her husband, was admitted to be to her separate use. *Lumb v. Milnes*, 5 Ves. 517.

3. Of the separate property of married women, arising from their savings out of their separate provisions.

The moment a woman takes personal to her sole use, she has sole right to dispose of it. 1 Ves. 48.

4. Of gifts by the husband to her separate use.

A claim by the testator's widow to dividends, to which he was entitled under a bankruptcy, as a gift by him to her separate use, failed; the evidence not even affording a sufficient ground for directing an issue. *M'Lean v. Longlands*, 5 Ves. 71.

5. Of the modes in which married women may dispose of their separate property, where it has been given to them with a power of disposing of it, without any-prescribed form.

1. A married woman may bind her separate property without the trustees, unless their assent is rendered necessary by the instrument giving her that property. 14 Ves. 547.

2. Settlement of stock to the separate use of a married woman for life; and after her death for her husband absolutely. Decree upon the bill of the husband and wife for a transfer to him upon his personal security. *Chesslyn v. Smith*, 8 Ves. 183.

3. South Sea Company ordered to permit a married woman to transfer 3,500*l.* south sea annuities under special circumstances. *Vanhessen v. South Sea Company*, Dick. 140.

4. The course is not to establish a deed between husband and wife on her separate estate, without the presence of the wife in court, where the trustees put the parties to file a bill. 2 Ves. 500.

6. Of the power of married women over their separate property, where it is limited to them with a prescribed form of appointment.

1. As to the proposition, that the separate property of a feme covert may be charged in a different form from that prescribed by the instrument, considering her as a feme sole to all intents and purposes, *quare*. 9 Ves. 497.

2. A power of appointment on certain contingencies in a feme covert, may be executed immediately, and the interest of the purchaser established, the wife consenting in court. *Guise v. Small*, 1 Anst. 277.

3. A feme covert having a settlement of real estate and money in the funds, the rent and dividends to be paid as she should, from time to time, direct, with a contingent remainder, in failure of issue, to herself, conveys the whole jointly with her husband for payment of his debts; the conveyance must be carried into execution by a court of equity. *Pybus v. Smith*, 3 B. C. C. 340.

4. But held, that there is no jurisdiction in equity by the consent of a married

married woman upon examination to transfer to her husband personal property, settled in trust for her, surviving her husband, absolutely. *Richards v. Chambers*; *Seaman v. Duill*, 10 Ves. 580.

5. Money invested in trust for a married woman, to pay her the interest for life to her separate use, and after her decease to such person, and subject to such powers, &c. as she should by any instrument in writing from time to time, or by will, appoint, during her present coverture; she cannot dispose of the principal, at once, by deed, but by a revocable act only. *Socket v. Wray*, 4 B. C. C. 483.

6. A sum of money in the public funds being given by will to trustees, for the separate use of a feme covert, and to be subject to her appointment after her death; the wife made an appointment of this money to her husband; and on bill filed by husband and wife against the trustees to transfer this fund, the court, on examination of the wife, decreed the same accordingly. *Frederick v. Hartwell*, Cox, 193.

7. Trust by marriage settlement to pay the rents and profits according to the appointment of the wife, from time to time, in default of appointment to her for her sole and separate use, the receipts of herself, or the person she should appoint from time to time, to be from time to time effectual releases, &c.; sale by her and her husband of her separate interest established. *Witts v. Dawkins*, 12 Ves. 501.

8. Under a bequest of stock, in trust to permit a woman to receive the dividends for life for her sole and separate use, &c. and to pay the same into her own proper hands, and that her receipt and receipts should from time to time be sufficient discharges; a sale by her of part of the dividends established. *Browne v. Like*, 14 Ves. 302.

9. On a marriage a sum of 9000*l.* was vested in trustees upon trust to pay the interest to the husband for life, and after his death to the wife for life, and after the death of the survivor, to pay the principal to such persons as the survivor should direct. The husband having occasion for money, the wife joined him in executing a deed poll, whereby they appointed the money immediately to the husband; but the trustees declining to act without the direction of the court, the bill was filed; and upon personal examination of the wife, the court directed the trustees to pay the money to the husband, and to deliver up the settlement to be cancelled. *Macarnic v. Buller*, 1 Cox, 357.

10. A feme covert, entitled to the interest of money for her life, with power of appointment as to the principal, receives a part of the principal for her support, and appoints to her husband; he cannot claim this part of the principal. *Randal v. Hearle*, 2 Anst. 363.

11. Power to the survivor of husband and wife, to appoint among children, is not well executed by a deed by both. *M'Adam v. Logan*, 3 B. C. C. 310.

7. Of the disposition by married women of their separate property, which has been limited to them without any express power to appoint.

1. Right of a married woman to dispose of property settled in trust for her separate use, to be paid into her hands, on her receipt, &c. unless restrained to payment, not by anticipation. 18 Ves. jun. 484.

2. Trust to permit a married woman to receive the interest or dividends of stock to her own use during her life, independent of her husband. She is absolutely entitled for life to her separate use; and upon the rule, that a feme covert is to be considered sole as to her separate property, her assignment, to secure an annuity with her husband, was established. *Wagstaff v. Smith*, 9 Ves. 520.

3. Grant of an annuity by a married woman out of her separate property established; notwithstanding notice to the plaintiff by the trustees, that they would



would pay to herself only, on account of complaints of her husband's conduct, in consequence of her refusing to join him in raising money; the transaction, though for the benefit of the husband, upon the evidence being her deliberate act, aware of what she was doing, and a free agent. *Essex v. Atkins*, 14 Ves. 542.

4. The court refused to enforce a security upon rents and profits, settled in trust to receive and pay them yearly as received, to the separate use of a married woman; and upon the circumstances dismissed the bill with costs. *Mores v. Huish*, 5 Ves. 692.

5. Under a settlement in trust to pay the rents and interest to the separate use for the joint lives of husband and wife; if she survived, for her heirs and executors; if he survived, according to her appointment by will; in default thereof, a limitation over as to the real estate; and as to the personal, to her executors; the wife cannot, during the coverture, bind the capital, surviving to her. *Lee v. Muggeridge*, 1 Ves. and Beam. 119.

6. When a married woman stipulates, that in the event of her surviving, the property shall be her's, reserving no power of disposition over it during the coverture, there are no means by which she can dispose of it, while covert. 1 Ves. and Beam, 123.

8. Of settlements to the separate use of married women, with a power to appoint from time to time.

1. The covenant of a feme covert, having a power over her separate estate, is binding upon her. 1 Ball and Beatty, 52.

2. Creditor of wife has a right in equity against her separate property, and against husband in respect of it, but not beyond it, if notice. *Lillia v. Airey*, 1 Ves. 277.

3. A married woman is liable to creditors in respect of any separate property, though not from her husband. If they are separated by deed or sentence, the husband need not be a party to the action; but he must, if they are not so separated, though living apart. 2 Ves. 145.

4. *Quære*, as to the liability of the separate estate of a feme covert to answer general demands upon her. *Greatley v. Noble*, 3 Mad. 79.

5. A married woman, separated from her husband, and having a separate maintenance, renders the same liable by accepting a bill of exchange. *Stuart v. Lord Kirkwall*, 3 Mad. 387.

6. Decree for payment of a debt by the promissory note of a married woman, out of the rents and profits of estates settled to her separate use for life. *Bullpin v. Clarke*, 17 Ves. jun. 365.

7. Advances to a married woman, deserted by her husband, on the credit of a friend in court, her property, for her maintenance, exceeding the income of that, reimbursed out of the capital. *Guy v. Pearkes*, 18 Ves. jun. 196.

8. Plaintiff with notice of separate allowance of the wife, a very weak woman, advanced to her wantonly beyond it; proof that she received more than the demand she could make out; bill dismissed without account, the value being trifling. *Lillia v. Airey*, 1 Ves. 277.

9. Bill against husband and wife, and the trustee under their marriage settlement, to be paid a bond in which the wife joined for the husband's debt, she having separate property. *Hulme v. Tenant*, Dick. 560.

10. Bond of a feme covert, as a surety, enforced against her separate estate, under a settlement to her separate use, with power of appointment by will, or by any writing, purporting to be her will, and in case she should die in the life of her husband, and without making any will or other disposition, as to the whole or any part, then as to the whole or such part, as to which no gift or disposition should be so made, to the persons, who would be entitled by the statute, if she had died intestate and unmarried. *Heatley v. Thomas*, 15 Ves. 596.

11. The

11. The wife's bond given jointly with her husband, shall bind her separate property. *Hulme v. Tenant*, 1 B. C. C. 16.

12. A feme covert, having power to dispose of her separate estates, granted an annuity to a young lady upon her marriage, for whom she had promised to provide. This annuity, a specific lien on the separate estate of the feme. *Power v. Bailey*, 1 Ball & Beatty, 49.

13. The husband of the grantor having notice of the execution of the deed; the grant is not a fraud upon him. *Ball & Beatty*, 49.

14. Husband and wife agree that the property settled to her separate use, shall be paid to the husband; it shall be carried into execution in this court. *Ellis v. Atkinson*, 3 B. C. C. 565.

15. Court will not infer an equitable *assumpsit* contrary to the tenor of the obligation subsisting between husband and wife. 1 Ves. 188.

16. Bill against a feme covert, seeking an account of monies received under a will fraudulently obtained by her, and placed out in securities in trustees' names, and that the same may be repaid out of her separate estate. General demurrer overruled. *Greatley v. Noble*, 3 Mad. 79.

17. Equity will not make good, against a married woman, a contract on which she cannot be sued at law. 2 Ves. 156.

18. Annuity granted by a feme covert, charged upon her separate estate, being void under the statute, for want of the insertion of the clause of redemption in the memorial, the consideration cannot be recovered out of her separate estate; though part of the money was applied in paying fines upon admission to copyholds. *Jones v. Harris*, 9 Ves. 486.

#### 9. Priority of bond creditors under a distribution thereof as assets.

In the distribution of separate property of a married woman as assets after her death, a bond not entitled to priority. *Anon*, 18 Ves. jun. 258.

#### 10. Of the persons with whom married women may deal, with respect to their separate estate, and of the account of it to which they are entitled, and against whom.

1. The rule, that a feme covert is to be considered as a feme sole as to her separate property, does not extend to transactions with her husband. 2 Ves. 498.

2. Wife can by consent in court dispose, in favour of her husband, of her reversionary interest in personalty. *Pickard v. Roberts*, 3. Mad. 384.

3. Gift by a feme covert of her separate property to her husband not inferred without clear evidence; nor, on the other hand, against the husband a gift to her separate use. *Rich v. Cockell*, 9 Ves. 369.

4. Power of disposition of a feme covert over estate settled to her separate use. A sale by the husband and wife by fine was, under all the circumstances, established as to the separate estate of the wife for life and her reversion in fee; though to the trustee for her separate use, and to support the contingent remainders; but set aside as to the remainders, to such persons, and uses, &c. as she should appoint by will, and in default of appointment to her children, upon her bill; and two wills, obtained from her, decreed to be delivered up. *Parkes v. White*, 11 Ves. 209.

5. A transaction between husband and wife, relative to the purchase by the husband, of his wife's separate estate, but not carried into execution during their lives, shall not be so after the death of the parties; but the husband's personal estate shall be liable for rents and profits received. *Pitt v. Jackson*, 2 B. C. C. 51.

6. Feme covert by deed, directed rents and profits, her separate property, to be paid during her life to her husband, for his own proper use and benefit; the intention being only to give him the administration during coverture without account, after his death the widow is entitled to the future rents,  
and

and to those accrued in his life and not received. If her interest had passed, it must, upon the circumstances of the transaction, have been set aside. *Milnes v. Busk*, 2 Ves. 488.

11. Of the separate character which a feme covert acquires with respect to her separate property.

1. Feme covert is a feme sole as far as the instrument creating her separate estate makes her proprietor; and if she pledges it according to her power, the trustees must hold to the uses she appoints: but where she, according to her power, appointed for the benefit of her husband, an inquiry into the circumstances was directed. *Pybus v. Smith*, 1 Ves. 189.

2. Where there is an assignment by a married woman of her separate property in the hands of trustees, the assignee may come for execution of the trust; for her disposition is valid to the extent of her power; but a general creditor cannot come into equity to have his debt satisfied out of that property. 2 Ves. 150.

3. Agreement by wife, without knowledge of husband, to pay additional rent out of her separate property, good. *Master v. Fuller*, 1 Ves. 513.

4. As to creditors of the husband, or persons dealing with a married woman as to the separate property, equity ought to go no farther than to leave any legal right undisturbed; not to improve the security. 4 Ves. 145.

5. If the wife elope, this court will not assist her in recovering property settled to her separate use. *Lee v. Lee*, Dick. 921.; 806.

12. Of the wife's equity as it is administered to her against her husband.

1. In an account of dividends of the wife's separate property received by the husband, consideration should be had of his extra expence in her maintenance, in consequence of her being a lunatic. *Attorney-General v. Parather*, 4 B. C. C. 409.

2. Wife permitting her husband to receive her separate income, the account shall go back only one year. 11 Ves. 225.

3. Husband is not to account for the income of his wife's separate estate, which she permitted him to receive. *Smith v. Lord Camelford*, 2 Ves. 698.

4. Husband receives interest of wife's separate property, her representatives shall have no account. *Squire v. Dean*, 4 B. C. C. 326.

13. Of her lien upon estates purchased by the husband with her separate property.

Money settled to the separate use of the wife, and in the event of no children to her absolutely, surviving the husband; with power to the trustees with her consent to invest it in land. No lien upon estates, purchased by the husband, having obtained the money from the trustee: the circumstances not raising the presumption, as if he had been under an engagement to purchase, that his purchases were in pursuance of that engagement; and upon the evidence of the fact of the application of the trust-fund, or the inability of the husband by other means, not being made out. Not a specialty debt from the husband by the effect of his covenant not to obstruct the appointment of the wife under a power. *Lench v. Lench*, 10 Ves. 511.

## XVII. Of the wife's choses in action.

### 1. Husband's interest therein.

Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against the husband, and the

the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared, he was not entitled to retain : but that the plaintiff's share was subject to a farther provision in favour of her and her children ; the settlement on her marriage being inadequate to the fortune she then possessed ; and it was referred to the master to see a proper settlement made on her and her children ; regard being had to the extent of her fortune and the settlement already made upon her. *Lady Elibank v. Montolieu*, 5 Ves. 737.

## 2. Of the wife's equity as it is administered to her against her husband.

1. Husband, where he can, may lay hold of wife's property ; and this court will not interfere. 10 Ves. 90.

2. The equity of a wife to have a provision out of her trust property, claimed by the husband, attaches upon newly-acquired property. 2 Ves. 608.

3. Settlement directed of a legacy to a married woman claimed by her husband. *Blount v. Bestland*, 5 Ves. 515.

4. Order upon an application of a wife under special circumstances, to be allowed maintenance for herself and child, out of a fund standing in the name of the accountant-general, to which the husband became entitled in right of his wife during the coverture, the husband opposing the application. *Atherton v. Noell*, Cox, 229.

5. Interest of a fund in court ordered to be paid to the wife, the husband being in a state of imbecility of mind. *Bird v. Le Fevre*, 4 B. C. C. 100.

6. Where the court secures a provision for a wife out of her equitable interest claimed by the husband, the trustee is at liberty to pay to the husband ; and that payment is not called back. No instance of the debtor calling upon the court to interpose that equity for the wife. 8 Ves. 206.

7. Previously to a bill a trustee for a feme covert may pay her personal property, or the rents and profits of her real estate, to her husband : not after a bill filed. 10 Ves. 90.

8. Where money is declared to be due to a feme covert, the court will not, on motion, direct it to be paid to the trustees on her marriage-settlement, till it is reported by the master that there is a settlement. *Hardwick v. Mynd*, 1 Anst. 274.

9. The court refused to order a provision for a married woman out of dividends and interest, to which she was entitled for life ; she refusing to live with her husband, an officer, abroad with his regiment, and willing to receive her. If he had deserted her, that would be a good ground. *Bullock v. Menzies*, 4 Ves. 798.

10. Husband and wife living separate under a divorce *a mensâ et thoro* obtained against the wife for adultery, she petitioned that a sum of money belonging to her might be settled to her separate use : he petitioned that it might be paid to him ; the court refused to make any order. *Carr v. Eastbrooke*, 4 Ves. 146.

11. Where a wife was entitled to a share upon the distribution of an intestate's effects, and resident in Prussia, by the laws of which, one moiety of the husband's effects must come to her on his death, the court did not require him to make any settlement. *Sawer v. Shute*, 1 Anst. 69.

## 3. Of the wife's equity as it is administered to her against the general assignees of her husband.

Husband and wife assign a reversionary interest of the wife in certain trust-stock, as a security for the payment of an annuity granted by the husband ; the husband afterwards takes the benefit of the insolvent debtor's act, and a general assignment is made of his property ; the person, upon whose death the wife was to take, dies, and then the husband dies without having done any other act to reduce the stock into possession. Held, that the

the wife was entitled by survivorship to the stock, against both the particular and the general assignee. *Hornsby v. Lee*, 2 Mad. 16.

4. Of the wife's equity as it is administered to her against the particular assignees of her husband.

1. Husband's assignment of wife's property will not bar her equity. *Pope v. Crashaw*. 4 B. C. C. 326.

2. Where a husband assigns the wife's property for a valuable consideration, Q. whether the assignee does not take it subject to the same equity to which it was subject at the time of the husband's assignment. *Ex parte Roberts*, Cox. 422.

3. Whether a particular assignee for a specific consideration, is liable to make a provision for the wife out of her fortune, as assignees in bankruptcy are, *Quere*. 9 Ves. 100.

4. As to the effect of an assignment for valuable consideration by a husband, of his wife's equitable interest, with reference to her equity for a provision, *Quere*. 11 Ves. 20.

5. Bill by husband for stock held in trust for his wife: a claim was set up under a bond by the wife and her former husband, securing an annuity out of the dividends, as an assignment for valuable consideration: but as it came before the court collaterally, and several objections were taken upon the annuity act, the infancy of the wife, and the nature of her interest at the time, the master of the rolls, though upon the general question inclining in favour of the wife's equity against an assignee for valuable consideration, would not determine it; but referred it to the master to approve a settlement upon the wife and her issue, with liberty to the representative of the obligee to apply. *Franco v. Franco*, 4 Ves. 515.

6. Assignment by a husband of part of his wife's equitable interest, viz. dividends of stock in trust for her, for valuable consideration, enforced upon the bill of a surety for the husband, to be indemnified against past and future payments: the assignment extending only to 100*l.* a-year, out of 260*l.* The remaining dividends under a bill, on behalf of the wife, paid to her; the husband having, after the assignment, gone abroad, without making any provision for her. *Wright v. Morley*, 11 Ves. 12.

7. Husband can dispose of his wife's property in expectancy against every one but the wife surviving. 1 Ves. and Beam. 405.

8. A wife's chose in action assigned by the husband to an unprovided child by a former wife; natural love and affection recited to be the consideration; not good. *Becket v. Becket*, Dick. 340.

5. Of the wife's equity as it is administered to her against the creditors or representatives of her husband.

1. Testator having proved the value of annuities, secured to the separate use of his wife, as a debt under the bankruptcy of the grantors, his assets were charged with the dividends only, upon the foot of that transaction, not with the annuities, as subsisting. *M'Lean v. Longlands*, 5 Ves. 71.

2. Husband and wife by indenture, assigned in trust for the husband personal property, bequeathed to the wife, and in possession of the administrator; the husband by will, gave the residue of his real and personal estates in trust for his wife for life, remainder over, and died; upon the bill of the wife and her second husband, claiming against the deed, being put to her election, she elected to take under the will; and the bill was dismissed. *Wright v. Rutter*, 2 Ves. 673.

6. Of the settlement by which the wife may be barred of her equity.

1. Husband claiming his wife's fortune in equity; though there was a separate provision, the court not thinking it sufficient, made him increase it. 3 Ves. 98.

2. Husband,

2. Husband, by settlement after marriage, considered a purchaser of a mortgage belonging to the wife, not reduced into possession. *Sykes v. Meynal*, Dict. 368.

7. Of the forms in which the wife waives her equity.

1. Where a married woman will consent to have part of her fortune (in court) paid to her husband, it must be so. *Dimenoch v. Atkinson*, 3 B. C. C. 195.

2. And money ordered to be paid to the husband in right of his wife is a vested interest in him. *Heygate v. Annesley*, 3 B. C. C. 362.

3. The court cannot take the consent of the wife to the disposal of her fortune, unless the amount is ascertained. *Edmonds v. Townshend*, 1 Anst. 93. *Woollands v. Crowcher*, 12 Ves. 174.

4. Where a feme covert joins in the sale of a contingent reversionary interest in money, her consent may be taken in court, and the conveyance established. *Guise v. Small*, 1 Anst. 277.

5. Consent of a married woman taken in court, under a bill by her and her husband for execution of a contract for sale of her reversionary contingent interest in stock. *Woollands v. Crowcher*, 12 Ves. 174.

6. Money, under special circumstances, ordered to be paid under a letter of the wife, who was in the East Indies. *Palmer v. Palmer*, Dict. 293.

7. Where a feme covert, who is abroad, is entitled to money, which she consents shall be paid to her husband, her examination and consent shall be taken by a magistrate of the place where she resides, attested by notaries and translated on oath. *Minet v. Hyde*. 2 B. C. C. 663.

8. A wife's legacy (above 100 guineas) shall not be paid to the husband without her consent being taken (where she resides abroad) before commissioners. *Bourdillon v. Adair*, 3 B. C. C. 237.

9. In all applications for money of the wife to be paid (by consent) to the husband, an affidavit shall be made that there is no settlement on the marriage. 2 B. C. C. 663.

10. Money devised to be laid out in land for a feme covert in tail, with reversion to her in fee; she chose to have it paid to her husband; not paid without affidavit by the husband and wife, that there is no settlement. *Binford v. Bawden*, 2 Ves. 38.

11. Where the money was paid to the wife with privity of husband, without writing, so as to appear that she could dispose of it in her life or by will, not to be considered the debt of husband. 1 Ves. 188.

12. Whether a jurisdiction in equity, to permit a married woman to give up her interest for life in a trust fund, not settled to her separate use, or subject to her appointment, analogous to a fine, can be maintained, *Quære*. The bill by the husband and wife against the trustees for this purpose was dismissed as premature, the funds not being ascertained; the husband accountable to the trustees in respect of his receipts by their permission, unliquidated; and as to part of the capital, the trust of which was for her appointment by deed or will, notwithstanding coverture, no absolute appointment having been executed, but merely by way of indemnity to the trustees. *Sperling v. Rochfort*, 8 Ves. 164.

8. Of the wife's right, by survivorship, to her equitable choses in action.  
See 4 Ves. 15.

## XVIII. Of separate maintenance.

### 1. Of the jurisdiction of courts of equity in relation to.

The spiritual court has exclusive cognizance of the rights and duties arising from the state of marriage; a court of equity, therefore, has no jurisdiction

diction upon a contract for separation between husband and wife simply, much less where it will affect a purchaser or creditor; but the jurisdiction holds in special cases: as, where a third party covenants to indemnify the husband against the wife's debts; or a fortune accrues to the wife after separation; or the property is the subject of a trust. *Legard v. Johnson*, 3 Ves. 352.

## 2. Of the jurisdiction of courts in general to decree.

No court has any original jurisdiction to give a wife separate maintenance; but it may be given incidentally; as on a *supplicavit* in chancery, or a divorce, *a mens et thoro propter scortitiam*, in the ecclesiastical court. 2 Ves. 195.

## 3. Mode of enforcing articles of separation.

Decree for the arrears and growing payments upon a bond for an annuity, upon separation between husband and wife, the trustee refusing to enforce the bond without an indemnity. An appropriation to answer the growing payments was refused. *Cooke v. Wiggins*, 10 Ves. 191.

## 4. Of the specific performance of an agreement between husband and wife for a separate maintenance, upon an intended immediate separation.

1. Equity will not establish an agreement of separation between husband and wife. *Wilks v. Wilks*, Dict. 791.

2. A court of equity will not execute articles of separation; notwithstanding which, it is held, that engagements between the husband and a third party (as a trustee), though originating out of, and relating to, a separation, are valid, and may be enforced by the court. *Worrall v. Jacob*, 3 Mer. 268.

3. There is no doubt of the general jurisdiction of a court of equity, to decree the specific performance of articles between husband and wife for a separation, and a separate maintenance. But the court exercises its discretion in this case very cautiously, and will not give its assistance until it has seen whether, from the circumstances of the case, there is or is not a probability of the parties being reconciled. A sentence in the ecclesiastical court for the restitution of conjugal rites, is a reason for this court refusing to give its assistance in such a case; and, in general, if such an agreement is not fit to be enforced, the court will, on a cross bill, order it to be delivered up, although there may be cases in which no relief will be given to either party. *Fletcher v. Fletcher*, Cox, 2. 100.

4. The court will not interfere in an agreement between baron and feme, whereby the feme is to give up part of her separate property to the husband, in consideration of their living separate, although the application be made to the court by the feme. *Durant v. Durand*, Cox, 207.

5. By deed of separation, the husband (a trader liable to the bankrupt laws), covenants with a trustee for the wife, in consideration of being indemnified from all debts and engagements, which might be contracted by her during the separation, to release his remainder in fee, in certain estates (of which he was tenant for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder to himself, in fee), to such uses, &c. as the wife shall by deed or will appoint; with power to the wife to revoke the uses of such deed or will. The wife executes the power by deed, which she retains in her possession, and afterwards alters, and re-executes. Held, 1. That the covenant, although entered into on occasion of a separation between husband and wife, was yet binding in equity, being made to a third party: 2. That it might be supported against creditors, under the statute of James, by the consideration of indemnity against the wife's debts and engagements: 3. That the deed of appointment, containing no power of revocation, although it was contained in the instrument creating the

the original power, the re-execution was void, and the original appointment, therefore, was decreed to be carried into execution. *Worrall v. Jacob*, 3 Mer. 255.

5. Of the specific performance of an agreement between husband and wife for a separate maintenance, in contemplation of a future separation.

As to the validity in law or equity of articles between husband and wife for future separation, even with trustees, in this instance providing, that the wife may at any time, with the assent of the trustees or the survivor, his executors or administrators, separate, and take away the children, *Quære*, Lord St. John v. Lady St. John, 11 Ves. 526.

6. Construction of articles of separation.

1. In articles of separation, the husband was to receive a certain annuity out of the wife's estate, while he should leave her unmolested. Upon mortgagation the annuity is gone. *Wright v. Chapman*. 2 Anst. 345.

2. Proviso in a deed of separation, that the wife surviving shall be entitled to her dower and thirds of all real and personal estates, whereof the husband shall die seized or possessed, construed, not as a covenant to leave her such a portion of the personal estate as she would be entitled to under the statute, had he died intestate, but that she should be in the same situation as if not separate, as to dower and thirds, i. e. the actual share by the law or custom; not interfering, therefore, with his testamentary disposition. *Cochran v. Graham*, 19 Ves. 63.

7. Determination of articles of separation.

1. Articles of separation put an end to by reconciliation. 9 Ves. 537.

2. Articles of separation, by which the husband was to pay the wife 100*l.* a year, decreed to be performed at the suit of the wife, though the husband offered, by his answer, to receive her back. *Guth v. Guth*, 9 B. C. C. 614.

3. Bill by a married woman, claiming under a bond, by her husband, to a trustee for a separate maintenance, admitted to have been destroyed by them, on the ground of subsequent incontinence. The bill retained, with liberty to bring an action. *Seagrave v. Seagrave*. 13 Ves. 439.

8. Of the wife's power of alienation over.

Trust in a deed of separation to permit A. to receive the dividends of stock for the maintenance and support of the wife, with a covenant of indemnity to her husband: a grant by her of an annuity out of the dividends was held void. *Hyde v. Price*, 3 Ves. 437.

9. Of the grounds of a sentence of divorce, *a mensâ et thoro*.

1. Separation *a mensâ et thoro* in the spiritual court only *propter sævitiam et adulter.*: and after reconciliation the same cause cannot be revived. 11 Ves. 532.

2. The ecclesiastical court, in a suit for separation, will not consider conduct previous to a reconciliation. 11 Ves. 536.

10. Of the grounds upon which a separate maintenance will be decreed, or be refused.

Where husband and wife lived separate by mutual consent, and no evidence of any cruelty on the part of the husband, and he had, before marriage, settled part of her property on her; the court refused to decree maintenance. *Duncan v. Duncan*, Cooper 254.

11. Of the effect of separation, and separate maintenance, upon the duties of marriage.

After a deed of separation executed, the wife is not "to all intents and purposes," *a feme sole*. She cannot be a witness against her husband, or be guilty of felony in his presence: nor can an action be maintained against her. 11 Ves. 530.



## XVIII. Judicial proceedings.

## 1. Preliminaries to.

See 8 Ves. 164.

## 2. Parties to.

1. As to the right of the husband to sue in his own name for the legal *chose in action* of his wife, *Quære*. 10 Ves. 579.

2. Husband a formal party to bill against wife, in respect of separate estate. 1 Ves. 278.

3. The wife must be served in proceedings against her separate estate.

Plaintiff seeking relief, not merely against a husband, seized or entitled in right of his wife, but against the separate estate of the wife, must serve the wife. *Jones v. Harris*, 9 Ves. 486.

## 4. Process against the husband for his wife's default.

1. Instances of a husband being committed, till his wife should do an act; but where he made it appear he could not prevail upon her, he was discharged. 5 Ves. 846.

2. Process against the husband and wife, but to be stayed against the husband, the wife having absconded. *Samson v. Overton*, Dick. 193.

3. Process of contempt stayed against the husband for want of the wife's answer, she having left him. *Lloyd v. Basnet*, Dick. 143.

4. Attachment against husband and wife, for want of the wife's answer, stayed as to the husband, and liberty given to attach his wife. *Leishly v. Taylor*, Dick. 573.

## 5. The wife when not entitled to summary relief.

*Feme covert*, living apart from her husband, and holding herself *feme sole*, not entitled to summary relief; but left to her plea of coverture. 16 Ves. 266.

6. The wife considered as sole, where the marriage was fraudulent upon the husband.

The defendant bribed a man, whom she scarcely knew, to marry her, for the purpose of screening her against creditors: the court considered her as a *feme sole*, and required her to answer a bill brought by one of her creditors, for a discovery, and payment of his debt. *Thorold v. Hay*, Dick. 410.

## 7. Of execution against the wife's separate estate.

As to execution against the property of a married woman, *Quære*, 9 Ves. 189.

## 8. Of execution against the wife's person.

A wife cannot be taken in execution for costs. *Jones v. Champion*, Dick. 160.

## 9. Of suits for discovery against the wife.

1. Demurrer, by a married woman, to a bill of discovery of transactions with her as agent to her husband, allowed. *Le Texier v. the Margrave of Anspach*, 5 Ves. 322. Affirmed on re-hearing, 15 Ves. 159.

2. Demurrer, of a married woman, to a bill of discovery against her and her husband, in aid of an action for a debt on her account, allowed. *Barrow v. Grifflard*, 3 Ves. and Beam. 165.

3. A married woman may demur to a discovery, that would subject her husband to a charge of felony. *Cartwright v. Green*, 8 Ves. 405.

## 10. Right

10. Right of husband to answer separately, from his wife living in adultery with the plaintiff.

Where the wife lived in adultery with the plaintiff, the husband was allowed to answer separate from her. *Chambers v. Bull*, 1 Aust. 269.

11. Of the wife's answering separately from the husband.

1. Liberty given to a woman defendant, charged by the bill to be married to another of the defendants, to answer separately, but without prejudice to any question as to the validity of the marriage. *Wybourn v. Blount*, Dick. 155.

2. Motion, by plaintiff, for a separate answer by a *feme covert* because her husband was a prisoner in the king's bench, refused. *Anonymous*, 2 Ves. 332.

3. A *feme covert* having obtained an order to answer separately, will be held to it. *Travers v. Bulkley*, Dick. 138.

4. After a joint answer by husband and wife, and amendment of the bill, the husband going abroad; the wife, being the material party, cannot be brought into contempt without a previous order upon her to answer separately. Order accordingly for a subpoena to her alone. *Carleton v. McErie*, 10 Ves. 442.

12. Separate examination of the wife.

1. Wife examined on commission apart from husband, as to the disposition of money devised to be laid out in land for her in tail, reversion to her in fee, whether to be received in money, or laid out as directed. *Binford v. Bawden*, 1 Ves. 512.

2. Form of a separate examination of a married woman taken by commission. *Tasburgh's case*, 1 Ves. & Beam. 507.

13. Effect of the wife's refusal to join in swearing to a plea.

Plea by husband for himself and wife, sworn to by the husband alone, the wife refusing to swear, allowed to stand as to the husband. *Parie v. Accourt*, Dick. 13.

14. Suit by husband against wife.

Bill by husband against his wife and another, retained, it containing a charge, that the other defendant had placed the property (the subject of the bill), out in trust for the wife. *Warner v. Warner*, Dick. 90.

15. Of compelling the wife to answer her husband's bill.

Order upon a married woman to put in an answer to a bill by her husband. 13 Ves. 266.

16. Whether the wife's evidence is admissible against her husband.

1. Wife's evidence not admitted against her husband. 3 Ves. & Beam. 166.

2. Wife's evidence against the husband allowed only for security of the peace; but she cannot sustain an indictment against him. 1 Ves. 49.

3. Wife's affidavit cannot be read against her husband. *Sedgwick v. Watkins*. 3 R. C. C. 2.

17. Order by consent, disposing of wife's separate estate, how far obligatory.

An order, disposing of the real estate of a *feme covert*, made on her consent, and acquiesced in during her life, will not be set aside on a doubtful case, made many years afterwards by her representatives. *Burke v. Crasbie, Ball & Beatty*, 489.

18. Wife's obligation to follow up a suit after the husband's death.  
Vide Dick. 566.

19. A decree how far obligatory on a married woman.

A feme covert is as much bound by a decree as a feme sole. Ball & Beatty, 502.

20. Of re-hearing after the husband's death, a bill taken *pro confesso* against both.

Bill decreed to be taken *pro confesso* against husband and wife (on 22d Jan. 1762), re-heard on the petition of the wife, the husband being dead. Took v. Clark, Dick. 350.

21. Expences of, how liquidated.

1. Bill by a wife for a specific performance of articles, and for alimony; 500*l.* ordered to be paid her by her husband, for the purpose of carrying on the suit. Yeo v. Yeo. Dick. 498.

2. 500*l.* to be paid to the wife to prosecute a suit in jactitation of marriage, although no agreement before marriage. Dickenson v. Mavie. Dick. 582.

22. Suit at law for wife's legacy.

Action by the husband for a legacy due to his wife, does not lie. 4 Ves. 19. 5 Ves. 516.

23. Supplicavit.

1. Order for security under a supplicavit, on articles exhibited by a wife against her husband, under statute 21 Jac. I. c. 8. Heyn's case, 2 Ves. & Beam. 182.

2. Order for security under a writ of supplicavit, on articles by a wife against her husband. Dobbyn's case, 3 Ves. & Beam. 183.

## XIX. Of the description under which a husband may take from his wife.

The description of next of kin.

*Prima facie*, bequest by a husband to his next of kin does not include his wife: nor does a similar bequest by a wife under a power include her husband. 14 Ves. 382.

## XX. Of the description under which a married woman may take from her husband.

The description of next of kin.

Vide 14 Ves. 382.

## XXI. Of the wills of married women.

1. When valid.

1. Where personal estate is given to a feme covert to her sole, and separate use, she may dispose of it by will, without the assent of her husband. Fettiplace v. Gorges, 3 B. C. C. 8.

2. Will by wife of her separate property and its produce, whether derived from her husband or a third person, good. Fettiplace v. Gorges, 1 Ves. 46.

3. Disposition by will incident to a trust for the separate use of a feme covert, and the husband having taken a transfer, is a trustee. As to other  
4 property,

property, she cannot make a will without the assent of her husband. *Rich v. Cockell*, 9 Ves. 369.

2. Probate, when essential.

Where a feme covert disposes by will, it is necessary to produce the probate to justify payment of the money. *Cothay v. Sydenham*, 2 B. C. C. 391.

3. Probate, to what extent efficient.

Probate of a will of a married woman, which is now necessary, though formerly otherwise, limited to her power, by the assent of her husband, with respect to any beneficial interest: not, as to her right, as executrix of another person, to make an executor, and continue the representation. *Stevens v. Bagwell*, 15 Ves. 139.

4. Revocation of.

1. A feme covert makes a will; becoming-discover, she takes a conveyance from the trustees; this is a revocation. *Lawrence v. Wallis*, 2 B. C. C. 319. Secus of marriage, and a settlement. *Ibid.*

2. It was part of an agreement between husband and wife before marriage, that she should have power to dispose of her property by will made after marriage: a will made previous to the marriage, though subsequent to the agreement, is revoked by the marriage. *Hodsdon v. Lloyd*, 2 B. C. C. 584.

XXII. *Of mutual wills by husband and wife.*

Revocation of.

A mutual will by the husband and wife, if revoked, must be revoked jointly; or if revoked separately, notice must be given to the other party of such revocation. *Dufour v. Periera*, Dick. 419.

XXIII. *Of the husband's right of survivorship.*

1. To the wife's separate estate.

1. If no disposition of wife's separate property, husband succeeds as next of kin, not by marital right. 1 Ves. 49.

2. Previous to her marriage, a widow entered into an agreement (without seal or stamp) that her property should go to the survivor for life. She being seized of a reversion in fee (subject to an estate tail, and a trust term for securing annuities, which determined in the life-time of the husband surviving the wife), he is entitled for life in equity. *Hodsdon v. Lloyd*, 2 B. C. C. 584.

2. To the wife's residuary share.

Where a feme covert was entitled to one-sixth of the residue of a testator's estate; upon a bill filed by another residuary legatee, to which she and her husband were defendants, a decree was made for a sale of the estate and payment. Held, that her share vested absolutely in her husband by survivorship; and though the defendants were creditors of the wife, yet that the court would interpose to take the money out of their hands. *Forbes v. Phipps*, 1 Eden. 502.

XXIV. *Of the husband's liabilities of survivorship.*

They are partial only, not universal.

Many obligations, which do not survive against the husband after coverture. 7 Ves. 183.

## XXV. Of the wife's right of survivorship.

## 1. Analogy between the rules of law and equity respecting survivorship.

Analogy between the rules of law and equity as to a wife's right of survivorship. 9 Ves. 98.

## 2. To her choses in action, not reduced to possession during coverture.

1. Distinction in equity, with reference to a wife's right of survivorship, between assignment voluntary and for valuable consideration. 9 Ves. 99.

2. Stock, the property of a married woman, not reduced into possession, so as to be vested in her husband, by a transfer to him merely as a trustee. *Wall v. Tomlinson*, 16 Ves. 413.

3. Stock, transferred into the name of a married woman, as next of kin of an intestate, upon the death of her husband, without having done any act with reference to it, except signing partial transfers by her; survives. Whether he had a right to transfer into his own or another name, whether the bank could prevent it, or this court could interfere, to make a provision for her, *Quære*. *Wildman v. Wildman*, 9 Ves. 174.

4. Possession by husband as executor and trustee, not a reduction into possession of his wife's share of the residue, entitling him against her right by surviving. *Baker v. Hall*, 12 Ves. 497.

5. On a question whether arrears of a rent-charge incurred in the lifetime of the plaintiff's late husband, and money due on a judgment recovered by her late father, of a bond, she being surviving executrix, belonged to the plaintiff, or to the representatives of the late husband; held, they belonged to the plaintiff, as his widow. *Salway v. Salway*, Dick. 434.

6. Legacy to a married woman, subject to a life-interest, reduced into possession, as against her right, surviving, by payment to her husband during the life of the person entitled for life. *Doowell v. Earle*, 12 Ves. 473.

7. A legacy to a married woman is not sufficiently reduced into possession by an appropriation by the executrix of a mortgage to the same amount, so as to prevent her survivorship upon her husband's death. *Blount v. Bestland*, 5 Ves. 515.

8. *A.* tenant for life, in case she should so long continue unmarried; in case of her marriage to her in fee; in case of her decease unmarried, to her sister *B.* in fee. *A.* and *B.* and the husband of *B.* joined in a sale. The purchase money was laid out in the funds in the names of trustees without any declaration of trust or agreement as to the application; nor was any notice of this fund taken in the wills of *B.* and her husband, and *B.* being the survivor, made a general disposition of all her personal estate in favour of *A.* *A.*, though still unmarried, held absolutely entitled to the stock. *Scawen v. Blunt*, 7 Ves. 294.

9. *D. E.*, the father of *C. N.*, after her marriage, drew a check in her favour upon his bankers for 10,000*l.* The bankers gave her a promissory note for 10,000*l.*; 1000*l.*, part of the principal money on the note, was paid to *W. L. N.*, the husband of *C. N.*, and he also received the interest due upon the promissory note, up to the time of his death; held, that upon his death *C. N.* was entitled to the note as a chose in action which had survived to her. *Nash v. Nash*, 2 Mad. 133.

## 3. Of her right to redeem a mortgage suffered by the husband to become absolute.

1. On marriage, the wife's estate is settled on the husband for life; remainder to the issue of the marriage in tail; remainder in fee, to the survivor of husband and wife. The husband and wife levy a fine, and mortgage the estate;

estate; the husband suffers the estate to become absolute in the mortgagee, and dies. His widow held entitled to redeem. *Hill v. Bp. of Bristol*, Dick. 526.

2. Baron and feme, seized in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption by lease and release to the mortgagee. The mortgagee having remained in possession as complete owner, for more than 20 years, during the life of the husband, tenant by the curtesy, the heir of the wife is barred of his equity of redemption by the lapse of time. *Corbett v. Barker*, 1 Anst. 138.

#### 4. Of her right to her paraphernalia.

1. Jewels of the wife, though given by the husband's will to her for life, shall not be sold for payment of the husband's debts, charged on a real estate in aid of personality. *Boynton v. Parkhurst*, 1 B.C.C. 576.

2. Vide in Executor.

### BASTARD.

#### I. Presumption of access and non-access.

The old rule to presume access within the four seas is obsolete.

#### II. Grants and bequests to.

1. Whether the term "child" includes natural children.

2. Whether an illegitimate child may take under a prospective provision for illegitimacy.

#### I. Presumption of access and non-access.

The old rule to presume access within the four seas is obsolete.

Access or non-access may now be proved: the old rule to presume access within the narrow seas having given way. 13 Ves. 58.

#### II. Grants and bequests to.

1. Whether the term "child" includes natural children.

Illegitimate child cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child. 1 Ves. & Beam. 452. 7 Ves. 458.

2. Whether an illegitimate child may take under a proscriptive provision for illegitimacy.

1. Rule, that a bastard cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before its birth. 17 Ves. jun. 531.

2. Natural child cannot take by a prospective bequest, made before his birth. *Arnold v. Preston*, 18 Ves. jun. 288.

3. Under a bequest "to such child or children, if more than one, as A. may happen to be ensient of by me;" a natural child, of which she was then pregnant, cannot take; though a bequest to the natural child of which a woman was ensient, without reference to any person as the father, would probably be good; leaving no uncertainty. *Earle v. Wilson*, 17 Ves. jun. 528.

4. Whether under a provision, if the party should have an illegitimate son, generally for such son, one in existence at the time can take, *Quære*. *Hercy v. Birch*, 9 Ves. 357.

**BILL OF EXCHANGE AND PROMISSORY NOTE.****I. What instruments are bills of exchange, what not.**

An order payable out of a particular fund.

**II. Of the acceptance of bills.**

An undertaking to accept, whether an acceptance.

**III. Of the acceptor.**

Nature of his contract.

**IV. Of the negotiation of bills.**

1. Liability on a discount without indorsement.
2. Joint liability on distinct indorsements by partners.

**V. Of the dishonour of bills.**

1. Notice thereof—general rule as to when essential or not.
2. Notice thereof—by whom given.
3. Notice thereof—to whom given.
4. Notice thereof—whether dispensed with by the acceptor's bankruptcy.
5. Notice thereof—what shall be effects to render it requisite.
6. Liability of the drawer, whether immediate thereon.
7. Rights of a payer for the honour of a party.
8. Of the holder's right to sue for the original consideration.

**VI. Of the modes in which the liability of a party may be discharged.**

1. By giving another bill in lieu of the former.
2. The drawer is discharged by giving time to the acceptor.
3. The drawer is discharged by compounding with the acceptor.

**VII. Judicial proceedings.**

1. Of declaring upon the original consideration.
2. Of attaching bills of exchange in Scotland:

**I. What instruments are bills of exchange, what not.**

An order payable out of a particular fund.

Order payable out of a particular fund, not a bill of exchange.  
1 Ves. 281.

**II. Of the acceptance of bills.**

An undertaking to accept, whether an acceptance.

A letter undertaking to accept bills, held an acceptance. Ex parte Dyer,  
6 Ves. 9.

**III. Of the acceptor.**

Nature of his contract.

Acceptor of a bill considered as a debtor, not a surety. 2 Ves. &  
Beam. 309.

**IV. Of**

## IV. Of the negotiation of bills.

## 1. Liability on a discount without indorsement.

A mere discount of a bill without the indorsement of a party who receives the money, does not give the holder of the bill any claim against such party. *Ex parte Roberts*, 2 Cox, 171.

## 2. Joint liability on distinct indorsements by partners.

If *A.* and *B.* are partners in a trade carried on in the name of *A.* only, and *A.* draws bills in his own name payable to his order, which he indorses, and afterwards *B.* also indorses and procures them to be discounted, there is no legal contract for a holder to maintain an action against *A.* and *B.* upon the bills, unless it appear that *A.* drew and indorsed them in the character of and as representing *A.* and *B.* *Ex parte Bolitho*; in *re Blackburn*, 1 Bock, 100.— But a person discounting the bills, may have a right of action against *A.* and *B.* jointly for money had and received, if he can show that they received the money by means of the bills for partnership purposes. *Ibid.*

## V. Of the dishonour of bills.

## 1. Notice thereof—general rule as to when essential or not.

Distinction as to the necessity of notice to the drawer of a dishonoured bill; depending on the fact, whether the acceptor has effects, or, whether it is a single transaction, or, if various dealings, the excess, for the accommodation of the drawer or acceptor. In the latter case, notice equally necessary without effects. *Ex parte Heath*, 2 Ves. & Beam. 240.

## 2. Notice thereof—by whom given.

Notice that a bill is dishonoured, to effect a discharge, must come directly from the holder. *Ex parte Barclay*, 7 Ves. 597.

## 3. Notice thereof—to whom given.

Notice of a dishonoured bill to a bankrupt, as drawer, before the choice of assignees, good. *Ex parte Moline*, 19 Ves. 216.

## 4. Notice thereof—whether dispensed with by the acceptor's bankruptcy.

Bankruptcy of acceptor does not dispense with notice to the drawer. 18 Ves. jun. 21.

## 5. Notice thereof—what shall be effects to render it requisite.

Whether securities, as title deeds and short bills, are not effects for the purpose of notice, *Quære*. *Ex parte Heath*, 2 Ves. & Beam. 240.

## 6. Liability of the drawer, whether immediate thereon.

The holder of a bill of exchange may resort to the drawer *immediately* after it has been dishonoured by the acceptor. *Ex parte Moline*, 1 Rose, 303.

## 7. Rights of a payer for the honour of a party.

A person, taking up a bill for the honour of the drawer, has no right against the acceptor without effects. *Ex parte Lambert*, 13 Ves. 179.

## 8. Of the holder's right to sue for the original consideration.

1. Bill taken for an antecedent debt, without indorsement, proving bad, the antecedent debt may be resorted to. Otherwise, if the bill is discounted without indorsement, and no antecedent debt. 10 Ves. 206.

2. Debt discharged by a bill taken as a discharge and satisfaction; otherwise not until payment. *Ex parte Hodgkinson*, 19 Ves. 291.

## VI. Of



### VI. Of the modes in which the liability of a party may be discharged.

#### 1. By giving another bill in lieu of the former.

Bills, in lieu of which other bills are given, if permitted to remain with the holder, and the latter bills are not paid, may be enforced. *Ex parte Barclay*, 7 Ves. 597.

#### 2. The drawer is discharged by giving time to the acceptor.

Holder of a bill giving time to the acceptor, discharges the drawer. 11 Ves. 411.

#### 3. The drawer is discharged by compounding with the acceptor.

Holder of a bill of exchange, discharging the acceptor by receiving a composition, cannot come upon the drawer. *Ex parte Wilson*, 11 Ves. 410.

### VII. Judicial proceedings.

#### 1. Of declaring upon the original consideration.

Creditor by note need not declare upon it, but may recover upon the loan. 2 Ves. 308.

#### 2. Of attaching bills of exchange in Scotland.

*Quære* whether bills of exchange may be attached in Scotland. 2 Ves. & Beam. 411.

## BLASPHEMY.

### Nature of the offence of blasphemy.

Whether founded on common law or statute, blasphemy was an offence punishable at common law before the st. 9 & 10 W. 3. c. 32., and that statute does not take away the common law punishment for blasphemy. *Attorney-gen. v. Pearson*, 9 Mer. 407.

## BOUNDARIES, COMMISSION TO ASCERTAIN.

### I. Of the jurisdiction in equity, as to granting a commission to ascertain boundaries.

Its deduction and original.

### II. When a commission to ascertain boundaries will be granted.

1. The grounds upon which courts of equity proceed.
2. Against a copyholder.
3. In the case of two manors.
4. Against a tenant.

### III. When a commission to ascertain boundaries will be refused.

1. In the case of two manors.
2. To ascertain the boundaries of two parishes.

IV. Of

#### IV. Of the mode of obtaining.

All parties interested should be brought before the court.

#### V. Of the commissioners.

The number which the plaintiff may name.

#### L. Of the jurisdiction in equity, as to granting a commission to ascertain boundaries.

Its deduction and original.

Jurisdiction, as to granting commission to ascertain boundaries, deduced from the writ *de rationalibus de.* or that, *de perambulatione fac.* Consent the ground upon which it was first exercised; then, upon the application of a party having an equitable claim, and no objection made. But a court of equity will not interfere between two independent proprietors, to force either to have his right so determined. *Speer v. Cawter*, 2 Mer. 410.

#### II. When a commission to ascertain boundaries will be granted.

##### 1. The grounds upon which courts of equity proceed.

1. Ground of relief upon confusion of boundaries, that there was a duty upon the defendant to keep them distinct. 9 Ves. 345.

2. The circumstance of confusion of boundaries constitutes *per se* no ground for the interposition of the court. *Speer v. Cawter*, 2 Mer. 410.

3. Commissions to fix boundaries of legal estates, are not of course; there ought to be some equitable circumstance for the court to lay hold of. *Wake v. Conyers*, Eden. 335. 2 Cox, 360.

4. All the cases where the court has entertained bills for establishing boundaries have been where the soil itself was in question, or there might have been a multiplicity of suits. *Wake v. Conyers*, Eden. 335. 2 Cox, 360.

##### 2. Against a copyholder.

Upon a bill of the lord, a commission issued to distinguish copyhold lands within the manor, comprised in admittances produced, the last in 1693, from freehold, and compounded copyholds, and to ascertain the boundaries; and if they cannot be distinguished, to set out lands of the tenant of equal value with so much of the copyhold lands as cannot be distinguished. *The Duke of Leeds v. the Earl of Strafford*, 4 Ves. 180.

##### 3. In the case of two manors.

Issue to try and settle boundaries of two manors by a special jury, and to have a view. *Lethieullier v. Lord Castlemain*, Dick. 46.

##### 4. Against a tenant.

1. Duty of the tenant to keep the boundaries; and the court will aid the reversioner to distinguish them: and, if they cannot be distinguished, will give him as much land. 6 Ves. 293.

2. Obligation of tenant to preserve boundaries; and having permitted them to be destroyed, so that the landlord's land cannot be distinguished from his and restored specifically, to substitute lands of equal value. The land or its value ascertained by commission. *Attorney-gen. v. Fullerton*, 2 Ves. & Beam. 263.

3. Commission to ascertain and distinguish boundaries; and if not to be distinguished, to set out the value, upon a bill by a prebendary against lessees of the prebendal lands, also owners of other lands within the parish, with which the prebendal lands had become intermixed and confounded by reason of the unity of possession. *Willis v. Parkinson*, 2 Mer. 507.

#### III. When

### III. When a commission to ascertain boundaries will be refused.

#### 1. In the case of two manors.

1. Bill to ascertain the boundaries of two manors, dismissed, there being no dispute as to the soil. *Wake v. Conyers*, Eden 331. 2 Cox, 360.

2. Bill by lord of the manor of B. against the lord of the adjoining manor of I. (who was also lessee of the manor of W.), and against commissioners under an act for inclosing lands within the manor of I., alleging confusion of boundaries arising out of the union of possession of the two manors; and that the defendants were preparing, in combination together, to set out a boundary of the manor of I., which would include lands belonging to the manor of W.; prayed a commission to set out the land lying within, and being part and parcel of, the manor of W. The answer of the defendant, lord of the manor of W. I., set out boundaries, referring to perambulations made previous to the union of possession; and the lease having expired since the filing of the bill, and it not being established in evidence that there was any confusion of boundaries occasioned by default or neglect of the owners of I., while lessees of W., the bill was dismissed, with costs, as against the commissioners; but without costs, as against the other defendant. *Speer v. Cawter*, 2 Mer. 410.

#### 2. To ascertain the boundaries of two parishes.

1. Bill will not lie for one parish against another, to ascertain boundaries. *St. Luke's Parish v. St. Leonard's*, 1 B. C. C. 40.

2. On a bill to settle the boundaries of two parishes, the matter held to be at law. *Waring v. Hotham*, Dick. 550.

3. A commission to ascertain the boundaries of two rectories, refused. 3 Anst. 801.

### IV. Of the mode of obtaining.

All parties interested should be brought before the court.

A commission to settle the boundaries of a parish or of a manor, ought not to be granted where all parties who may probably be interested are not before the court. 2 Anst. 386. 392.

### V. Of the commissioners.

The number which the plaintiff may name.

On a bill by a prebendary against his lessees, for a commission to ascertain the boundaries of the prebendal lands, the prebendary is entitled to name as many commissioners as his lessees. *Willis v. Parkinson and others*. Swanst. 9.

## BYE-LAW.

### I. As to the validity of bye-laws in restraint of trade.

1. Distinction between charter and contract.
2. Distinction between charter and custom.
3. Restraining members of the same corporation from being concerned in the same trade.
4. A bye-law of the company of Whitstable fishermen.

### II. Construction of bye-laws.

1. A bye-law of the East India Company, requiring a discovery by answer to bill in equity.

**I. As to the validity of bye-laws in restraint of trade.****1. Distinction between charter and contract.**

Distinction between charter and contract; that which may be the subject of contract between the different interests in a partnership, might not be good as a bye-law; for instance, an agreement among the citizens of London, who have as extensive a power in making bye-laws as any corporation, not to sell, except in the markets of London, would be good, though a bye-law to that effect has been declared bad by the legislature. 17 Ves. jun. 322.

**2. Distinction between charter and custom.**

Bye-law, even in restraint of trade to a certain extent, which would not have been good under the authority of charter, may be good by custom. 17 Ves. jun. 322.

**3. Restraining members of the same corporation from being concerned in the same trade.**

No instance of a bye-law restraining the individual members of the corporation from being concerned, either in any other place, or within given limits, in the same trade. 17 Ves. jun. 322.

**4. A bye-law of the company of Whitstable fishermen.**

As to the validity of a bye-law of the corporation, the company of Whitstable fishermen, that any freeman, engaging in any other oyster fishery on the coast of Kent, shall forfeit 10*l.*, and until payment, should be excluded from all share of the profits which should in the mean time be divided, as if he had wholly ceased to be a freeman; and whether such suspension is open to a mandamus, as a temporary disfranchisement, *Quære*. *Adley v. The Whitstable Company*, 17 Ves. jun. 315.

**II. Construction of bye-laws.****1. A bye-law of the East India Company, requiring a discovery by answer to bill in equity.**

Bye-law of the East India Company requiring a discovery by an answer to a bill in equity as to transactions, upon which penalties were imposed, confined to the case of a bill by the company. *Paxton v. Douglas*, 16 Ves. 239.

**CANAL NAVIGATION.****I. Of the jurisdiction of courts of equity to enforce the provisions of, or in relation to, canal navigation acts.**

1. Preliminaries to their interference in a case of deviation.
2. By compelling disputants to resort to the tribunal of the commissioners.
3. By restraining the undertakers from proceeding farther on a deficiency of funds.

**I. Of the jurisdiction of courts of equity to enforce the prohibitions of, or in relation to, canal navigation acts.**

**1. Preliminaries to their interference in a case of deviation.**

Though the court will not restrain an action of trespass by a party, through whose estate a canal is cutting, for deviating from the line, because he has laid by and rested upon his legal rights; yet, if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so, without a trial by a jury in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Company*, Cooper, 77.

**2. By compelling disputants to resort to the tribunal of the commissioners.**

Equity cannot compel resort to commissioners appointed under an act of parliament, to settle disputes between parties arising from a navigation, a lease for years having expired, and the landlord proceeding to recover possession. Demurrer allowed. *Stanhope v. Pilkington*, Cooper, 193.

**3. By restraining the undertakers from proceeding farther on a deficiency of funds.**

1. Persons authorised by act of parliament to cut a canal, if their funds are insufficient for the completion of the undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding. *Agar v. Regent's Canal*, Swanst. 250.

2. Persons authorized by act of parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, not restrained from cutting through their own lands, at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to parliament for farther powers to levy money. *Mayor, &c. of King's Lynn, v. Pemberton*, Swanst. 244.

## CERTIORARI.

**Its form, and in what court returnable.**

A writ of certiorari returnable in the court whence it issues; and it must be to return the record, not the tenor of the bill, in the mayor's court. *Woodroffe v. Kinaston*, Dick. 233.

## CHAMPERTY.

**I. Of maintenance and champerty in general.**

**Defined.**

**II. What transactions are void as amounting to champerty.**

Assignment of part of the subject of a suit in the prize-court.

**III. Of the jurisdiction of courts of equity in the matter of champerty.**

They will set aside a bond which, though not strictly champerty, is near it.

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**I. Of maintenance and champerty in general.**

Defined.

Maintenance and champerty. 18 Ves. jun. 125.

**II. What transactions are void as amounting to champerty.**

Assignment of part of the subject of a suit in the prize-court.

Assignment to navy-agents of part of the subject of a prize-suit, then depending, void, amounting to champerty; viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it; which is not confined to courts of common law. *Stevens v. Bagwell*, 15 Ves. 139.

**III. Of the jurisdiction of courts of equity in the matter of champerty.**

They will set aside a bond which, though not strictly champerty, is near it.

Bond set aside as, though not strictly champerty, near it. 18 Ves. jun. 128.

**CHANCERY.****I. Of maxims in equity.**

What things are considered in equity as actually performed.

**II. Equity and law contrasted with each other.**

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2. Distinctions peculiar to England; with the consequences.
3. Distinction between the rules of property at law and in equity.
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5. Of the different rules which govern each in regard to fraud.
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**IX. Jurisdiction of courts of equity over transactions cognizable at law.**

1. Equity will act in aid of a legal right.
2. To compel the conveyance of a legal estate.
3. A legal defence does not necessarily oust equitable relief.
4. The extension of the legal has not ousted the equitable jurisdiction.
5. From the remedy at law being ineffectual.
6. From the remedy in equity being more speedy and effectual.
7. From the remedy at law being doubtful or difficult.
8. From the exclusive power of equity to give the parties mutual advantage.
9. From the assistance of the former being required on equitable circumstances.
10. Whether confined by the death or bankruptcy of some of the parties.
11. The case of the loss of a deed.
12. In the case of fraud.
13. The validity of a will.
14. The case of a demand cognizable by legal action of assumpsit or interest.
15. In case of compensation sought for a breach of contract.
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**X. Jurisdiction of courts of equity over transactions cognizable in the spiritual court.**

Equity will not interfere.

**XI. Jurisdiction of courts of equity over transactions cognizable in the university courts.**

Equity will not interfere.

**XII. Jurisdiction of courts of equity, in exclusion, or from defects, of courts of law.**

1. The case of evidence for a legal defence obtained by bill, and not available from form.
2. The case of a mortgage term outstanding, and possession sought.

3. The

3. The case of the assignment of a chose in action.
4. To aid a legal execution against trust-property.

**XIII. Jurisdiction of courts of equity, in correcting excess of jurisdiction by inferior courts.**

1. Excess of jurisdiction by spiritual court, in proving an act *inter vivos*.
2. They will relieve against the order of commissioners of sewers.

**XIV. Jurisdiction of courts of equity to enjoin or regulate legal proceedings.**

Proceedings upon indictments.

**XV. Jurisdiction of courts of equity over foreigners and foreign transactions.**

1. Right of a foreign potentate to sue in a court of equity.
2. *Ex officio* notice of a foreign government not acknowledged by us.
3. Transactions between British subjects acting as an independent state, and foreign states.
4. Transactions concerning lands abroad.

**XVI. Jurisdiction of courts of equity, in the case of fraud.**

1. In the case where the interests of innocent third persons are involved.
2. Fraud vitiates a deed, even against innocent persons.
3. Whether equity, to relieve from fraud, will dispense with the provisions of an act of parliament.
4. In cases of fraud intended for one, taking effect upon another.
5. In cases of interests obtained through the fraud of another.
6. Force of the circumstance, that a consideration has been given, to uphold transactions otherwise void.
7. Of invalidating a fraudulent deed in part.
8. Of the mode in which it is usually exercised.
9. Of confirmation.
10. How far lapse of time will prevent their interposition.
11. How far a release of the principal in the fraud will prevent their interposition.
12. Evidence of fraud — preparation of an instrument by the party himself.
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15. Evidence of fraud — old age.
16. Evidence of fraud — miscellaneous circumstances.
17. In the case of an agent dealing as principal.
18. In cases of fraud in sales by agents.
19. In the case of the sale of an annuity by an attorney to his client.
20. In case of a grant from a distressed prisoner to his attorney.



21. Fraud in an attorney acting for all parties.
22. In cases of fraudulent awards.
23. In the case of a bequest prevented by a promise.
24. In the case of a devisee preventing a legacy being charged, by promising payment.
25. In cases of leases from the ward to his late guardian.
26. In cases of frauds upon heirs.
27. In case of improvident transactions by young men.
28. In case of fraud by the husband upon the wife's interest.
29. In cases of fraudulent judgments.
30. In cases of fraud upon jointuring powers.
31. In the case of a lease obtained by fraud.
32. In the case of an agreement for a lease fraudulently obtained.
33. In case of the delivery of a lease being obtained by fraud.
34. In cases of renewals of leases fraudulently obtained.
35. In case of leases obtained *pendente lite*.
36. In case of suit postponed by promises beyond the period of limitation.
37. In case of a bargain with a servant in fraud of his master.
38. In cases of frauds on marriage.
39. In case of refusal after marriage to perform a previous agreement to settle.
40. In the case of a bond of indemnity against a marriage settlement.
41. In cases of fraudulent misrepresentation.
42. In case of a contract between child and parent for an appointment in his favour.
43. In the case of a partnership.
44. In the case of a release from concealment of a material fact.
45. In the case of the completion of a recovery by the fraud of a remainder-man.
46. In cases of religious delusion.
47. In cases of fraud in sales under a decree.
48. A purchaser with notice is affected by the fraud.
49. In the case of fraud as to the quantity and quality of goods sold.
50. In case of tenant in fee being fraudulently induced to accept a chattel lease.
51. In the case of purchase of the inheritance by tenant for life.
52. In cases of conveyances taken by tenants in possession from adverse claimants.
53. In the case of a fraudulent title.
54. In the case of an appointment as trustee induced by fraud.

## XVII. Jurisdiction of courts of equity, in the case of mistake.

1. Analogy between this jurisdiction and that over fraud.
2. The jurisdiction is peculiarly equitable.
3. Essentials to the exercise of the jurisdiction.
4. The mode of exercising it is by reforming the instrument.
5. General rule upon the subject of mistakes in instruments.
6. Mis-

6. Misapprehension of one's rights.
7. In the case of an annuity society, with a rate of subscription inadequate to its object.
8. Mistake in the mode of attestation.
9. Mistake in calculating the sum in a bond.
10. In the case of a bond made joint, instead of several also.
11. Compromise founded in misconception.
12. Mistake in not providing against the chance of death.
13. Expenditure upon an estate.
14. Mistakes in leases.
15. Mistake in a verdict.
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**XVIII. Jurisdiction of courts of equity to modify written instruments.**

By limiting their extent as securities.

**XIX. Jurisdiction of courts of equity to order written instruments to be delivered up.**

1. It is invested with such jurisdiction.
2. Distinction between directing an instrument to be delivered up, and making it effectual.
3. It will not be exercised merely because the instrument would not be specifically enforced.
4. In the case where the rights of innocent third persons have intervened.
5. A voluntary deed.
6. Instruments obtained under a misconception of right.
7. Instruments obtained through ignorance and misrepresentation.
8. Instruments obtained under mutual ignorance.
9. Instruments given in state of intoxication.
10. Instrument improvidently obtained.
11. Instruments obtained through undue influence.
12. Instruments obtained through an abuse of confidence.
13. Instruments founded on inadequate consideration.
14. In the case where the instrument is legally defective.
15. A void decree.
16. Instruments contrary to public policy.
17. Instruments become impossible to be fulfilled.
18. In the case of forged instruments.
19. A forged will.
20. Of ordering a re-conveyance to the favoured party.
21. Consequent direction thereon for repayment of money paid under.

**XX. Jurisdiction of courts of equity in the case of the loss of written instruments.**

1. Its original.
2. The legal has not superseded the equitable jurisdiction.
3. General rule upon the subject.
4. In the case of an instrument delivered up through ignorance.
5. In

5. In the case of negotiable instruments.
6. Peculiar jurisdiction in case of a negotiable instrument.
7. In case of a note cut into two parts and one lost.
8. Against sureties.

**XXI. Jurisdiction of courts of equity to relieve against a penalty or forfeiture.**

1. Distinction between penalties by contract and by statute.
2. Forfeiture under a bye-law.
3. Forfeiture from non-payment of government loan.
4. A penalty designed to secure money.
5. Forfeiture of lease by breach of covenant.
6. Forfeiture by breach of conditions in law.

**XXII. Jurisdiction of courts of equity in relation to personal chattels.**

To compel a specific delivery.

**XXIII. Jurisdiction of courts of equity in relation to uncertainty of value.**

In the valuation of reversionary uncertain interests.

**XXIV. Jurisdiction of courts of equity in relation to matters of prize.**

To determine whether a particular ship was part of a particular squadron.

**XXV. Jurisdiction of courts of equity in miscellaneous cases.**

1. To aid the omission of a defence at law.
2. In the case of acquiescence in a defective title.
3. In the case between an executor and one entitled under the will.
4. Jurisdiction to prevent the operation of a fine, in the case of suppression of deeds.
5. On the grounds of public policy.
6. Remainder-man suffering money to be laid out, and then impeaching the title.
7. On the ground that a trustee will not allow his name to be used.
8. To compel the transfer of a *cestui que* trust's aliquot share.
9. Another case.

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**I. Of maxims in equity.**

What things are considered in equity as actually performed.

Nothing is looked upon in equity as done, but what ought to have been done, not what might have been done. *Burgess v. Wheate*, Eden, 186.

**II. Equity and law contrasted with each other.**

**1. The era of equity.**

1. Equity in England is as old as Bracton. *Burgess v. Wheate*, Eden, 194.

2. Dis-

2. Distinctions peculiar to England; with their consequences.

Distinction in the administration of law and equity in this country by different courts; and consequences of that distinction. 6 Ves. 39.

3. Distinction between the rules of property at law and in equity.

A rule of property in equity is not therefore to be adopted at law: the courts in some respects proceeding upon different principles: courts of equity, for instance, not allowing a single witness, unless supported by circumstances, to prevail against a positive denial by the answer. 6 Ves. 183.

4. In relation to the different modes of proof.

Distinction of legal and equitable jurisdictions upon the same subject, with reference to the different modes of proof. *Ball v. Oliver*, 2 Ves. & Beam. 110.

5. Of the different rules which govern each in regard to fraud.

1. Distinction between legal and equitable jurisdiction upon fraud, which at law must be proved, not presumed; and the equitable jurisdiction may be exercised upon an instrument unduly obtained, where a court of law could not enter into the question. 18 Ves. jun. 483.

2. *Vide etiam*, 8 Ves. 283. 1 V. & B. 98.

6. Transactions void at law may be upheld in equity.

Instrument, though void at law, may be sustained in equity. 18 Ves. jun. 423.

III. *Of the officers of the court of chancery.*

Jurisdiction of the chancellor over the master of the rolls.

It is not competent to the lord chancellor to order the master to review a report confirmed and followed by a decree of the master of the rolls, containing consequential directions, while that decree stands. *Ex parte Turner*; *Turner v. Metcalf*. *Swanst.* 154.

IV. *Essentials to the exercise of the general jurisdiction of courts of equity.*

1. An interest in the applicant.

The court will not interfere even to secure the fund, upon the application of a person who does not shew any interest. *Brown v. Dunbridge*, 2 B. C. C. 321.

2. The applicant not a volunteer.

1. A court of equity does not interfere for volunteers. Ves. 275.

2. Tenant in tail prevented from completing a recovery by the fraud of a person whose wife is entitled in remainder. Relief in equity; treating the estate, even in favour of a volunteer, as if the recovery had been suffered. 11 Ves. 639.

3. A grant from a distressed man in prison for debt, to his attorney, set aside as fraudulent in favour of children, though deriving as volunteers, yet having as fair a claim to be relieved against fraud, as the heir at law. *Falkner v. O'Brien*, 2 B. and B. 214.

3. Authority in the court to interfere, and not merely the existence of injustice.

In order to found a title to relief in equity, it is not sufficient to shew that injustice has been done: it must be shewn that the court is warranted to interfere, and equity is not warranted to interfere, on the ground that an unconscientious verdict has been had at law against plaintiff, if it was competent to him to have laid that ground before a court of law. *Bateman v. Willoe*, 1 Sch. & Lef. 201. 204.

### V. Preliminaries to the exercise of the equitable jurisdiction.

#### 1. Establishment of the right at law,

1. Bill to be quieted in the possession of a mill, and that defendants may pull down works above it, and be restrained from erecting others; demurrer, because plaintiff had not established his right at law, allowed. *Weller v. Smeaton*, 1 B. C. C. 572.

2. Where the whole of a case rests on the validity of a lease of tithes, and of a notice to determine it, equity will not interfere till those points are settled at law. *Bousher v. Morgan*, 2 Anst. 404.

#### 2. Attempt to make available property abroad, liable to the demand.

The plaintiff's testator's property being confiscated in America (subject to his debts), a creditor there ought to apply to make that property available to the payment of his debts, before he sues the debtor here. *Wright v. Nutt*, 3 B.C.C. 326. Vide in tit. Debtor and Creditor.

### VI. Jurisdiction of courts of equity may be exercised conditionally.

As, that the applicant shall do that which otherwise he is not compellable to perform.

There are many cases in which a court of equity will not interfere in favour of a plaintiff, except upon terms which could not be directly enforced against him in the character of a defendant. *Fildes v. Hooker*, 2 Mer. 427.

### VII. Jurisdiction of courts of equity conferred by act of the parties.

The act of filing a cross-bill.

Filing a cross-bill prevents any objection to the jurisdiction. *Burgess v. Wheate*, Eden, 190.

### VIII. Jurisdiction of courts of equity over matters of fact.

The rule which governs them in deciding facts without a jury.

Jurisdiction in equity to try questions of fact without the aid of a jury, to be exercised by a sound discretion. 3 Ves. & Beam. 42.

### IX. Jurisdiction of courts of equity over transactions cognizable at law.

#### 1. Equity will act in aid of a legal right.

1. Account would be decreed upon a bill on a mere right of entry, if the defendant admitted the title and receipt of the rents and profits. 2 Ves. 128.

2. Bill by the bailiff of the city of London, entitled under a grant of Edw. 6. of the execution and return of all process in the borough of Southwark, against the sheriff of Surrey for an account of the fees, dismissed. *Lewis v. Sutton*, 5 Ves. 683.

3. Upon a bill by the deputy meters of oysters at Billingsgate, appointed by the city of London, the allowance claimed for meteage, &c. of the cargoes brought to market being established as reasonable by the verdict upon an issue, an account and payment of the arrears was decreed. *Milbourn v. Fisher*, 5 Ves. 685. n.

## 2. To compel the conveyance of a legal estate.

Demurrer allowed to a bill for a conveyance, the estates being legal, not equitable ones. *Thong v. Bedford*, 1 B. C. C. 313.

## 3. A legal defence does not necessarily oust equitable relief.

1. It does not follow *of course*, that because a plaintiff has a defence at law, he cannot come into a court of equity for relief. *Campbell v. French*, 2 Cox, 366.

2. A bill in equity lies to have a policy of insurance delivered up as fraudulent, although the discovery obtained would be a defence at law. *French v. Connelly*, 2 Anst. 454.

## 4. The extension of the legal has not ousted the equitable jurisdiction.

1. The extension of the jurisdiction of the courts of law in modern times to cases, that formerly were subjects of equitable jurisdiction exclusively, has not destroyed the jurisdiction of courts of equity. 7 Ves. 249.

2. Extension of legal jurisdiction to subjects formerly not dealt with at law, marriage-brochage, for instance. 18 Ves. jun. 483.

## 5. From the remedy at law being ineffectual.

In cases where effectual cognizance cannot be taken at law, equity interferes; as, in complicated accounts. So, where a verdict is obtained by fraud, or where a party at law has possessed himself improperly of something whereby he has an unconscientious advantage. 1 Sch. & Lef. 205.

## 6. From the remedy in equity being more speedy and effectual.

1. Action upon damage from a wilful, fraudulent misrepresentation; though by a person having no privity. Concurrent jurisdiction in equity; where the law cannot give so speedy and effectual relief. 13 Ves. 133.

## 7. From the remedy at law being doubtful or difficult.

Where there may be remedy by law, yet, if doubtful or difficult, equity will hold jurisdiction. *Weymouth v. Boyer*, 1 Ves. 417.

## 8. From the exclusive power of equity to give the parties mutual advantages.

A plaintiff in a suit may have a remedy in a court of equity, concurrently with a right to sue the defendant at law, where the former court can give the parties mutual advantages not in the power of the latter. *Davies v. Dodd*, 4 Price, 176.

## 9. From the assistance of the former being required on equitable circumstances.

Bill for a legal demand retained, with liberty to bring an action; the assistance of the court being required on equitable circumstances. *Stevens v. Praed*, 2 Ves. 519.

## 10. Whether conferred by the death or bankruptcy of some of the parties.

1. Bill will not lie against several for a mere legal demand, on account of the death or bankruptcy of some of the parties. *Hoare v. Contencier*, 1 B. C. C. 27.

2. A question arising in equity, that prevents the assertion of a legal right, does not alter the tribunal. Therefore the court will not determine a question of partnership in the event of a bankruptcy any more than of death, or than it would determine a claim as heir, without a trial at law, unless perfectly satisfied; though the evidence is all in support of the claim. The court expressed great doubt whether, the stock in trade being in the possession of the bankrupt solely, the claim of partnership could be sustained.

tained upon the statute 21 James 1. c. 19. s. 10, 11. *Binford v. Dommett*, 4 Ves. 756.

11. The case of the loss of a deed.

Though a court of law will permit a plaintiff to declare upon a lost bond, that does not oust the jurisdiction of this court. *Atkinson v. Leonard*, 3 B. C. C. 218.

12. In the case of fraud.

1. Courts of equity have a concurrent jurisdiction with courts of law in cases of fraud, and therefore a demurrer for want of equity will not lie to a bill praying relief against a fraudulent policy of insurance. *Sowerby v. Warder*, 2 Cox, 268.

2. Bill not sustained, upon the ground of fraud or mistake, the relief being in the nature of damages, the subject of an action; and, the charges of fraud not being proved, the bill was dismissed with costs. *Clifford v. Brooke*, 13 Ves. 131.

13. The validity of a will.

A court of equity has no jurisdiction to determine on the validity of a will either of real or personal property. *Jones v. Jones*, 3 Mer. 162.

14. The case of a demand cognizable by legal action of *assumpsit* or in *tort*.

If a plaintiff in equity might proceed at law for that which he demands by his bill, either by an action of *assumpsit* or by an action for the *tort*, the bill may be demurred to, if it be in the nature of an action for the *tort*. But if in nature of *assumpsit*, defendant may plead his bankruptcy and certificate. *De Tastet v. Walter*, 1 Buck, 153.

15. In case of compensation sought for a breach of contract.

Equity cannot relieve by decreeing compensation for non-performance of an agreement; such relief must be sought at law. Sch. & Lef. 25.

16. Jurisdiction to increase legal damages.

Upon equity reserved, the court refused to increase damages, on suggestion that interest was omitted at law through mistake, on the supposition that it would be given in equity. *Stevens v. Praed*, 2 Ves. 519.

**X. Jurisdiction of courts of equity over transactions cognizable in the spiritual court.**

Equity will not interfere.

The question in the cause being between persons in their ecclesiastical capacity, chancery would not interfere, but left it to the ecclesiastical court, as being the proper court to determine it. *Clare Hall v. Orwin*, Dick. 457.

**XI. Jurisdiction of courts of equity over transactions cognizable in the university courts.**

Equity will not interfere.

The claim of the university of Oxford, of a suit in chancery allowed. *Edwards v. Dennison*, 1 Dick. 139.

**XII. Jurisdiction of courts of equity, in exclusion, or from defects, of courts of law.**

1. The case of evidence for a legal defence obtained by bill, and not available from form.

On a bill to obtain evidence for a defence at law, when the evidence is obtained, the court cannot proceed to give relief, although the party cannot have the effect of the evidence at law, from objections of form. *Lee v. Shoulbred*, 1 Anst. 83.

2. The case of a mortgage term outstanding, and possession sought.

A mortgage term outstanding will bar an ejectment at law even between heir and devisee claiming subject to the charge; the only remedy, therefore, is in a court of equity. *Barnes v. Crow*, 4 B. C. C. 2.

3. The case of the assignment of a *chose* in action.

A. by marriage settlement, covenants for payment, within four years, to the trustees, of a sum of 4000*l.*, the dividends whereof, and of other funds thereby settled, are made payable to himself for life. He afterwards obtains a pension from government, by warrant of the treasury, made payable to him and his assigns by the treasurer of the navy, out of a certain fund, during the life of the grantee. A. subsequently absconds, being largely indebted to the crown, and not having paid the 4000*l.* according to the covenant in his settlement; and upon his departure the pension is withdrawn by order of council, and the trustees of the settlement stop the payment of the dividends of the other funds to which he was entitled for life under the settlement. A. having granted annuities, secured by assignment of his pension and of these dividends, on a bill by the annuitants against the treasurer of the navy and the attorney-general, for recovery of what was in the hands of the former on account of the pension, and against the trustees of the settlement for dividends accrued since A.'s departure; held, as to the first, that equity had no jurisdiction; and, as to the second, that the trustees, who had no notice of the assignment, were entitled to retain the dividends in satisfaction of the covenant; and the bill was therefore dismissed against all the defendants. *Priddy v. Rose*, 3 Mer. 86. — The equity of the trustees was to stop the dividends, not only immediately on failure of performance of the covenant, but at any time after at their discretion. *Ibid.* *Quære*, whether the pension from government in this case is assignable within the policy of the law. *Quære* also as to the right of the crown to retain the pension in discharge of a debt due from the grantee in a different capacity from that in which it was granted him. *Priddy v. Rose*, 3 Mer. 86.

4. To aid a legal execution against trust-property.

Equity cannot assist a legal execution, so as to reach money in the hands of a trustee. *Cailland v. Estwick*, 2 Anst. 381.

**XIII. Jurisdiction of courts of equity in correcting excess of jurisdiction by inferior courts.**

1. Excess of jurisdiction by spiritual court, in proving an act *inter vivos*.

Courts of law and equity supervise the acts of the spiritual court when they are incidental to their own determinations, and therefore if they prove an act *inter vivos*, they will consider it as void, as much as if that court had proved a will relative to lands only. *Pigott v. J'Anson*, 1 Eden, 469.

2. They



2. They will relieve against the order of commissioners of sewers.

Demurrer to bill for relief against an order of the commissioners of sewers, overruled. *Box v. Allen*, Dict. 49.

#### XIV. Jurisdiction of courts of equity to enjoin or regulate legal proceedings.

##### Proceedings upon indictments.

No general jurisdiction in equity to enjoin or regulate proceedings upon indictments; but circumstances may give it; as, where prosecuted by relators in an information, or plaintiffs, they are subject to control by order personally affecting them, but not the defendants. 18 Ves. jun. 220.

#### XV. Jurisdiction of courts of equity over foreigners and foreign transactions.

1. Right of a foreign potentate to sue in a court of equity.

Q. Whether a foreign sovereign can sue in a municipal court of this country. 3 Ves. 431.

2. *Ex officio* notice of a foreign government not acknowledged by us.

A judicial court cannot take notice of a foreign government, not acknowledged by the government of the country, in which that court sits; and the fact of acknowledgment is matter of public notoriety. *City of Berne v. The Bank*, 9 Ves. 347.

3. Transactions between British subjects acting as an independent state, and foreign states.

1. Political treaties between a foreign state and subjects of the crown of Great Britain, acting as an independent state under powers granted by charter and act of parliament, are not a subject of municipal jurisdiction; therefore a bill founded on such treaties by the Nabob of Arcot against the East India Company was dismissed. *Nabob of the Carnatic v. East India Company*, 2 Ves. 56.

2. A bill in this court cannot be maintained by a sovereign prince in India against the East India Company, for an account of monies, &c. paid in consequence of treaties, in the nature of federal conventions for the protection of their respective territories. *Nabob of Arcot v. East India Company*, 4 B. C. C. 189.

3. Bill by Nabob of the Carnatic v. East India Company, for discovery and account of rents and profits of his territories while in their possession, as security for debt; and for the balance, submitting to pay it, if against him. Plea, that by divers charters, &c. and statutes concerning them, defendants have sole privilege of trading to India, and a right to send men, ships, &c. and to commission officers to continue, or make peace and war, &c. for their advantage, with any natives not christians: that plaintiff is a native sovereign, not a christian: that all the transactions in the bill passed between him as such sovereign and defendants in exercise of their privileges; and related to matters transacted between them with regard to peace and war, and security and defence of their respective possessions; and therefore are not cognizable in this or any municipal court. Plea over-ruled; and having been once amended, farther time refused; and defendants compelled to answer immediately. *Nabob of the Carnatic v. E. I. Company*, 1 Ves. 371.

4. Transactions concerning lands abroad.

1. Regularly all questions of title to land in the colonies are to be decided,

cided, in the first instance, by courts of local judicature, from which an appeal lies to the king in council. *Attorney general v. Stewart*, 2 Mer. 143.

2. Allowance in respect of advances for supplies to a West India estate by persons, acting as consignees under a regular appointment, but with permission of the owners, or by one tenant in common; if not upon the ground of lien by the colonial law or usage, upon the nature of the subject, requiring expenditure; as in the case of mines, allum works, &c. distinguished from a mere landed estate in this country. *Scott v. Nesbitt*, 14 Ves. 438.

3. This court having jurisdiction *in personam* upon equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchaser of an estate in the West Indies by a creditor under his own execution was, upon the circumstances, held only a security for the debt, the expences of the proceeding, and incumbrances paid by him, with interest; and subject thereto a re-conveyance was decreed. *Lord Cranston v. Johnston*, 3 Ves. 170.

4. Jurisdiction upon a contract concerning an estate in a colony. But the question upon the construction of the contract, for a security by way of mortgage, having been before a court of competent jurisdiction in the colony, and a foreclosure and judicial sale directed, the allegations of fraud merely general, and denied, an injunction was refused. *White v. Hall*, 12 Ves. 921.

## XVI. Jurisdiction of courts of equity in the case of fraud.

1. In the case where the interests of innocent third persons are involved.

Relief against a fraud by preventing a recovery; affecting the interests of third persons, not parties in the fraud. 14 Ves. 290.

2. Fraud vitiates a deed, even against innocent persons.

A deed obtained by fraud is bad *in toto*, though innocent persons are interested in it. *Davidson v. Russel*, Dick. 761. vide Dick. 84.

3. Whether equity, to relieve from fraud, will dispense with the provisions of an act of parliament.

How far in a case of fraud; the provisions of the annuity act might be dispensed with, not as against the grantor but against his creditors, *Quære*. Ex parte Wright, 1 Rose, 308.

4. In cases of fraud intended for one taking effect upon another.

1. Relief against fraud intended against one person taking effect upon another; and the same principle prevails in trespass and criminal cases. 13 Ves. 132.

2. Whether a party, acting upon the faith of a representation, not to him or with a view to deceive him, but to a third person, would be entitled to relief against the person making it, *Quære*. 18 Ves. jun. 504.

5. In cases of interests obtained through the fraud of another.

Interests obtained through the fraud of another person cannot be maintained. 14 Ves. 289.

6. Force of the circumstance, that a consideration has been given, to uphold transactions otherwise void.

No part of a fraudulent agreement can be supported except where a consideration has been given, in consequence of which the parties cannot be replaced in the same situation in which they stood before. *Daubeny v. Cockburn*, 1 Mer. 643.

7. Of

### 7. Of invalidating a fraudulent deed in part.

A. having an estate in fee of 6,000*l.* a year, and being tenant for life without impeachment of waste of another estate of 5,000*l.* a year, with the reversion in fee after an estate in tail male in B. his only son by a former marriage, became indebted by mortgage, annuities, and otherwise, to the amount of near 100,000*l.* A. and B. joined in conveying both estates to trustees, upon trust by sale or mortgage, sale of timber, or by rents and profits, to pay debts, and to apply so much of the rents and profits of what should remain unsold, as should seem meet to them, as a sinking fund, and to pay the residue to A. and to settle the remaining trust-estates, subject to an annuity of 1,000*l.* to B. for the joint lives of him and A. upon A. for life without impeachment of waste, with power to lease for 21 years only; remainder to trustees to preserve, &c.; remainder, subject to a jointure to the wife of A. and portions for children by her, to the joint appointment of A. and B.; in default thereof to the appointment of B. surviving; in default thereof to B. in tail male; remainder to the other sons of A. in tail male; remainder to B. in tail; remainder to the daughters of A. in tail, with cross remainders; remainder to B. in fee, with powers of leasing and full powers of management in the trustees, and a provision for the appointment of new trustees, as vacancies should happen. The trustees raised 50,000*l.* by mortgage of the settled estate, which they applied to the debts; and they paid 2,500*l.* a year to A. and 1,000*l.* a year to B. from the date of the settlement. Upon the bill of A. to set aside the deed, except the trust for the debts, upon a general charge of fraud, misapprehension, and misrepresentation, or to control the management of the trust, and for an account against the trustees, the court held, 1st, that the deed could not be set aside partially for fraud; nor under this bill totally; for then the prior estates in the settled estate must be revested clear of incumbrances, A. being under covenant to exonerate; and the mortgagees, who must either consent to change their securities, or be paid, were not parties; 2dly, that general charges of fraud required no answer, and could not support a decree; that upon the evidence there was no fraud or mistake; and that B.'s joining to subject the settled estate, was sufficient consideration; 3dly, that the court would not interfere with the trustees, there being no misbehaviour; and that the payment of the annuity to B. was good. The bill, therefore, was dismissed with costs; and the trustees having been always ready to account, the court refused to retain it for that purpose; but without prejudice to a bill for that only. *Middleton v. Lord Kenyon*, 2 Ves. 391.

### 8. Of the mode in which it is usually exercised.

In ordinary cases of fraud, equity undoes the whole transaction, and replaces the parties in their former situation. *Daubeny v. Cockburn*, 1 Mer. 644.

### 9. Of confirmation.

1. To a bill charging fraud, confirmation and length of time not a ground of demurrer. *Earl of Deloraine v. Browne*, 3 B. C. C. 633.

2. An agent employed to sell a reversionary legacy, buys it in the name of another, afterwards sells it to the legatee, for a bond payable after the death of his father, and then obtains a money-bond: the transaction is fraudulent, and the giving the last bond, and paying interest, no confirmation. *Crowe v. Ballard*, 3 B. C. C. 117.

3. A reversionary grant from a person in the situation of an expectant heir, made thirty-four years, and confirmed by a subsequent deed, was set aside; being obtained by fraud and imposition; the party confirming being ignorant of his rights; and the length of time satisfactorily accounted for. *Roche v. O'Brien*, 1 Ball & Beatty, 330.

### 10. How

10. How far lapse of time will prevent their interposition.

1. Fraud, however long committed, may, under particular circumstances, be relieved against in equity, if it be clearly and distinctly proved; and if the persons entitled to investigate it have pursued their remedy with due diligence after the discovery thereof; but nothing short of the fullest satisfaction that fraud did exist, and the most diligent pursuit of the demand, will warrant the court in making a decree. *Underwood v. Lord Courtown*, 2 Sch. & Lef. 56.

2. Conveyance of a reversionary interest from an uncle to a nephew, under circumstances of gross inadequacy of price and alleged fraud, attempted to be set aside after forty years; but held to be supported by the consideration of natural love and affection, inserted in the witnessing part of the deed, although not expressed in the recital. *Whalley v. Whalley*, 1 Mer. 436.

3. *Quere*, as to the effect of length of time in such a case operating by way of evidence. *Whalley v. Whalley*, 1 Mer. 436.

4. Vide 1 B. & B. 330. 3 B. C. C. 633. 4 B. C. C. 125.

5. Court of equity will not relieve against purchasers of a term from executor or administrator, after length of possession, even under suspicion of fraud. *Andrew v. Wrigley*, 4 B. C. C. 125.

11. How far a release of the principal in the fraud will prevent their interposition.

If the plaintiff releases the principal in a fraud, he cannot proceed against those who would be secondarily liable. *Thompson v. Harrison*, 2 B. C. C. 164.

12. Evidence of fraud — preparation of an instrument by the party himself.

Where an instrument is prepared by the party himself, who seeks the benefit of it; this alone is sufficient to raise a strong suspicion of fraud: 2 Sch. & Lef. 503.

13. Evidence of fraud — obscurity and inaccuracy of a deed.

From the obscurity and inaccuracy of a deed, fraud and inadequacy of consideration will not, after the death of the parties, be presumed when not proved: therefore, a bill by mortgager to set aside a deed, executed by him and the mortgagee, of the mortgaged premises, excepting a part the mortgagee had with the privity of the mortgager agreed to assign to another, which the purchaser covenanted to ratify, dismissed. *M'Namara v. Browne*, 2 B. & B. 1.

14. Evidence of fraud — inadequacy of consideration.

1. Inadequate consideration a badge of fraud. *Gwynne v. Heaton*, 1 B. C. C. 1.

2. Inadequacy of price, a badge of fraud, upon which a contract shall be set aside. *Heathcote v. Paignon*, 2 B. C. C. 167.

3. Effect of inadequacy of consideration towards constituting fraud. 12 Ves. 373.

4. Inadequacy of consideration, though not of itself a sufficient ground for setting aside a contract, is, when gross, strong evidence of fraud. 13 Ves. 103.

5. *Quere*, as to the effect of gross inadequacy of price, as evidence of fraud. *Whalley v. Whalley*, 1 Mer. 436.

6. A purchase of an estate at a halfpenny a yard, when the vendee knew that not to be one-fourth of the real value, is fraudulent, and void in equity. *Denne v. Rastron*, 1 Anst. 64.

7. Vide 10 Ves. 209.

15. Evidence

## 15. Evidence of fraud — old age.

Old age alone not a sufficient ground to presume imposition. *Lewis v. Pead.* 1 Ves. 19.

## 16. Evidence of fraud — miscellaneous circumstances.

Marriage settlement of personal property in general terms, "all monies, debts, bills, bonds, notes," &c. No inference of fraud from the cancellation, during the treaty, upon a fair moral consideration, of a note, the only instrument of that description; the marriage not taking place upon a representation of the particulars or amount. *De Manneville v. Crompton* 1 Ves. & Beam. 354.

## 17. In the case of an agent dealing as principal.

Lord I. dealt for an annuity with C., who treated for Lord I.'s son (which was unknown to Lord I.) This is not a fraud to vitiate the transaction. *Irnham v. Child*, 1 B. C. C. 92.

## 18. In cases of fraud in sales by agents.

Vide 3 B. C. C. 117.

## 19. In the case of the sale of an annuity by an attorney to his client.

Sale of an annuity by an attorney to his client set aside under the circumstances. *Gibson v. Jeyes*, 6 Ves. 266.

## 20. In case of a grant from a distressed prisoner to his attorney.

A lease obtained *pendente lite*, set aside. *Falkner v. O'Brien*, 2 B. & B. 214.

## 21. Fraud in an attorney acting for all parties.

It is a sufficient ground for the interference of equity, that a person entrusted to act as attorney for all parties, abuses the confidence placed in him. *Costigan v. Hastler*, 2 Sch. & Lef. 165.

## 22. In cases of fraudulent awards.

Bill shewing, that a judgment at law was obtained against conscience by concealment, would open it. So, an award would be opened in equity, if impeached upon equitable matter, as concealment, notwithstanding a clause that it should be final. 2 Ves. 135.

## 23. In the case of a bequest prevented by a promise.

Relief upon fraud in not performing a promise, relying on which the testator forbore to bequeath. 2 Ves. & Beam. 262.

## 24. In the case of a devisee preventing a legacy being charged by promising payment.

Devisee, preventing the testator from charging a legacy by undertaking to pay it, bound in equity, though not at law. 11 Ves. 636.

## 25. In cases of leases from the ward to his late guardian.

Leases obtained by an uncle from his nephew, but just come of age, and to whom he had been guardian and agent, set aside; being made at undervalue, and other considerations, than the reserved rent, being held out, for which no security was given. *Dawson v. Massey, Ball & Beatty*, 219.

## 26. In cases of fraud upon heirs.

Gift obtained from an heir at law, ignorant of his rights, by one who undertook to support him in obtaining possession of his estate, set aside under the circumstances. *Strachan v. Brander*, 1 Eden, 303.

27. In

27. In case of improvident transactions by young men.

Improvident young men relieved against bonds and judgments, executed by them through fraud on repaying the money really and *bond fide* advanced to them. *Waller v. Dalt*, Dick. 8; 1 Eq. Abr. 90.; 1 C.C. 276.; *Finch*, C. A. 295.

28. In case of fraud by the husband upon the wife's interest.

Agreement on marriage to settle stock and other property of the wife to the use of the wife; husband having by fraud made her transfer the stock to him, decreed upon a bill of performance to transfer the stock and assign the rest under the direction of the master to trustees for her use, who should receive the dividends due and to become due till the transfer and assignment. Costs on account of the fraud. *Lampert v. Lampert*, 1 Ves. 21.

29. In cases of fraudulent judgment.

Vide 2 Ves. 135.

30. In cases of fraud upon jointuring powers.

Power of jointuring executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts. Held, a fraud upon the power, and the execution set aside, except so far as related to the annuity, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment. *Aleyn v. Belchier*, 1 Eden, 192.

31. In the case of a lease obtained by fraud.

A lease sought to be set aside as having been obtained by surprise and fraud; but under the circumstances the bill dismissed. *Smyth v. Smyth*, 2 Mad. 75.

32. In the case of an agreement for a lease fraudulently obtained.

Bill for specific performance of an agreement to grant a lease to the plaintiff would, on evidence of his fraud, misrepresentation, and insolvency, have been dismissed with costs, if not compromised. *Willingham v. Joyce*, 3 Ves. 168.

33. In case of the delivery of a lease being obtained by fraud.

Fraud in obtaining delivery of a lease, the execution of which was obtained *bond fide*, affects it equally as if used to obtain the execution; delivery making it a lease. 1 Ves. 208.

34. In cases of renewals of leases fraudulently obtained.

A tenant having, by collusion with the steward of the landlord, obtained a renewal of a lease for lives, as if one only had dropped, and two were exchanged, when in fact two lives had fallen, decreed to pay the value of the two lives; and he shall not have the option of delivering up the new, and abiding by his former lease. *Earl of Abingdon v. Butler*, 2 Cox, 260, 3 B. C. C. 112.

35. In case of leases obtained *pendente lite*.

Vide 2 B. & B. 214.

36. In case of suit postponed by promises beyond the period of limitation.

To prevent by promises a suit being instituted, until a claim is barred by the statute of limitations, is a fraud. 1 Hall & Beatty, 178.

37. In

37. In case of a bargain with a servant in fraud of his master.

Servant taking by collusion more than belongs to his office, must account : so must a stranger upon a bargain with a servant, which is a fraud on the master. 1 Ves. 289.

38. In cases of frauds on marriage.

In cases of frauds on marriage, though the husband be a party to such fraud, yet his interest cannot be affected, if either a wife or child (who is an object of such settlement) be living. *Thompson v. Harrison*, 1 Cox, 345.

39. In case of refusal after marriage to perform a previous agreement to settle.

Refusal after marriage to perform a previous agreement to settle, is a fraud, against which equity will relieve. 1 Ves. 109.

40. In the case of a bond of indemnity against a marriage settlement.

Settlement of a jointure by a father upon the marriage of his son. Bond of indemnity, of the same date, by the son to the father, void, as a fraud upon the contract. *Palmer v. Neave*. 11 Ves. 165.

41. In cases of fraudulent misrepresentation.

1. An old head of equity, that if a representation is made to a man, going to deal on the faith of it in a matter of interest, the person making the representation, knowing it false, shall make it good ; and the jurisdiction assumed by courts of law in such cases will not prevent relief in equity. 6 Ves. 182.

2. If the intention is fraudulent, though not pointing exactly to the object accomplished, yet the party is bound. 6 Ves. 192.

3. Defendant having represented, that A., one of the plaintiffs, owed him nothing, to the agent of B. the other plaintiff, whose daughter A. was about to marry, shall not recover against the other plaintiff who was indebted. *Neville v. Wilkinson*, 1 B. C. C. 543.

4. Creditor, at the desire of his debtor, about to marry, gives in a false account of his demand to the father of the intended wife : after the marriage the creditor is bound even as against the debtor. 3 Ves. 461.

5. *Quere*, whether the wilful concealment by a creditor of his debt (otherwise good) from the parent of a woman upon a treaty of marriage between her and the debtor, is alone sufficient to vitiate the debt. *Scott v. Scott*, 1 Cox, 366.

6. A. having charged his estates by mortgages and other incumbrances to a very large amount, appointed B. to be his steward or receiver of all his estates, with verbal directions to pay the interest to the mortgagees, and to pay over the surplus of the rents to himself. On the making a fifth mortgage, A. by deed appointed B. receiver of the estates comprised in that mortgage in trust to keep down the interest of that mortgage, and to pay over the residue of the rents to himself. A. afterwards granted several annuities, which he charged on all the mortgaged premises, and demised the same to a trustee, for securing the said annuities in manner therein mentioned, and subject thereto to permit A. to receive the surplus for his own benefit. At the time of granting these annuities, A. represented the estates to be free from all incumbrances. On a bill filed by the annuitants against A. and B. (without making any of the prior incumbrancers parties) the court will restrain B. from paying over any part of the rents to A., and will appoint a receiver, without prejudice to the prior mortgagees taking possession. *Dalmer v. Dashwood*, 2 Cox, 378.

7. Consequences of permitting an action for an injury sustained by giving credit upon a false representation by the defendant. 6 Ves. 186.

42. In

42. In case of a contract between child and parent for an appointment in his favour.

Equity will relieve against a contract entered into by a child with a parent, for an appointment from him; and a purchaser from the parent, with notice of the fraud, will be affected with it. *Palmer v. Wheeler*, 2 B. & B. 30.

43. In the case of a partnership.

1. A partner after the partnership ceased, gave a joint note. Bill filed to strike out the plaintiff's (the former partner's) name; the bill retained for a year, and a trial had; at which the plaintiff at law, could not prove the partnership, and was nonsuited; yet chancellor refused to decree the name to be erased. *Ryan v. Mackmath*, 3 B. C. C. 15.

2. One partner retired; the others continued in partnership, and failed; in the interval large sums were paid to him who retired, in respect of a balance due to him on account; under the bill of the assignees of the last partnership, upon circumstances of fraud, an account was decreed against the partner who retired, with respect to the period of the last partnership, and refused as to the previous time. *Anderson v. Maltby*, 2 Ves. 244.

3. In a case where an attorney has prevailed upon a young man, about to be admitted, to become his partner in business for a certain term, and to pay him as a consideration, a considerable sum of money, a part to be paid on the execution of the articles, and the remainder by yearly instalments; if during the term the attorney sue out, in character of petitioning creditor, a commission of bankruptcy against the person so having become his partner, whereby on his being declared bankrupt, the partnership is necessarily dissolved, the court will not only not permit him to sue for the instalments accruing due afterwards, but will order him to refund the money already received by him in consideration of the partnership, except as far as shall be commensurate with the period of the actual duration of such partnership; so also, if the attorney has himself since become bankrupt, and assignees have been chosen. *Hamil v. Stokes*, 4 Price, 161.; *Dan.* 20.

44. In the case of a release from concealment of a material fact.

Concealment of a material fact is a sufficient ground for equity to avoid a release obtained by the person whose duty it was to make the disclosure. *Bowles v. Stewart*, 1 Sch. & Lef. 209. 227.

45. In the case of the completion of a recovery by the fraud of a remainder-man.

*Vide* 11 Ves. 639.

46. In cases of religious delusion.

Grant of an annuity fraudulently obtained by a person having a spiritual ascendancy over a woman, who was under state of religious delusion, set aside upon principles of public policy. *Norton v. Rely*, 2 Eden. 286. 1 *Collect. jun.* 458.

47. In cases of fraud in sales under a decree.

Sale declared to be made subject to the trusts of testator's will, where, under a decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion between the creditors and tenants for life. *Manaton v. Molesworth*, 1 Eden, 18.

48. A purchaser with notice is affected by the fraud.

Grants in reversion, obtained by an agent and trustee from his employers and *cestuique* trusts, by fraud and misrepresentation, afterwards assigned for valuable  
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valuable consideration to a purchaser having notice of the facts, and nature of the title, set aside. *Dunbar v. Tredennick*, 2 B. & B. 304. A conveyance taken after the grants, the fiduciary relations still existing, and the grantor ignorant of his rights, is a continuation of the fraud, and not a confirmation. *Dunbar v. Tredennick*, 2 B. & B. 304.

49. In the case of fraud as to the quantity and quality of goods sold.

Bill alledging fraud as to quantity and quality of goods sold, not discovered till they were exported to America; that they were sold in consequence at a loss; and the plaintiff being threatened with an action, paid the original price according to the contract, under a protest, that he would seek relief in equity; and praying an account and payment in respect of the loss, and a commission to America. Demurrer allowed. *Kemp v. Pryor*, 7 Ves. 237.

50. In case of tenant in fee being fraudulently induced to accept a chattel lease.

If A. having in fee simple, be induced by fraud to accept a chattel lease, whether equity will control the setting up such lease to the prejudice of A., if induced to do so through mere ignorance, *Quære*. *Saunders v. Lord Annesley*, 2 Sch. & Lef. 101.

51. In the case of purchase of the inheritance by tenant for life.

Purchase of the inheritance by tenant for life, though liable to objection, not to be impeached on general principles. 9 Ves. 52.

52. In cases of conveyances taken by tenants in possession from adverse claimants.

Party in possession under the title of A., taking a conveyance, though for valuable consideration, from one who claims under a title adverse to that of A., is guilty of covin, which would avoid the transaction at law. *Underwood v. Lord Courtown*, 2 Sch. & Lef. 64.

53. In the case of a fraudulent title.

In giving relief against a fraudulent title, equity will reimburse the party in possession for permanent improvements. 1 Ball & Beatty, 444.

54. In the case of an appointment as trustee induced by fraud.

Securities obtained from a married woman, having property settled to her separate use by a creditor of her husband, who, by suppressing that fact, procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction; account of separate property not farther back than the husband's death; having lived together. *Dalbiac v. Dalbiac*, 16 Ves. 116.

XVII. Jurisdiction of courts of equity in the case of mistake.

An omission in an agreement by mistake stands upon the same ground as an omission by fraud. 1 Ves. & Beam. 168.

XVIII. Jurisdiction of courts of equity in the case of mistake.

1. Analogy between this jurisdiction, and that over fraud.

1. It is not necessary to shew even legal fraud on every occasion of seeking relief in equity; and a mere mistake will sometimes be sufficient. *Hitchcock v. Giddings*, 4 Price, 135.

2. Vide 1 V. & B. 168.

2. The

2. The jurisdiction is peculiarly equitable.

To rectify mistakes is the peculiar province of the court of chancery. 1 Ves. 545.

3. Essentials to the exercise of the jurisdiction.

Equity cannot relieve against a mistake, unless compensation can be made for the injury sustained by it. 1 Ball & Beatty, 293.

4. The mode of exercising it is by reforming the instrument.

Where an instrument is incorrect in a matter that demonstrates fraud, the court will generally set it aside: if the incorrectness arises from pure mistake, from ignorance, or from accident, the instrument may be reformed. 2 Sch. & Lef. 502.

5. General rule upon the subject of mistakes in instruments.

1. Though a formal mistake in a deed may be rectified by articles of which it purports to be an execution, essential additions cannot be made to a conveyance from articles, of which it does not purport to be an execution; nor can the transaction be rescinded by the court. *Mosely v. Virgin*, 3 Ves. 184.

2. The court will reform a deed, entered into under a previous agreement, by ordering a fresh conveyance to be executed, from which a covenant, complained of as not being the intention of the covenantor at the time of the agreement, or inserted therein, will be directed to be expunged: although such covenant was introduced by the attorney of the covenantor (but without his express authority), on its being shewn that the party had not considered himself liable to such covenant, when he entered into the agreement. *Rob and another v. Butterwick*, 2 Price, 190.

6. Misapprehension of one's rights.

A party acquiescing and receiving money under a misapprehension of his rights, not bound by it; as in the case of a contract for a disputed title, or the compromise of a litigated right. *Blenherhassett v. Day*, 2 B. & B. 128.

7. In the case of an annuity-society, with a rate of subscription inadequate to its object.

Society for raising an annuity fund for the members; the rate of subscription being too low, though the subsisting fund was equal to the annuities then payable, and no adequate remedy by the articles, inquiries were directed, 1st, to ascertain the state of the society, the defects of the plan, &c.; 2d, to provide a remedy, viz. by additional subscription, adequate to the object, by paying the arrears, and providing for the present and future annuities. *Pearce v. Piper*, 17 Ves. jun.

8. Mistake in the mode of attestation.

A power to be executed by deed attested by three witnesses, is executed in consideration of marriage by deed attested by two witnesses only. This defect in the execution of the power shall be supplied. *Wade v. Paget*, 1 B. C. C. 363.

9. Mistake in calculating the sum in a bond.

A bond having been given for a certain sum, which was calculated to be the amount of a residue of a personal estate, it turns out the same is miscalculated; bill to have the bond considered as a security only for the real sum, dismissed. *Burt v. Barlow*, 3 B. C. C. 451.

10. In the case of a bond made joint, instead of several also.

1. Mistake by making a bond joint only, instead of joint and several, rectified in equity and bankruptcy. 10 Ves. 227.

2. Ground of the case of a bond, by mistake joint only, instead of joint and several; the relief upon the intention. 9 Ves. 125.

11. Compromise founded in misconception.

Executor having, under a misconception of a will at the trial of an issue upon a debt, entered into an improper compromise with the creditor, expressly subject to the approbation of the court, was permitted to try the issue, paying the costs. *Legh v. Holloway*, 8 Ves. 213.

12. Mistake in not providing against the chance of death.

Under a contract for sale at a price to be fixed by an award within a limited time during the lives of the parties, the death of one is not an accident against which the court will relieve. 17 Ves. jun. 241.

13. Expenditure upon an estate.

Equity from expenditure upon another's estate through inadvertence or mistake; that person seeing it, and not interfering. 12 Ves. 85.

14. Mistakes in leases.

1. A lease deliberately executed, cannot be set aside on the grounds of mistake, from omitting a covenant of a general warranty; such not constituting part of the agreement of the parties. *Legge v. Croker*, 1 Ball & Beatty, 506.

2. A lease deliberately executed, cannot be set aside on account of an unfounded (though justifiable) assertion of the lessor pending the treaty; there being no wilful misrepresentation by him. *Legge v. Croker*, 1 Ball & Beatty, 506.

3. Where a lease had been granted with a covenant for renewal, and also the deputation of a keepership, with a memorandum to renew concurrently with the lease; and upon renewal, a few days before the expiration of the term, the renewed deputation had been by mistake made for the residue of the old instead of for the new term: Held, that the mistake ought to be rectified; and though there was a covenant in the lease not to assign, yet as that covenant would not at law have prevented an underletting, the same relief was given to an under-tenant, as the original lessee would have been entitled to. *Jalabert v. Duke of Chandos*, 1 Eden, 372.

15. Mistake in a verdict.

Relief where there is a mistake in a verdict. *Greames v. Stritho*, Dick. 469.

16. Mistake in wills.

1. Mistake in a will corrected upon the clear intention appearing on the whole will. *Phillips v. Chamberlaine*, 4 Ves. 51.

2. Where testator means for a valuable or meritorious consideration to create a charge, which by law he cannot, equity will aid the intention, and even supply a defect, as the want of a surrender; but the intent must be clear. 2 Ves. 332.

3. Where a will proceeds upon a mistake, a devisee, insisting on the benefit of such mistake, must relinquish what the will gives him. *Vane v. Lord Dungannon*, 2 Sch. & Lef. 130.

4. A court of equity will not supply words in a will, unless there be palpably *error scribentis*. *Molesworth v. Molesworth*, 1 Cox, 75.

5. A will cannot be varied upon the ground of mistake; unless the alleged

leged mistake is clearly inconsistent with the intention upon the whole will. *Mellish v. Mellish*, 4 Ves. 45.

6. A mistake in a will cannot be corrected, unless it clearly appears by fair inference from the whole will. 4 Ves. 57.

7. Testator's mistake not rectified, because nothing to shew what would have been the intention, if no mistake. *Smith v. Maitland*, 1 Ves. 362.

8. Inconvenient consequences, not in the contemplation of the testator at the time of making his will, not sufficient to authorize a variation or interpolation in the terms of a bequest, where those terms are in themselves clear and intelligible. *Smith v. Streatfield*, 1 Mer. 358.

9. Bequests, not to individuals but to classes of persons, not to be altered because some individuals of an intended class are incapable of taking, either into particular bequests to the individuals, or by subdividing the class itself. *Leake v. Robinson*, 2 Mer. 390.

### XIX. Jurisdiction of courts of equity to modify written instruments.

By limiting their extent as securities.

1. A bond given for silks taken up to be sold, decreed to be given up on payment of the money actually raised by the sale of the silks. *Barker v. Vansommer*, 1 B. C. C. 149.

2. On the ground of fraud a general account was decreed; and the securities to stand only for the balance: though the vouchers had been destroyed by general consent. *Wharton v. May*, 5 Ves. 27.

3. Deeds set aside as absolute securities and conveyances, and ordered to stand as security only for what should appear due upon a general account, after a considerable lapse of time, seventeen years; upon the nature of the deeds themselves, the circumstances under which, and the confidential relation of the person by whom, they were obtained; and no confirmation; the other parties being throughout under same influence, control, and ignorance of their rights. *Purcell v. M'Namara*, 14 Ves. 91.

4. Unconscientious bargain to pay four times the money advanced, subject to the contingency of the borrower, young and in good health, surviving a young but very bad life, and a very improbable chance of issue. The securities to stand only for the principal advanced, interest, and costs under the circumstances: no fraud, the terms proposed by borrower to several others, being merely acceded to. *Bowes v. Heaps*, 3 Ves. & Beam. 117.

### XX. Jurisdiction of courts of equity to order written instruments to be delivered up.

1. It is invested with such jurisdiction.

Equitable jurisdiction to grant an injunction, or order an instrument to be delivered up; though it might be the subject of an action. Discretionary, whether an issue or an action shall be directed or permitted. *Jervis v. White*, 7 Ves. 413.

2. Distinction between directing an instrument to be delivered up, and making it effectual.

Distinction between directing an instrument to be delivered up, and making it effectual in equity. 17 Ves. jun. 167.

3. It will not be exercised merely because the instrument would not be specifically enforced.

The relief by delivering up a contract, requires a stronger case than to resist a specific performance. *Savage v. Brocksop*, 18 Ves. jun. 335.

4. In the case where the rights of innocent third persons have intervened.

Bond given for securing a premium payable by instalments, as the consideration of an admission to a partnership for a certain period, will be ordered to be delivered up to be cancelled if the original partner cause the other to be made a bankrupt, whereby the partnership is dissolved. Nor will the court allow a *bond fide* creditor, to whom the bond to pay the instalments has been assigned as a security for his debt, to put it in suit, because all equities follow the bond into whatever hands it may come, and they will order the bond to be delivered up to be cancelled. *Hamil v. Stokes*, 4 Price, 161.

5. A voluntary deed.

1. No discretion upon honourable or delicate feelings to relieve against a voluntary gift, even stripping the donor entirely of his property; if no undue influence. 14 Ves. 290.

2. Bill to have a voluntary deed delivered up, dismissed: cross-bill to execute it retained for a year, with liberty to sue upon a covenant in the deed. *Colman v. Sarrel*, 1 Ves. 50.

6. Instruments obtained under a misconception of right.

Conveyance obtained from persons uninformed of their rights, set aside, though no actual fraud. *Evans v. Llewellyn*, 2 B. C. C. 150.

7. Instruments obtained through ignorance and misrepresentation.

Conveyance obtained from a woman in ignorance of her rights, and upon misrepresentation of the circumstances of the property, set aside, although she was of full age, and acquiesced in the sale, and although she consulted with her friends, and had their assent: they being in equal ignorance with herself. *Murray v. Palmer*, 2 Sch. & Lef. 474.

8. Instruments obtained under mutual ignorance.

1. Agreement decreed to be delivered up, on the ground, not of fraud, but surprise: neither party understanding the effect of it, viz. a lease, with covenant for perpetual renewal, at a fixed rent, of premises, held under a church lease, renewable upon fines, continually increasing. A single lease for twenty-one years refused; no terms of agreement for such an interest appearing; and, under the circumstances, permission to try the effect of it at law was refused. *Willan v. Willan*, 16 Ves. 72.

2. A bond given by the purchaser of a contingency, which no longer existed, at the time of the bargain (as of the reversion expectant on an estate tail, the tenant in tail having in fact suffered a recovery), will be ordered to be delivered up to be cancelled, and the interest to be paid on it to be refunded, although there was no fraud, and both parties were alike ignorant of the fact of the contingency having been destroyed. *Hitchcock v. Giddings*, 4 Price, 135.

9. Instruments given in a state of intoxication.

General rule, that a court of equity will not assist a person who has obtained, or wishes to get rid of, an agreement or deed, on the mere ground of intoxication. Exception, where any contrivance was used to draw him in to drink; or any unfair advantage made of his situation; or that extreme state of intoxication, depriving a man of his reason, which, even at law, would invalidate a deed. *Cooke v. Clayworth*, 18 Ves. jun. 12.

10. Instruments improvidently obtained.

1. Unreasonable bargains made with an heir, &c. although more than of age,

age, and upon his own offer, set aside, on what circumstances and upon what terms, *vide Gwynne v. Heaton*, 1 B. C. C. 1.

2. Money advanced to an heir-at-law, ignorant of his rights, by a subscription from different persons, and amongst the rest from his attorney, to enable him to prosecute suits: and an absolute bond having been taken from him for double the sum lent, with a defeazance executed, some days after, declaring that, if he did not recover the estate, or half of it, the bond was to be delivered up: held to be unconscionable, savoring of champerty, and dangerous to public justice. *Strachan v. Brander*, 1 Eden, 303.

3. A fair settlement beneficial to the family, was not set aside, although made with tenant in tail, immediately upon his coming into possession, and at the recommendation of the father, who took an interest under the settlement. *Kinchant v. Kinchant*, 1 B. C. C. 369.

4. Deed set aside as improvidently obtained, being obtained for an inadequate consideration from persons in low circumstances, and unapprized of their right until the time of the transaction, though no representation or actual fraud whatever appeared to have been made use of. *Evans v. Llewellyn*, 1 Cox, 333.

5. Taking an annuity worth nine years' purchase at five years, is an unconscientious bargain, and the court will give the taker no assistance in a bargain for a re-purchase. *Vaughan v. Thomas*, 1 B. C. C. 556.

6. Relief against an unconscientious bargain upon the contingency of death without issue. 3 Ves. & Beam. 120.

7. B., while in distressed circumstances, upon the advice and suggestion of M. and upon a supposed right in him to demand it, executes a bond to him for a sum due by a deceased brother, to whom she was next of kin, but who left no personal chattels. This bond set aside under the circumstances: but if it had been executed by her from a feeling of propriety, after getting possession of an estate to which she had become entitled after the death of her brother, she having immediate means of payment, and acting with proper advice, it could not have been defeated. *Beasley v. Magrath*, 2 Sch. & Lef. 31. 35.

8. A bond given by a daughter who had not received her fortune, to a step-father, for the immediate payment of a sum alleged to be due to her mother for maintenance, ought to be set aside as improvidently executed: the utmost that the mother could claim being a lien on the interest of the daughter's fortune when recovered. An act of the daughter binding the interest of her fortune to that extent, would have been valid. *Beasley v. Magrath*, 2 Sch. & Lef. 31. 35.

9. An agreement for an annuity, to be paid during the joint lives of the plaintiff and his uncle, for a sum to be paid on the death of the uncle without issue, and the annuity paid during the uncle's life. Bill to set it aside, dismissed. *Henley v. Axe*, 2 B. C. C. 17.

#### 11. Instruments obtained through undue influence.

1. Securities set aside, being unconscionable and oppressive, and obtained by taking advantage of the party's poverty and distress. *Lamplugh v. Lamplugh*, Dick. 411.

2. Deed set aside, as obtained by fraud and undue influence by a keeper of a house for lunatics from a person under his care; as within the general principle arising from the relation of guardian and ward, attorney and client, &c. *Wright v. Proud*, 13 Ves. 136.

3. Voluntary settlement by a widow upon a clergyman and his family set aside; as obtained by undue influence and abused confidence in the defendant, as an agent undertaking the management of her affairs; upon the principle of public policy and utility, applicable to the relation of guardian and ward, &c. *Huguenin v. Baseley*, 14 Ves. 273.

4. Deed of gift ordered to be delivered up as obtained by undue influence over the donor, who was 84 years old, and nearly blind, and placed a confidence in the donee. *Griffiths v. Robins*, 3 Mad. 191.

5. A lease set aside under the circumstances; being made by mortgagor to mortgagee, the latter taking advantage of the distresses of the former, and using his mortgage as an instrument to obtain an undue advantage; and the lessor executing the lease on the faith of an agreement that he was to be allowed a certain maintenance out of the property for himself and family, which lessee did not perform, and which it would not have been in his power to have secured on account of the rights of creditors. *Gubbins v. Creed*, 2 Sch. & Lef. 214.

6. Relief given against securities passed in lieu of marriage-brochage bonds; the party passing them being involved in difficulties, not *sui juris*, and being compelled, by necessity, to enter into such terms. *Shirley v. Martin*, 1 Ball & Beatty, 358.

7. Bill to have deeds, assigning stock, delivered up, as obtained by undue influence by a servant over her master; and an account; the evidence of direct influence considerably subsequent to the deeds; the defendant a married woman, her only separate property stock; and not liable therefore without a lien. An issue being declined, the bill was dismissed. *Nantes v. Corrock*, 9 Ves. 182.

#### 12. Instruments obtained through an abuse of confidence.

Grant of annuities at six years' purchase, where the grantee was accountable to the grantor for the price obtained for an estate of which he was trustee to sell for payment of debts, set aside. *Fox v. Macreath*, 2 B. C. C. 400.

#### 13. Instruments founded on inadequate consideration.

1. Inadequacy of price alone not sufficient to set aside an agreement. *Fox v. Macreath*, Dick. 689.

2. Deeds entered into by parties knowing their rights, though upon inadequate consideration, shall not be set aside. *Stephens v. Bateman*, 1 B. C. C. 22.

3. Inadequacy of value is not in itself sufficient to set aside a contract. *Griffith v. Sprightly*, 1 Cox, 383.

4. Mere inadequacy of value is not a ground upon which a court of equity will be willing to set aside purchases, if unaccompanied by fraud or misrepresentation. *Murray v. Palmer*, 2 Sch. & Lef. 288.

5. Bill to set aside the sale of a reversion dismissed with costs: the only ground on the evidence being inadequacy of price; and no fraud, &c.; and the bill filed twelve years after the sale. *Moth v. Atwood*, 5 Ves. 845.

6. Relief in equity upon inadequacy of consideration so extreme, as to satisfy the court, that there must have been imposition or oppression. *Underhill v. Harwood*, 10 Ves. 209.

7. The sale of a reversionary interest, in the court of chancery, considered as the case of an expectant heir, forms an exception to the general rule, that for mere inadequacy of value, a contract is not to be set aside. During the continuance of the same situation, acquiescence has no effect, and the value is to be estimated at the time of the transaction; not according to the event. Interest at 5 *per cent.* upon the money advanced; compound interest refused. *Goulard v. De Fasia*, 17 Ves. jun. 20.

8. Premises worth 20*l.* or 22*l.* let for 15*l.* 8*s.*, the difference is not so gross as to vitiate the bargain, on the ground of inadequacy of consideration, it not appearing that the lessor had been deceived by the lessee, respecting the value. *Lukey v. O'Donnell*, 2 Sch. & Lef. 471.

9. A transaction of many years standing, sought to be set aside on the ground

ground of inadequacy of consideration, the relation between the parties, and the incapacity of the vendor; relief refused, neither of the grounds having been sufficiently made out. *Evans v. Brown*, Wightw. 102.

10. The court will set aside a contract where there appears to have been great inadequacy of consideration, at a distance of more than seven years from the date of the deed, on proof of the inadequacy, and that the purchaser had knowledge of the value of the subject matter, and was in the confidence of the vendor, and ought therefore to have protected her by his advice, from imposition, rather than have misled her for his own advantage. *Taylor v. Obee*, 3 Price, 83.

11. Leases for lives obtained by agents of a deceased person of weak intellects, upon inadequate considerations, set aside. *Garside v. Isherwood*, 1 B. C. C. 558.

12. Grant of an annuity for 4 years' purchase, set aside for inadequacy of price. *Heathcoat v. Paignton*, 2 B. C. C. 167.

13. Renewal of a lease obtained by collusion between lessee and steward of lessor, for an inadequate consideration: bill to set it aside on refunding the money paid: after answer submitting to that on receiving the money with interest; plaintiff by amended bill prayed either, as before, or that defendant should keep the lease, and pay the full fine; which, on account of the fraud was decreed, with interest at 4 per cent. on the residue, from signing the lease and costs: but credit to be given for the money originally paid, with interest; and failing the lessee, the steward to pay. *Lord Abingdon v. Butler*, 1 Ves. 206.

14. Conveyance, by lease and release and fine, set aside upon great inadequacy of consideration, combined with misrepresentation and surprise upon parties in extreme distress, ignorant of their interests, and not properly protected; though the transaction took place twelve years before the bill; and a former bill having been dismissed, the plaintiff not appearing; that objection not being made either by plea or answer. As to the effect of inadequacy alone, *Quere*. The account limited to the time of the bill filed. *Pickett v. Loggon*. 14 Ves. 215. vide 13 Ves. 103.

14. In the case where the instrument is legally defective.

1. The cases in which equity orders instruments, to which there is a legal objection, to be delivered up, are rare, and the relief on terms. 5 Ves. 618.

2. Jurisdiction of equity to order an instrument to be delivered up, though void at law; as if against policy. 11 Ves. 535.

3. Jurisdiction of equity to order instruments to be delivered up, even upon legal objections, as under the annuity-act, arising incidentally in the exercise of equitable jurisdiction; as upon extreme inadequacy of consideration and contribution among several sureties. *Ware v. Horwood*, 14 Ves. 28.

4. Equitable jurisdiction to order a deed, forming a cloud upon a title, to be delivered up, though void at law. Accordingly, a demurrer to a bill to have a deed fraudulent and void, as in contemplation of bankruptcy, delivered up, was over-ruled. *Haward v. Dimsdale*, 17 Ves. jun. 111.

5. A bill, seeking to have bills of exchange delivered up, as given on a gaming transaction, is good. *Newman v. Franco*, 2 Anst. 519.

6. An action was brought upon bills of exchange given by mistake, and a bill for discovery and relief to have them delivered up, filed: upon the trial at law, the defendant there had a verdict; he then amended his bill to state that fact, and proceeded in equity. He is entitled to a decree to have the bills delivered up, although, by the judgment at law, they cannot be enforced. *Lisle v. Liddle*, 3 Anst. 649.

7. After verdict upon a bond against the obligor, bill to have it delivered up, charging the consideration to have been an agreement by the defendant,



ant, to cohabit with the plaintiff as his wife ; and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery : demurrer allowed. *Franco v. Bolton*. 3 Ves. 368.

#### 15. A void decree.

Jurisdiction of a court of equity, to order a void decree to be delivered up. 1 Ves. & Beam. 244.

#### 16. Instruments contrary to public policy.

1. Contracts contrary to the policy of the law, as a deed of gift by a client to an attorney, by an heir to guardian, the purchase of a reversion from a young heir, a trustee selling to himself, set aside without evidence of fraud. 12 Ves. 371.

2. Where a transaction is impeached, on the grounds of public policy, a court of equity will not look minutely into the circumstances of it. 1 Ball & Beatty, 338.

#### 17. Instruments become impossible to be fulfilled.

Equity will relieve against a contract become impossible to be performed. *Smith v. Morris*, 2 B. C. C. 311.

#### 18. In the case of forged instruments.

Where an instrument is shewn to be false, it lies upon the party claiming benefit under it to support it. 2 Sch. & Lef. 502.

#### 19. A forged will.

Demurrer allowed to a bill by one of the next of kin for the delivery up of a pretended will, &c. and for the appointment of a receiver of the property of the intestate, until letters of administration were granted by the ecclesiastical court, it being unnecessary to have the will delivered up ; and no ground being stated, to show that such letters of administration could not be immediately obtained. *Jones v. Frost*, 3 Mad. 1.

#### 20. Of ordering a re-conveyance to the favored party.

1. Instruments being absolutely set aside for fraud, there ought not to be a re-conveyance by the party who took under them. *Bates v. Graves*, 2 Ves. 287.

2. Where deeds are set aside for fraud, but the estate has been conveyed to a third person, as an instrument not privy to the fraud, or where they are set aside on paying so much money, a re-conveyance ought to be decreed. 2 Ves. 295.

#### 21. Consequent direction thereon, for re-payment of money paid under.

Where a bond is void, a re-payment of interest, which has been paid upon the supposition of its being valid, will be decreed. 1 Dan. 9.

### XXI. Jurisdiction of courts of equity in the case of the loss of written instruments.

#### 1. Its original.

1. Jurisdiction of equity upon lost bonds very ancient ; founded upon the want of remedy at law without profert, till that jurisdiction was lately assumed. 9 Ves. 466.

2. Another reason for the exclusive jurisdiction of equity upon lost bonds—the difficulty of securing indemnity at law. 9 Ves. 466.

#### 2. The

**2. The legal has not superseded the equitable jurisdiction.**

1. The jurisdiction assumed by courts of law, dispensing with profert in the case of a lost bond, does not oust the equitable jurisdiction. 5 Ves. 238.

2. The ancient jurisdiction of this court not destroyed by the assumed jurisdiction of courts of law dispensing with profert, and permitting averment of a consideration not in the deed. 7 Ves. 19.

**3. General rule upon the subject.**

1. The loss of an instrument with the usual affidavit, gives a right to a relief: as upon a bond to a decree for payment: so of a deed. 2 Ves. 461.

2. Relief in equity upon security lost. 15 Ves. 343.

**4. In the case of an instrument delivered up through ignorance.**

Relief upon an instrument, that had been delivered up, under the ignorance of one party, and with the knowledge of the other, as to a fact, upon which the right attached. *East India Company v. Donald*, 9 Ves. 275.

**5. In the case of negotiable instruments.**

1. A plaintiff (indorsee) seeking relief in equity against the acceptor of a lost bill of exchange, is not bound to institute his suit within any given period, although the drawer may in the mean time have become insolvent. *Davies v. Dodd*, 4 Price, 176.

2. The court will enjoin a plaintiff proceeding in an action at law on a lost bill of exchange, on the equity of the defendant's right to have a sufficient indemnity. *Davies v. Dodd*, 4 Price, 176.

**6. Peculiar jurisdiction, in case of a negotiable instrument.**

The indorsee of a bill of exchange which has been lost, has a remedy against the acceptor by bill in equity to compel payment, and that although he might have recovered on the bill at law, his equity being founded on the want of power in a court of law to impose terms upon the plaintiff of giving the defendant security against the forthcoming of the bill, which would have been good ground for an injunction to restrain such an action, nor is it any answer to such a suit, that the bill of exchange was a mere accommodation-bill; that the plaintiff might have applied before; or that the drawer has since become insolvent. The plaintiff is not bound in a court of equity to institute such a suit within any particular period. It is not necessary to make the drawer a party. *Davies v. Dodd*, 4 Price, 176.

**7. In the case of a note cut into two parts and one lost.**

Bill for payment of a promissory-note, (not negotiable) which had been cut in two parts, one being produced, and the other alleged to be lost, and offering an indemnity, dismissed; as, proving the loss, an action might be maintained. *Mossop v. Eadon*, 16 Ves. 430.

**8. As against sureties.**

Relief upon a lost bond against sureties, the principal being out of the jurisdiction, upon giving an indemnity against demands of the plaintiffs, or persons claiming under them by virtue of the bond, and such costs, damages, and expences as they may be put to by the loss of the bond. *East India Company v. Boddam*, 9 Ves. 464.

**XXII. Jurisdiction of courts of equity to relieve against a penalty or forfeiture.****1. Distinction between penalties by contract and by statute.**

In cases of contract, equity relieves against forfeitures introduced by the parties:

parties: but when they are created by statute, or are conditions in law, no relief can be given. 1 Ball & Beatty, 47. 373.

2. Forfeiture under a bye-law.

No relief against forfeiture under a bye-law of an incorporated company for water-works, providing, that the members shall receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after the notice sent; though the lapse arose from ignorance of the call, from accidental circumstances, and absence from town, when the notice was sent. *Sparks v. Liverpool Water-work Company*, 13 Ves. 428.

3. Forfeiture from nonpayment of government loan.

No relief against forfeiture by not paying instalment upon a loan to government. 13 Ves. 435.

4. A penalty designed to secure money.

Where a penalty is only designed to secure money, then relief may be given in equity. 1 Ball & Beatty, 374.

5. Forfeiture of lease by breach of covenant.

Relief against a right of entry on breach of covenant by nonpayment of rent. 16 Ves. 405.

6. Forfeiture by breach of conditions in law.

No relief can be given in equity against the breach of conditions in law, even when compensation can be given. 1 Ball & Beatty, 373.

**XXIII. Jurisdiction of courts of equity in relation to personal chattels.**

To compel a specific delivery.

Vide 3 Ves. 70. 10 Ves. 163. 13 Ves. 95. 3 V. & B. 16.

**XXIV. Jurisdiction of courts of equity in relation to uncertainty of value.**

In the valuation of reversionary uncertain interests.

Jurisdiction as to the valuation of reversionary uncertain interests, depending on lives. 18 Ves. jun. 311.

**XXV. Jurisdiction of courts of equity in relation to matters of prize.**

To determine whether a particular ship was part of a particular squadron.

*Quære*, whether it be competent to a court of equity, to determine whether a ship of war was or was not, at the time of capture, one of the squadron under the command of a particular officer. *Parker v. Toulmin*, 1 Cox, 265.

**XXVI. Jurisdiction of courts of equity in miscellaneous cases.**

1. To aid the omission of a defence at law.

No relief in equity upon the omission of a defence at law. 14 Ves. 31.

2. In

2. In the case of acquiescence in a defective title.

When a title to an estate is defective in the knowledge of a party who had acquiesced in it, the possession under it will, as against him, be quieted in equity. 1 Ball & Beatty, 444.

3. In the case between an executor and one entitled under the will.

Bill stated the plaintiff to be entitled to certain benefits under the will of which the defendant was executor; that a bill was filed for an account of the personal estate, &c., and a decree having been made, the plaintiff was charged before the master with several articles of the personal estate possessed by him; that the account between them was afterwards referred to arbitrator, who found a small sum in favour of the plaintiffs, but never made an award; that after this, the defendant, as executor, brought an action against the plaintiff for the effects so possessed by him; and the bill prayed an injunction, and that the value of the articles possessed by the plaintiff might be deducted out of the interests taken by him under the will. To this bill there was a demurrer for want of equity, which was overruled. Milner v. Goolden, 1 Cox, 196.

4. Jurisdiction to prevent the operation of a fine, in the case of suppression of deeds.

Suppression of deeds under particular circumstances, is a ground for the intervention of equity to prevent the operation of a fine, though levied by the person having the legal estate, *semb.* But it is clearly so in the case of a trustee, and that, notwithstanding any length of time. 1 Sch. & Lef. 225.

5. On the grounds of public policy.

Money advanced by plaintiff to the defendant to procure him a commission in the marines, decreed to be refunded with interest, plaintiff having, after six months, been discovered to have worn a livery, and being therefore discharged; first, upon grounds of public policy; and, secondly, as plaintiff had been imposed upon, defendant knowing that he was incapable of holding the commission. Morris v. M'Culloch, 2 Eden, 190.; Amb. 432.

6. Remainder-man suffering money to be laid out, and then impeaching the title.

Remainder-man lying by and suffering a tenant to lay out money under an agreement with tenant for life, without giving him notice of his intention to impeach his title; a ground of relief against the remainder-man. Shannon v. Bradstreet, Sch. & Lef. 52. 73.

7. On the ground that a trustee will not allow his name to be used.

Demurrer to a bill for relief, as to a policy of insurance, for that a trustee would not consent to have his name used, allowed. Holles v. London Assurance Company, 1 Dick. 45.

8. To compel the transfer of a *cestui que* trust's aliquot share.

One of seven persons entitled to a certain aliquot share in an ascertained sum standing in trustees' names, filed his bill against the trustees and the other *cestui que* trust, to have his share transferred. Demurrer for want of equity by the *cestui que* trust defendants, allowed. Smith v. Snow, 3 Mad. 10.

9. Another case.

I. S. in his life-time, received money to pay custom-house duties for H. and M., and there being reason to believe that the duties were not paid, H. and M. called upon the administrator of I. S. to invest in the funds, in the names of trustees, a sum sufficient to answer the duties if H. and M. should

should be called upon to pay them. Many years elapsed without any claim of the duties, and the plaintiff called for a re-transfer of the funds; but no other relief was given, except a direction that the dividends which had accrued on the funds, should be paid to the plaintiff. *Linton v. Hyde*, 2 Mad. 94.

## CHANCERY PLEADING.

### I. In relation to the parties to a bill, complainants and defendants.

#### 1. General rules on the joinder of parties.

1. *Grounds upon which the general rule, requiring that all persons interested should be made parties, will be dispensed with.*
2. *Joinder of parties who, though in some respects connected, have distinct interests.*

#### 2. General rules on the joinder of complainants.

*In the case of joint interest, some will be allowed to sue for all, if inconvenient to justice that all should be parties.*

#### 3. General rule on the joinder of defendants.

*Joinder of a party against whom no relief is prayed.*

#### 4. Agent.

*Joinder of agent on a bill against the principal.*

#### 5. Assignee of a bond.

*Joinder of assignor, or, if dead, his representative, on a bill by assignee of a bond.*

#### 6. Assignee of a judgment.

*Joinder of assignor on a bill by assignee of a judgment.*

#### 7. Assignee of a mortgage.

*Assignment without the authority or privity of the mortgagor; the assignee is the only necessary party.*

#### 8. Assignee of a residuary legatee.

*Joinder of assignor, or, if dead, his representative, on a bill by assignee of a residuary legatee.*

#### 9. Attorney.

1. *Joinder of attorney because of his possession of title-deeds.*
2. *Joinder of attorney on a bill for relief from fraudulent release obtained through his assistance.*

#### 10. Attorney-general.

1. *The attorney-general is an officer of the crown, and in that sense only the officer of the public.*
2. *Joinder of attorney-general in the case of a legacy to a charity.*
3. *Joinder of attorney-general in a bill to establish a modus, where the rector is an eleemosynary foundation, of which the king is visitor.*
4. *Joinder*

4. *Joinder of attorney-general on an information and bill to set aside leases, granted by a vicar and vestrymen under an unlimited power to lease, given by statute.*
5. *Joinder of attorney-general on application by a foreign government for dividends.*

11. Bond.

1. *Joinder of all the obligors, principal and sureties, in a joint and several bond.*
2. *Joinder of surety in a bond on a bill against the obligor's executor.*

12. Charge.

1. *Joinder of all incumbrancers.*
2. *Joinder of all persons whose estates are liable, upon a bill for equitable relief as to a rent-charge.*

13. Charity.

1. *Joinder of all the terre-tenants of the premises charged with the charity.*
2. *Joinder of trustees and disinherited heir, on an information to apply money given to a charity, to different uses, where there is a residuary gift to trustees for other charitable uses.*

14. Common, tenants in.

1. *Joinder of the lessee of one tenant in common, on a bill for partition.*
2. *Joinder of a surviving tenant in common on a bill of revivor by the representative of the other.*

15. Corporation.

1. *Joinder of members in their individual capacity on a bill against the corporation in its political character.*
2. *Joinder of all the commissioners of a navigation, on a bill upon orders signed by some only.*

16. Association in nature of corporations.

1. *Joinder as complainants of the whole society on a bill upon a contract by their committee.*
2. *Demurrer allowed to a bill by some members of a mason's lodge against others, for the effects.*
3. *Joinder of the whole society on a bill against the committee who contracted.*
4. *Joinder of all the commissioners of a navigation, on a bill upon orders signed by some only.*
5. *Joinder of all the members of a society for relief in sickness, on a bill against the trustees for an account.*

17. Creditors.

- In other instances besides those of creditors and legatees, some only will be allowed to represent a joint-interest, when inconvenient to justice that all should be made parties.*

18. Executor.

1. *Joinder, on a bill by a creditor against the executor of a debtor to the estate.*
2. *Joinder of residuary legatees on a bill against an executor.*
3. *Joinder of heir and executor on a bill for an account under ancestor's agreement as well before as since the death.*
4. *Joinder of an executor in a miscellaneous case.*

19. Feme

## 19. Feme Covert.

*Joinder of feme covert on a bill against her husband, to obtain her evidence against him.*

## 20. Heir.

1. *Joinder of infant heir, on a bill on behalf of younger children to raise portions.*
2. *Joinder of heir and executor on a bill for an account under ancestor's agreement as well before as since the death.*
3. *Joinder of trustees and disinherited heir, on an information to apply money given to a charity, to different uses, where there is a residuary gift to trustees for other charitable uses.*

## 21. Infant.

1. *Infant sues by his next friend, without waiting till of age.*
2. *Joinder of an infant partner.*

## 22. Information.

*A new relator named in the room of a deceased relator.*

## 23. Insolvent debtor.

*Joinder of the insolvent on a bill by a purchaser.*

## 24. Joint-tenants.

*Joinder of a joint-owner on a bill against factor, on a demand against the other moiety, defendant admitting separate accounts, and possession of the produce of that moiety.*

## 25. Legatees.

1. *In other instances besides those of creditors and legatees, some only will be allowed to represent a joint-interest, when inconvenient to justice that all should be made parties.*
2. *Joinder of legatees whose legacies are charged on the real estate.*
3. *Joinder of all persons interested in the fund arising under a devise for sale.*
4. *Joinder of persons entitled to purchase-money, on a bill, by devisees in trust to sell for specific performance of agreement to purchase.*
5. *Joinder of all the residuary legatees on a bill by some.*
6. *Joinder, on a bill by a residuary legatee, of all persons interested in the residue.*
7. *Joinder, on a bill for a moiety of a residue, of the persons to whom the other moiety has been given over in default of appointment.*
8. *Joinder of residuary legatees on a bill against an executor.*
9. *Joinder of residuary legatee on a bill by creditors against the executor.*
10. *Joinder of residuary legatee on a bill for a specific legacy.*

## 26. Lunatic.

1. *Information at the relation of a lunatic not proper; he must be a party.*
2. *Appointment of a responsible relator in an information at the relation of a lunatic.*
3. *Right of an annuitant made a party only in respect of an annuity given by the will, to attend, at the passing of the accounts, as next of kin to the residuary legatee, a lunatic.*

## 27. Manor.

1. *Joinder of all the tenants of a manor on a bill by or against them.*
2. *Joinder of several tenants of a manor on a bill for quit-rents.*

## 28. Mortgagor

## 28. Mortgagor and mortgagee.

1. Joinder of all the joint-mortgagees on a bill to foreclose.
2. Joinder of the mortgagor's lessee, evicted for non-payment of rent, on a bill to foreclose.
3. Joinder of the mortgagor, or, if dead, his heir, on a bill by the second mortgagee to redeem the first mortgage.
4. Joinder of the personal representative of a mortgagor tenant in fee, mortgaging by creating a term, on a bill to foreclose.
5. Assignment without the authority or privity of the mortgagor; the assignee is the only necessary party.

## 29. Parishioners.

*Joinder of all the parishioners, on a bill for tithes, or a modus.*

## 30. Partition.

1. Joinder of the lessee of one tenant in common, on a bill for partition.
2. Joinder, on a bill for partition, of a lessee, whose lease is relied on by defendant as evidence of a former partition.

## 31. Partner.

1. Joinder of all the members of a partnership.
2. Joinder of a partner abroad.
3. Joinder of a dormant partner.

## 32. Privateer.

*Joinder of all parties interested on a bill for an account of captures.*

## 33. Receiver.

*Joinder of vendor's receiver on a bill for specific performance.*

## 34. Remainder-man.

1. Joinder of remainder-men where the first tenant in tail is a party.
2. Joinder of remainder-men in order to clear a party's title.

## 35. Revivor.

1. Joinder of all the plaintiffs upon a revivor by *scire facias*.
2. Joinder of surviving tenant in common on a bill of revivor by the representative of the other.

## 36. Ship-owners.

*Joinder of all the part-owners of a ship.*

## 37. Steward.

*Joinder of vendor's steward on a bill for specific performance.*

## 38. Terre-tenants.

1. Joinder of all the terre-tenants of the premises charged with a charity.
2. Joinder of the lessee of one tenant in common on a bill for partition.

## 39. Tithes.

1. Joinder of the ordinary on a bill to establish a customary payment in lieu of tithes.
2. Joinder of the patron and ordinary on a bill to establish a modus.
3. Joinder of a rector in a vicar's suit for an account of small tithes charged to be withheld by occupiers, on a claim by the rector.
4. Joinder of all the persons liable to contribution, on a bill to establish a contributory modus.



5. Joinder of all the owners of lands in a township, on a bill by one to establish a contributory modus.
6. Joinder of all interested in any one particular adventure, on a bill for tithe of fish.

## 40. Trust.

1. Joinder of a trustee in a will, who released and never acted, on a bill to set aside the will for fraud.
2. Joinder of trustees and disinterested heir, on an information to apply money given to a charity, to different uses, where there is a residuary gift to trustees for other charitable uses.
3. Joinder of an intermediate trustee of the equitable interest, on a bill by the trustees and cestui que trust of a term to execute the trusts.
4. Joinder of the assignee of a trust on a bill against the trustee.
5. Joinder of cestui que trust on a bill by one trustee of stock against the other to compel him to replace it pursuant to agreement.

## 41. Vendor and purchaser.

Joinder of retired owners of a colliery on a bill by those who remained against the vendor of timber, paid for by the latter.

## 42. Witness.

A witness ought not to be a party, with some exceptions.

## 43. Practice connected with the subject of parties.

1. A decree is void against persons who ought to have been made parties.
2. Though a party be named, yet if process against him be not prayed, he is considered not joined.
3. On showing cause against a decree, want of parties may be objected.
4. Where the want of parties is apparent, a demurrer lies; where not, a plea.
5. Of the requisite certainty in the objection for want of parties.
6. In the case of a general objection by the answer to an information, that all the terre-tenants of the premises charged with a charity, are not parties, without any particular description.
7. Where the personal representative is a mere formal party, the court will go on, and suffer him to be brought before the master.
8. Supplemental bill to add parties.
9. Of striking out the name of plaintiff inserted without his consent.

## II. In relation to bills.

## 1. Of the different species of bills.

1. A bill of interpleader when necessary or appropriate.
2. Value essential to a bill of interpleader.
3. An interpleading bill never suggests a case.
4. Form of the affidavit on an interpleading bill.
5. Force of the affidavit on an interpleading bill.
6. Questions arising on bills of interpleader, how disposed of.
7. Course of proceeding in a bill of interpleader where one claimant establishes his title by evidence, the other makes default at the hearing.
8. Course of proceeding in interpleader where some defendants are abroad.
9. Effect of a bill of interpleader.
10. Bill to perpetuate testimony, when necessary or appropriate.
11. Preliminaries to a bill to perpetuate testimony.
12. Bill to perpetuate testimony, praying relief on the same matters, is good.
13. Of the requisite precision in bills to perpetuate testimony.

14. As

14. *As to bringing on to a hearing bills to perpetuate testimony.*
15. *A bill of discovery when necessary or appropriate.*
16. *Bill of revivor, when necessary or appropriate.*
17. *Of the time for filing a bill of revivor.*
18. *A bill of revivor held bad, for not charging that plaintiff had proved her husband's will.*
19. *Bill of revivor taken pro confesso.*
20. *Revivor of original bill by plaintiff in a revived suit.*
21. *General rule as to revivor by a defendant.*
22. *Revivor by defendant after a decree.*
23. *Revivor by defendant on plaintiff's neglect to prosecute a bill of revivor.*
24. *Suit revived by scire facias.*
25. *Supplemental bill, when necessary or appropriate.*
26. *Structure of supplemental bills.*
27. *Time for hearing a supplemental bill in nature of a bill of review.*
28. *Supplemental bill, in nature of a bill of revivor, to execute a decree.*
29. *Cross bill, when necessary or appropriate.*
30. *Of using at the hearing of the original cause a cross bill ordered to be taken pro confesso.*
31. *Bill of review, when necessary or appropriate.*
32. *Leave of the court, when necessary to a bill of review.*
33. *Bill of review may be also a bill of revivor and supplement.*
34. *Distinction between a bill of review, and a supplemental bill in nature of a bill of review.*
35. *Original bill to vary a decree.*
36. *Bills quia timet when necessary or appropriate.*
37. *Bill for an issue to try a right to a manor, dismissed.*

## 2. Of the structure of bills in general.

1. *Formerly a bill contained little more than the statement.*
2. *The plaintiff's equity must appear in the stating part of the bill.*
3. *Mere description is not a sufficient averment of fact.*
4. *As to what circumstances the plaintiff may interrogate.*
5. *Mode of construing the interrogating part of the bill.*
6. *The prayer of a bill is material, in construing charges not direct.*
7. *Relief may be given under the general prayer, if consistent with the case made by the bill.*
8. *Relief improperly prayed, cannot be given under the general prayer.*
9. *Where the relief sought is inconsistent with the frame of the bill, it cannot be given under the general prayer.*
10. *Demurrer to a bill only praying a commission to enable plaintiff to go to law, overruled.*
11. *Of praying interest.*
12. *Relief prayed by the bill, but given up at the hearing, must be expressly waived on the record.*
13. *In relation to irrelevancy and scandal.*
14. *What allegations are or are not impertinent or scandalous.*
15. *Where some of the parties are out of the jurisdiction.*

## 3. Of the structure of bills in particular cases.

1. *An ejectment bill.*
2. *An injunction bill.*
3. *Bill to restrain an action upon different policies on different ships, between the same parties, not multifarious.*
4. *The joinder of joint and several demands by the same bill, is multifarious.*
5. *Bill against several purchasers and others, is multifarious.*

6. *Distinct bills necessary for distinct invasions of a patent ; secus of a right of fishery, or the custom of a mill.*
7. *Prayer of costs against an agent involved in a fraud.*
8. *A bill to open an account.*
9. *A bill for an account after a previous arbitrement.*
10. *A bill by an attorney for his bill.*
11. *Statement of a bargain and sale.*
12. *A bill demanding writings, not stating them to be in defendant's possession.*
13. *Claiming in right of their estates or otherwise, too general.*
14. *A bill stating generally, that under some deeds in defendant's custody plaintiff was entitled to some interest in some estates in their possession, too general.*
15. *Claiming in right of their estates or otherwise is too loose, on a bill to perpetuate testimony of a right of common and way.*
16. *A bill to discover money won at play.*
17. *A bill seeking a discovery of a pedigree.*
18. *Statement by an heir at law of his pedigree.*
19. *Demurrer to the bill, as stating the defendant's estate, viz. that he is seised in fee or otherwise well entitled to, too generally, overruled.*
20. *Statement that a party was factor.*
21. *Statement of a feoffment.*
22. *General charge of combination to defraud, too loose.*
23. *Of the degree of certainty in charging fraud.*
24. *What a sufficient connection of fraud with the particular transaction.*
25. *What allegation is sufficiently precise to put in issue a person's insanity.*
26. *A bill by judgment-creditors in Jamaica.*
27. *Statement of, by whom the duties, claimed by the city of London, were payable.*
28. *Statement of a valid legal conveyance to the mortgagee, on a bill to redeem.*
29. *As to interrogating to the fact of payment.*
30. *A bill for a specific performance of an agreement.*
31. *Extent of the description of the right to tithes in a bill for an account.*
32. *Of waiving the treble value in a bill for an account of tithes.*
33. *Statement of payment in a bill to establish a modus.*
34. *A bill to establish a modus in districts.*
35. *A bill to establish a modus for an ancient farm.*
36. *A bill to establish a modus for every ancient farm.*
37. *A bill to have an usurious security delivered up.*

### III. In relation to informations.

1. When appropriate.

*Of the distinction between the course by bill, and by information.*

2. Structure of informations.

1. *A case in which an information against a corporation was held multifarious.*
2. *Structure of an information to remove trustees of charity, ordered to be elected out of a certain parish.*

### IV. In relation to pleas.

1. When a plea is necessary or appropriate ; when not.

1. *Where the bill is demurrable on the face of it.*
2. *Plea of a fact in bar to a bill of discovery, does not lie.*

3. *In the case of an executor relying on the statute of limitations.*
4. *To a bill of revivor.*
5. *To a scire facias to revive.*
6. *A plea to an amended bill.*

## 2. Force and effect of a plea.

*As putting a defendant, suing at law, to his election.*

### 3. A plea is in its nature divisible.

1. *It may therefore be good in part, and bad in part.*
2. *Plea allowed as to relief, overruled as to discovery.*
3. *As to a plea good to the relief, but bad to the discovery.*
4. *Plea to the account, allowed as to the real, overruled as to the personal, estate.*

### 4. Of successive pleas.

*Of pleading the same matter more formally than at first.*

### 5. Of the structure of pleas in general.

1. *The office of a plea in general is to confess the right to sue, and avoid it by matter dehors; the excepted cases are, where the plea must be supported by an answer.*
2. *The true way of pleading is to plead facts.*
3. *A plea must tender issuable matter.*
4. *A plea must reduce the defence to a single point, which, however, may consist of a variety of facts.*
5. *In relation to duplicity.*
6. *Surplusage will not render a plea multifarious.*
7. *Two inconsistent facts cannot be joined in one plea.*
8. *As to the effect of many inconsistent defences.*
9. *Of meeting by averment in the plea the charges of the bill.*
10. *A plea must go to collateral circumstances charged as evidence of the principal ground of relief.*
11. *It is no objection, that all matters of the plea, except the denial of collusion, are contained in the bill.*
12. *Distinction as to pleading at law and in equity; the latter admitting the denial of some fact alleged by the bill, in some instances, with certain averments, as a good plea.*
13. *Office of a plea, generally, not to deny the equity, but to bring forward a fact, the result perhaps of a combination of circumstances, which, if true, displaces the equity.*
14. *A plea stating no new matter in bar of the suit, will be overruled.*
15. *As to a negative plea.*
16. *Averment to belief as to the transactions of others, sufficient.*
17. *Plea with an exception, not requiring a reference to the answer, good.*
18. *Plea, with exception of matters after-mentioned, bad.*

### 6. Of the structure of pleas in particular cases.

1. *A plea of accounts stated and settled, to a bill for an account.*
2. *The plea of alien enmity.*
3. *A plea maintaining an award against a bill invalidating it.*
4. *Pleas of charters and acts of parliament conferring authority, without detailing them.*
5. *Plea of a fact in bar to a bill of discovery, does not lie.*
6. *Plea to a bill to discover articles pawned to defendant.*
7. *Plea to a bill for discovering defendant's marriage with A., that she is his sister, protects him from discovering any fact forming a link in the chain.*

8. *Plea justifying a distress, not stating that the sum was due.*
9. *In relation to duplicity.*
10. *Plea of a fine of lands.*
11. *Plea of a former suit.*
12. *Plea of a former suit satisfied.*
13. *Plea of title paramount to a bill to set aside a conveyance for fraud.*
14. *Plea of the statute of frauds.*
15. *Plea denying plaintiff's heirship.*
16. *A plea, under the circumstances, overruled, as tendering an immaterial issue.*
17. *A plea, under the circumstances, overruled as inconsistent.*
18. *Plea to discovery as tending, upon a double account, to criminate, held, under the circumstances, inconsistent.*
19. *Plea of an insolvent act.*
20. *Plea to the jurisdiction.*
21. *Plea by executor of the statute of limitations.*
22. *Plea of the statute of limitations.*
23. *Plea of a traverse to an inquisition of lunacy.*
24. *Plea to a mortgage bill.*
25. *Plea of conveyance, and of fine and non-claim, whether multifarious.*
26. *Plea denying notice.*
27. *Plea of plenarty.*
28. *Plea of purchase.*
29. *Plea of recovery of land.*
30. *Plea of a release to a bill to set it aside.*
31. *A plea to a bill of revivor.*
32. *A plea of payment to a bill for tithes.*
33. *A plea of simony to a bill for tithes.*
34. *A plea controverting the plaintiff's title.*
35. *Plea of the statute against buying pretended titles.*

#### 7. Practice connected with a plea.

1. *When a plea must be sworn to.*
2. *Of severance in pleading.*
3. *Of overruling a plea without prejudice to insisting on the same matter by answer.*
4. *Plea covering too much, ordered to stand for an answer with liberty to except.*
5. *The plea of outlawry, like other pleas, is to be set down by the defendant for argument.*

### V. In relation to demurrers.

1. *When a demurrer is necessary or appropriate, when not.*
1. *Where the fact objected is not apparent on the bill.*
2. *Where, taking charges to be true, the bill would be dismissed at the hearing.*
3. *On the ground of multifariousness.*
4. *To save costs only.*
5. *In relation to the statute of limitations.*
6. *In relation to prayer of relief in a discovery bill.*
7. *To a bill for discovery of matter which defendant need not answer.*
8. *To a bill for discovery of matters subjected to penalties.*
9. *To a bill for discovery and relief, charging fraud.*
10. *On the ground that defendant is a mere witness.*
11. *Demurrer of another cause depending, overruled, from the other cause being inefficacious.*

12. *In*

12. *In the case of a bill stating a payment to protect an individual from prosecution for felony, and desiring the assistance of the court.*
13. *No decree, where defendant might have demurred.*
  2. General demurrer, when the appropriate form, when not.
    1. *To a bill, proper for discovery only, praying relief.*
    2. *Where, though the decree and conveyance were stated only by way of precedence, the whole right as against the defendants, was founded on that conveyance.*
  3. *In a miscellaneous case.*
3. Demurrer *ore tenus*.
  1. *Whether allowable in equity.*
  2. *Whether allowable at law.*
4. Extent of a demurrer.
  1. *Demurrer to the whole relief is bad, if plaintiff is entitled to any part.*
  2. *Demurrer to the whole bill, defendant having answered part, is bad.*
  3. *A demurrer in its form applicable to part of a bill only, is not to be extended to the other part answered by defendant.*
  4. *Demurrer to the whole bill, with an exception to a small part, may be good in point of form.*
  5. *Demurrer not going to the whole bill, must clearly express the particular parts demurred to.*
  6. *In an answer and demurrer, the parts demurred to must be distinctly specified.*
  7. *Demurrer overruled, as not stating particularly the parts demurred to.*
  8. *Demurrer overruled, as covering relief to which plaintiff was entitled.*
  9. *Defendant may demur to relief, and answer to discovery.*
  10. *Demurrer to bill for discovery and relief, if good as to the relief, is good as to the discovery also.*
  11. *Demurrer to discovery and answer to relief, is bad.*
  12. *On a general demurrer to a bill seeking relief, an objection to the discovery, as subjecting the defendant to penalties, is not competent.*
  13. *To an amended bill.*
5. Of a second demurrer.
  1. *There cannot be two demurrers to one bill; secus to original and amended bill.*
  2. *Demurrer overruled as too extensive, defendant cannot afterwards demur as to part.*
  3. *Demurrer to the whole bill being overruled; demurrer less extended is allowable, by leave of the court, but not otherwise.*
6. A demurrer is, in its nature, entire.
  1. *A demurrer, unlike a plea, cannot be good in part and bad in part.*
  2. *The rule that a demurrer bad in part is altogether bad, has reference to the matter demurred to.*
  3. *Demurrer may be good as to one defendant, and bad as to another.*
7. A demurrer operates as an admission.
  1. *Facts only are admitted by a demurrer.*
  2. *A demurrer does not admit what, though stated by plaintiff as fact, is merely inference from matter of law.*
  3. *Every thing well pleaded, is confessed by demurrer.*
8. Effect of a demurrer upon the cause.
 

*Notwithstanding, on a demurrer allowed, bill dismissed, it has been set on foot again.*

9. When an answer shall overrule a demurrer.

*Demurrer to relief overruled by answer to discovery of facts on which relief is prayed.*

10. Demurrer for want of parties.

*No general rule, that demurrer for want of parties must state the parties.*

11. When a demurrer shall be aided by matter dehors.

*Answer read to support a demurrer.*

## VI. In relation to answers.

1. When an answer is necessary or appropriate, when not.

1. *In general, when a party pleads he must also answer.*
2. *To support a plea.*
3. *In a suit for discovery, the answer of the party interested cannot be dispensed with.*
4. *In the case of resisting a discovery.*
5. *In the case where the discovery will subject to penalties, and the time of limitation elapses after a first and before the second answer.*
6. *In relation to the statute of frauds.*
7. *With reference to the statute of limitations.*
8. *Where a plea bars the whole bill, an answer overrules it.*

2. Force and effect of an answer.

1. *An insufficient answer is as none.*
2. *Where the plaintiff is misnamed.*
3. *It must be taken to be true, until proved false.*
4. *The test of its credibility.*
5. *In the case of mistake.*
6. *Effect of an admission by answer of assets.*
7. *Effect of an admission by executor by his answer.*
8. *Force of affidavit against an answer.*

3. Of the structure of answers in general.

1. *In relation to the title.*
2. *An answer must correspond to the number of plaintiffs.*
3. *An answer joint and several for many, taken as the answer of those only who swore it.*
4. *An evasive answer is as none, and may be taken off the file.*
5. *An evasive answer is a contempt.*
6. *A defendant, who might have pleaded or demurred, answering, must answer fully.*
7. *A full answer is always requisite, unless it goes to criminate, or in the case of a purchaser for value without notice.*
8. *Whether a defendant can by answer refuse to give a full answer.*
9. *Particular charges must be answered particularly.*
10. *Circumstances tending to the point relied and issue tendered on by the plea, need not be answered.*
11. *Answer is requisite to the sifting inquiries upon the general question.*
12. *Of the obligation to answer circumstances not connected with defendant's own interest.*
13. *Defendant cannot by answer refuse a full discovery.*
14. *Of answering by reference to a schedule or writings.*
15. *A schedule to an answer was, under the circumstances, held impertinent.*
16. *A party charging himself in a schedule to his answer, cannot discharge himself by another schedule stating his disbursements.*

17. A

17. *A party charged by his answer, cannot discharge himself by it, unless the whole is stated as one transaction.*
18. *An answer in support of a plea.*
19. *What shall be scandal in an answer, what not.*

#### 4. Of the structure of answers in particular cases.

1. *Of setting forth an account.*
2. *A defendant to bill for discovery and account, objecting, by answer, that he had no concern in the business, must answer fully.*
3. *An answer to a bill seeking an account, relying on a deed of compromise as a bar to rendering it, was, on exceptions, considered short.*
4. *When an answer to a bill for an account shall be deemed impertinent.*
5. *An agent, charged with personal fraud, must answer fully.*
6. *Admission of the receipt of sums, which sums he had paid, &c. a good discharge.*
7. *The case of an answer by bankers denying any concern in the affair for which an injunction and discovery was sought.*
8. *To a bill for discovery of a correspondence.*
9. *Discovery by a miller carrying on the trade of a mealman.*
10. *A schedule to an answer was, under the circumstances, held impertinent.*
11. *Defendant stating himself trustee for mortgages, decreed to deliver up deeds, because he did not name them, so that plaintiff could amend.*
12. *Of intimating an intention to rely on the insufficiency of a notice.*
13. *Answer, a purchase for value without notice; further answer not requisite.*
14. *Answer to a bill of revivor.*
15. *In an answer to a bill for tithes, it is sufficient if plaintiff has notice of the general nature of the defence.*
16. *In laying a modus.*
17. *A witness (made defendant) answering, must answer fully.*

#### 5. Supplemental answer when necessary or appropriate, when not.

1. *General rule upon the subject.*
2. *In the case of mistake.*
3. *Upon discovery of new matter after replication.*
4. *In a miscellaneous case.*

#### 6. Of an answer by a foreigner.

*A sworn translation must be filed with an answer in a foreign language.*

#### 7. Answer to a cross bill.

*Cannot be read where there have been no ulterior proceedings.*

#### 8. Answer to an amended bill.

*Of the obligation to answer an, amended bill, with the consequence of omission.*

#### 9. In relation to exceptions.

1. *When exceptions are answered, the whole taken as one answer.*
2. *That defendant does not speak to his knowledge and belief, is no objection at the hearing to the manner of stating a modus.*

#### 10. Of using an answer as evidence.

1. *An answer, though not used as evidence in the cause, may be read as to costs.*
2. *A guardian's answer may be read against himself in his individual character.*
3. *Answer read as evidence, contrasted with the other evidence, not for the purpose of discrediting it.*

4. One



4. *One defendant's answer read to support another's plea.*
5. *One defendant's answer cannot be read against the other.*
6. *Distinction at law and in equity as to reading the answer.*
7. *The whole answer to a discovery bill must, when used, be read.*
8. *Of allowing the original answer to be used as a trial at law.*
9. *The propriety of using an answer at law is for the consideration of the court.*

#### 11. Practice connected with an answer.

1. *In relation to the oath and signature — where defendant is abroad.*
2. *In relation to the oath and signature — where defendant is a quaker.*
3. *In relation to the oath and signature — course upon an irregularity.*
4. *An answer must be signed by counsel.*
5. *Of taking an answer off the file in case of mistake.*
6. *A scandalous answer will be taken off the file.*
7. *A scandalous answer may be referred on the motion of another defendant.*
8. *Of taking an answer off the file to found a prosecution for perjury.*
9. *Order relative to references of answers for insufficiency, scandal, or impertinence.*
10. *An answer cannot be referred for impertinence, after a reference for insufficiency.*
11. *Of the affidavit for a supplemental answer.*

### VII. In relation to disclaimers.

*Of retracting a disclaimer.*

*Defendant cannot get rid of a disclaimer without a strong case on affidavit.*

### VIII. In relation to replications.

*Of the structure of a replication.*

*General or special.*

### I. In relation to the parties to a bill, complainants and defendants.

#### 1. General rules on the joinder of parties.

1. *Grounds upon which the general rule, requiring that all persons interested be made parties, will be dispensed with.*

1. The general rule, requiring all persons interested to be parties, dispensed with, where it is impracticable, or, extremely difficult. In such a case, to obtain a decree, to establish the right of suit to a mill, for instance, the court only requires parties sufficient to secure a fair contest; and, the right being established in that way, consequential relief may be had against the rest in another suit. *Adair v. The New River Company*, 11 Ves. 429.

2. The strict rule that all persons, materially interested, must be parties, dispensed with, where it is impracticable, or very inconvenient; as in the case of a very numerous association in a joint concern; in effect a partnership. *Cockburn v. Thompson*, 16 Ves. 321.

2. *Joinder of parties who, though in some respects connected, have distinct interests.*

Bill by a bankrupt, and the assignee under an insolvent act, of which he afterwards took the benefit, against representatives of the deceased assignees and others, for an account of his estate, and various transactions before and since the bankruptcy; no assignee in the bankruptcy being a party, and collusion with

with persons accountable to the estate charged against only some of the representatives of the assignees. Demurrer allowed generally, for want of equity, and as relief might be had by petition in bankruptcy; and *ore tenus* the suit being multifarious, as uniting parties though in some respects connected, having distinct interests. *Saxton v. Davies*, 18 Ves. jun. 72.

## 2. General rules on the joinder of complainants.

*In the case of joint interests, some will be allowed to sue for all, if inconvenient to justice that all should be parties.*

Demurrer to a bill by some members of a lodge of free-masons against others to have the dresses, and decorations, books, papers, and other effects of the society delivered up; an injunction was allowed, on the ground, that they affected to sue in a corporate character: but leave was given to amend; the court holding jurisdiction for the delivery of a chattel; and where there is a joint interest, permitting some to sue as individuals, representing the rest, in other instances than those of creditors and legatees, if inconvenient to justice that all should be parties. *Lloyd v. Loaring*, 6 Ves. 773.

## 3. General rule on the joinder of defendants.

*Joinder of a party against whom no relief is prayed.*

The only case in which a person against whom no relief is prayed, is allowed to be made a party, is that of the agent of a corporation. 15 Ves. 164.

## 4. Agent.

*Joinder of agent on a bill against the principal.*

Demurrer by a married woman to a bill praying discovery only against her, and relief against her husband, as to contracts, &c. by her, as agent for her husband; alledging the vouchers, &c. to be in her possession; allowed; upon the objection, first, to making a mere agent a party; secondly, to admitting the testimony of a wife in her husband's cause. *Le Texier v. Margrave of Anspach*, 15 Ves. 159.

## 5. Assignee of a bond.

*Joinder of assignor, or, if dead, his representative, on a bill by assignee of a bond.*

The original obligee on a bond being dead, without representative, there is a want of parties. *Ray v. Fenwick*, 3 B. C. C. 25.

## 6. Assignee of a judgment.

*Joinder of assignor on a bill by assignee of a judgment.*

To bill by assignee of judgment, assignor is a necessary party. *Cathcart v. Lewis*, 1 Ves. 463.

## 7. Assignee of a mortgage.

*Assignment without the authority or privity of the mortgagor; the assignee is the only necessary party.*

Assignment without the authority or privity of the mortgagor; the assignee is the only necessary party. 9 Ves. 269.

## 8. Assignee of a residuary legatee.

*Joinder of assignor, or, if dead, his representative, on a bill by assignee of a residuary legatee.*

One of two joint executors and residuary legatees, assigned his interest and died; the assignee filed a bill to have half the residue transferred to him. The representative of the assignor need not be a party unless there appear

appear any doubt of the validity of the assignment. *Blacke v. Jones*, 3 Anst. 651.

#### 9. Attorney.

##### 1. *Joinder of attorney because of his possession of title deeds.*

Generally it is not necessary to make an attorney a party because he has title deeds in his possession, although it may become so under particular circumstances. *Fenwick v. Reed*, 1 Mer. 114.

##### 2. *Joinder of attorney on a bill for relief from fraudulent release obtained through his assistance.*

A solicitor assisting his client in obtaining a fraudulent release, is properly made a party to a bill seeking relief from the fraud; and he shall be liable to costs if the principal be not solvent. 1 Sch. & Lef. 227.

#### 10. Attorney-general.

##### 1. *The attorney-general is an officer of the crown, and in that sense only the officer of the public.*

The attorney-general is an officer of the crown, and in that sense only the officer of the public. *Attorney-general v. Brown*, Swanst. 294.

##### 2. *Joinder of attorney-general in the case of a legacy to a charity.*

Where there is a legacy to a charity, not necessary to make the attorney-general a party. *Chitty v. Parker*, 4 B. C. C. 38.

##### 3. *Joinder of attorney-general in a bill to establish a modus where the rector is an eleemosynary foundation, of which the king is visitor.*

In a bill to establish a modus, where the rector is an eleemosynary foundation, of which the king is visitor, the attorney-general need not be made a party. *Scarr v. Trinity College*, 3 Anst. 768.

##### 4. *Joinder of attorney-general on an information and bill to set aside leases granted by a vicar and vestrymen, under an unlimited power to lease given by statute.*

Information and bill to set aside three leases, one for 999 years, and two for 1000 years, granted by a vicar and vestrymen under an unlimited power to lease given by an act of parliament. Held, that the attorney-general ought not to have been made a party, and that the leases were valid. *Attorney-general v. Moses*, 2 Mad. 294.

##### 5. *Joinder of attorney-general on application by a foreign government, for dividends.*

The court refused to order dividends, received before the bill filed, of stock, purchased by the old government of Switzerland, to be paid into court by the trustees on the application of the present government, without having the attorney-general a party. *Dolder v. The Bank of England*, 10 Ves. 352.

#### 11. Bond.

##### 1. *Joinder of all the obligors, principal and sureties, in a joint and several bond.*

1. All obligors in a joint and several bond, principal and sureties, must be parties, generally. Exception, where the surety is insolvent; or has paid nothing. 16 Ves. 326.

2. Injunction obtained by obligor, in a joint and several bond; the co-obligor not a party. *Chaplin v. Cooper*, 1 Ves. & Beam. 16.

##### 2. *Joinder of a surety in a bond on a bill against the obligor's executor.*

On a bill against an executor to be paid a bond debt, a surety with the testator held to be a necessary party. *Angerstein v. Clark*, Dick. 738.

#### 12. Charge.

## 12. Charge.

1. *Joinder of all incumbrancers.*

As to the necessity of making all incumbrancers parties, *Quære*. 12 Ves. 58.

2. *Joinder of all persons whose estates are liable upon a bill for equitable relief as to a rent-charge.*

Upon a bill for equitable relief as to a rent-charge, all the persons whose estates are liable must be parties. The rule dispensed with under circumstances, making it impracticable or highly inconvenient. 11 Ves. 367.

## 13. Charity.

1. *Joinder of all the terre-tenants of the premises charged with the charity.*

General objection by the answer to an information, that all the terre-tenants of the premises, charged with the charity, are not parties, without any particular description. The court will direct inquiries, what other lands are charged, &c.; previously deciding the validity of the charge against the defendants before the court. Attorney-general v. Jackson, 11 Ves. 365.

2. *Joinder of trustees and disinherited heir, on an information to apply money, given to a charity, to different uses, where there is a residuary gift to trustees for other charitable uses.*

In an information to apply money, given to a charity, to other uses than those specified by the will: where there is a residuary gift to trustees for other charitable uses, the trustees and the heir, though disinherited, must be parties. Attorney-general v. Green, 2 B. C. C. 495.

## 14. Common, tenants in.

1. *Joinder of the lessee of one tenant in common, on a bill for partition.*

One tenant in common having leased his share; on a bill for partition, the lessee is a necessary party, and his costs must be borne by his lessor. *Cornish v. Gest*, 2 Cox, 27.

2. *Joinder of a surviving tenant in common on a bill of revivor by the representative of the other.*

Abatement by the death of one of the plaintiffs, tenants in common. Bill of revivor by his representative. The survivor, if not a co-plaintiff, must be made a defendant. Whether the original defendant, having had orders for time to answer the original bill, can begin again with the usual course of orders for time to answer in the revived cause, *Quære*. *Fallowes v. Wilkinson*, 11 Ves. 306.

## 15. Corporation.

1. *Joinder of members in their individual capacity on a bill against the corporation in its political character.*

Bill against a corporation, trustees for a charity, for a discovery, and injunction against a resolution, depriving the plaintiff of his office of school-master; charged to have been procured by five of the members, including the bailiff, from improper motives, with reference to a parliamentary election. Demurrer by those five, on the ground, that no title was shewn to discovery against them, and *ore tenus*, that the charge would be the subject of a criminal prosecution, overruled. *Dummer v. Corporation of Chippenham*. 14 Ves. 245.

2. *Joinder of all the commissioners of a navigation, on a bill upon orders signed by some only.*

In a bill against the committee of a voluntary society who contract with a tradesman, it is not necessary to make the other members of the society parties.

parties. *Cullen v. Queensbury*, 1 B. C. C. 101. So, of the commissioners of a navigation who have signed any of the orders. *Horseley v. Bell*, 1 B. C. C. 101. n.

#### 16. Associations in nature of corporations.

1. *Joinder as complainants of the whole society, on a bill upon a contract by their committee.*

Persons contracting on behalf of a legal society, of which they are members, as a committee, are not liable to nonsuit, and cannot defend an action, upon an objection of parties. *Cousins v. Smith*, 13 Ves. 542.

2. *Demurrer allowed to a bill by some members of a mason's lodge against others, for the effects.*

Vide 6 Ves. 773.

3. *Joinder of the whole society on a bill against the committee who contracted.*  
Vide 1 B. C. C. 131. 13 Ves. 542.

4. *Joinder of all the commissioners of a navigation, on a bill upon orders signed by some only.*

Vide 1 B. C. C. 101. n.

5. *Joinder of all the members of a society for relief in sickness, on a bill against the trustees for an account.*

Society for relief in sickness, &c. by means of a fund raised by subscription of the members, considered merely as a partnership, having no corporate capacity. *Beaumont v. Meredith*, 3 Ves. & Beam. 180. In a suit, therefore, against the trustees by some members for an account, alleging a dissolution contrary to the articles, all other members must be parties. *Ibid.*

#### 17. Creditors.

*In other instances besides those of creditors and legatees, some only will be allowed to represent a joint-interest, when inconvenient to justice that all should be made parties.*

Vide 6 Ves. 773.

#### 18. Executor.

1. *Joinder, on a bill by a creditor against the executor of a debtor to the estate.*

Creditor filing a bill against executor, cannot make a debtor of the debtor a party; in case of insolvency in the executor, the court will, on petition, appoint a receiver, and compel the executor to allow his name to be used in bringing actions. *Utterson v. Mair*, 2 Ves. 95.

2. *Joinder of residuary legatees on a bill against an executor.*

Residuary legatees not necessary parties to a suit against an executor. *Brown v. Dowthwaite*, 1 Mad. 446.

3. *Joinder of heir and executor on a bill for an account under ancestor's agreement, as well before as since the death.*

The plaintiff was tenant to the father of the defendants in a colliery, under a lease and subsequent agreements. On the father's death he continued to hold under the defendant, the heir, on the same terms. He filed his bill against the two defendants, as executors of their father, and against the one as heir, for an account under the agreement, both in the life-time of the father, and since. The defendants demurred separately, as being improperly joined in the suit. The demurrers were allowed. *Ward v. the Duke of Northumberland and another*, 2 Aust. 469.

4. *Joinder of an executor in a miscellaneous case.*

A testator appointed persons residing in India and Scotland his executors. The will was not proved in England. The executors in India remitted a  
sum

sum of money to their agent in England, and a creditor of the testator filed a bill against the agent of the executors, to whom the money was remitted, praying an account and payment of the money to the accountant-general for security. A demurrer was put in to the bill, on the ground that no personal representative of the testator was made a party; and the demurrer allowed. *Lowe v. Farlie*, 2 Mad. 101.

## 19. Feme Covert.

*Joinder of a feme covert on a bill against her husband, to obtain her evidence against him.*

Vide 15 Ves. 159.

## 20. Heir.

1. *Joinder of infant heir, on a bill on behalf of younger children to raise portions.*

On a bill filed on behalf of younger children, to raise the portions out of the real estate, the infant heir ought to be made a defendant, not a plaintiff. *Plunket v. Joice*, 2 Sch. & Lef. 159.

2. *Joinder of heir and executor, on a bill for an account under ancestor's agreement, as well before as since the death.*

Vide 2 Anst. 469.

3. *Joinder of trustees and disinherited heir, on an information to apply money given to a charity, to different uses, where there is a residuary gift to trustees for other charitable uses.*

Vide 2 B. C. C. 495.

## 21. Infant.

1. *Infant sues by his next friend, without waiting till of age.*

Infant ought to sue by next friend, not to wait till of age. *Blake v. Bunbury*, 1 Ves. 194.

2. *Joinder of an infant partner.*

Though one of three partners is an infant, an action must be brought against all three. 4 Ves. 164.

## 22. Information.

*A new relator named in the room of a deceased relator.*

A new relator named in the room of a deceased relator. *Attorney-general v. Powell*, Dick. 355.

## 23. Insolvent debtor.

*Joinder of the insolvent on a bill by a purchaser.*

1. An insolvent debtor is not a necessary party to a bill, but a purchaser of his interest in stock, against the assignee. *Collet v. Wollaston*, 3 B. C. C. 228.

2. Bill by purchaser of one who afterwards took the benefit of an insolvent act. Objection, that insolvent should have been party, overruled. *Collet v. Saunders*, 1 Anst. 103.

## 24. Joint tenants.

*Joinder of a joint owner, on a bill against factor, on a demand against the other moiety, defendant admitting separate accounts, and possession of the produce of that moiety.*

Joint owner not necessary party to bill against factor, on a demand against the other moiety, defendant having kept separate accounts, and admitted the produce of that moiety to be in his possession. *Weymouth v. Boyer*, 1 Ves. 417.

## 25. Legatees.

## 25. Legatees.

1. *In other instances besides those of creditors and legatees, some only will be allowed to represent a joint interest, when inconvenient to justice that all should be made parties.*  
Vide 6 Ves. 773.

2. *Joinder of legatees whose legacies are charged on the real estate.*

Every legatee whose legacy is charged on the real estate, ought to be before the court. *Moise v. Sadler*, 1 Cox. 352.

3. *Joinder of all persons interested in the fund arising under a devise for sale.*

In a devise to sell, and the produce to be divided, all the persons interested in the fund must be parties, although the land is sold before the suit. *Faithful v. Hunt*, 3 Anst. 751.

4. *Joinder of persons entitled to purchase-money, on a bill, by devisees in trust, to sell, for specific performance of agreement to purchase.*

Bill, by devisees in trust to sell, for specific performance of an agreement to purchase: exception to the report in favour of the title, that the persons entitled to the purchase-money, subject to debts, legacies, and other charges, were not parties to the suit: the Lord Chancellor was of opinion, they ought not to be parties to the conveyance: and if they were, their covenant ought to extend only to their own acts and those of the devisor; not to a general warranty, without a special contract for it: but as the point must come properly upon objections to the conveyance, the exception was overruled upon the form, exception that the persons entitled to the purchase-money, subject to the charges, were not parties to the conveyance, overruled. *Wakeman v. the Duchess of Rutland*, 3 Ves. 233. 504.

5. *Joinder of all the residuary legatees on a bill by some.*

Bill by some of the residuary devisees, all must be parties. *Parsons v. Neville*, 3 B. C. C. 365.

6. *Joinder on a bill by a residuary legatee of all persons interested in the residue.*

Generally, a residuary legatee must bring before the court all persons interested in the residue. Exception, where not necessary or convenient. 16 Ves. 328.

7. *Joinder on a bill for a moiety of a residue of the persons to whom the other moiety had been given over in default of appointment.*

Bill for a moiety of a residue, the other moiety was given to A. for life, and upon her decease, to such persons as she should appoint; in default of appointment, to other persons: those persons must be parties. *Skerritt v. Birch*, 3 B. C. C. 229.

8. *Joinder of residuary legatee on a bill against an executor.*

Vide 1 Mad. 446.

9. *Joinder of residuary legatee, on a bill by creditors against the executor.*

In a bill by creditors against the executor, it is not necessary to make the residuary legatee a party. *Lawson v. Barker*, 1 B.C.C. 303.

10. *Joinder of residuary legatee, on a bill for a specific legacy.*

Residuary legatee need not be party to bill for specific legacy. *Wainwright v. Waterman*, 1 Ves. 313.

## 26. Lunatic.

1. *Information at the relation of a lunatic, not proper; he must be a party.*

Information at the relation of a lunatic, not proper; he must be a party. *Attorney-general v. Tiber*, Dick. 378.

2. *Appointment of a responsible relator, in an information at the relation of a lunatic.*

In an information at the relation of a lunatic, a proper relator was directed

directed to be appointed, who might be responsible for the costs of the suit. *Attorney-general v. Tyler*, 2 Eden, 230.

3. *Right of an annuitant made a party only in respect of an annuity given by the will, to attend, at the passing of the accounts, as next of kin to the residuary legatee, a lunatic.*

A defendant made a party to a suit only in respect of an annuity to which she is entitled under a will, not allowed to attend at the passing the accounts of the general estate in the master's office, or to be paid the costs of past attendances, as next of kin to the party beneficially interested in the residue of the estate, who had since become lunatic; where there is no direction in the decree for such purpose. *Tharp v. Tharp*, 3 Mer. 510.

#### 27. Manor.

1. *Joinder of all the tenants of a manor on a bill by or against them.*

Various cases, where parties dispensed with: bills by or against some tenants of a manor; as for suit to a mill, &c.: some parishioners for tithes, or a modus: societies for insuring each other, which is not within the statute. 6 Geo. 1. c. 18.; 16 Ves. 328.

2. *Joinder of several tenants of a manor on a bill for quit-rents.*

Bill will not lie against several tenants of a manor for quit-rents, unless the premises are uncertain. *Bowrie v. Prentice*, 1 B. C. C. 200.

#### 28. Mortgagor and mortgagee.

1. *Joinder of all the joint-mortgagees on a bill to foreclose.*

Where there are three mortgagees, being joint tenants, one cannot bring a bill to foreclose without making the others parties. *Lowe v. Morgan*, 1 B. C. C. 968.

2. *Joinder of the mortgagor's lessee, evicted for nonpayment of rent on a bill to foreclose.*

The lessee of a leasehold interest, that had been evicted for nonpayment of rent, is a necessary party to a bill, by the mortgagee against the lessor, filed after the expiration of the six months allowed the tenant to redeem; and a demurrer, for want of parties, accordingly allowed. *Adams v. St. Leger*, 1 Ball & Beatty, 181.

3. *Joinder of the mortgagor, or, if dead, his heir, on a bill, by the second mortgagee, to redeem the first mortgage.*

1. Bill by second mortgagee to redeem the first mortgage, the mortgagor, or his heir, must be a party; the heir being abroad, the court cannot proceed. *Fell v. Brown*, 2 B. C. C. 276.

2. A second mortgagee, to redeem a prior mortgage, must make the heir of the mortgagor a party; though the second mortgage is only of part of the estates comprised in the first, and under a different title. *Palk v. Lord Clinton*, 12 Ves. 48.

3. To a bill by a mortgagee or trustee of a leasehold interest, evicted for nonpayment of rent, against the landlord, seeking a redemption after the expiration of the six months; a demurrer, the lessee not being a party, allowed. *Adams v. St. Leger*, 1 Ball & Beatty, 181.

4. *Joinder of the personal representative of a mortgagor tenant in fee, mortgaging by creating a term, on a bill to foreclose.*

Mortgage by tenant in fee by creating a term. The personal representative ought not to be a party to a bill of foreclosure. *Bradshaw v. Outram*, 13 Ves. 234.

5. *Assignment without the authority or privity of the mortgagor; the assignee is the only necessary party.*

Vide 9 Ves. 269.

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## 29. Parishioners.

*Joinder of all the parishioners on a bill for tithes, or a modus.*

Vide 16 Ves. 328.

## 30. Partition.

1. *Joinder of the lessee of one tenant in common, on a bill for partition.*

Vide 2 Cox, 27.

2. *Joinder, on a bill for a partition, of a lessee, whose lease is relied on by defendant as evidence of a former partition.*

Bill for a partition against D.: D., by his answer, sets up a partition made several years ago; as evidence whereof (amongst other things) he states, that plaintiff acted upon a moiety of the premises to his several estate, and particularly that he made a lease of part thereof to C. Plaintiff amends his bill, making C. a party, charging that the lease to him was made under circumstances of fraud and imposition; and praying that, as against C., the lease may be set aside. Demurrer by D. to the whole bill, for that it is exhibited against several persons for several distinct matters; allowed. Plaintiff ought first to have filed his bill against C. only, to impeach the lease. *Whaley v. Dawson*, 2 Sch. & Lef. 367.

## 31. Partner.

1. *Joinder of all the members of a partnership.*

One partner cannot sue separately. 15 Ves. 213.

2. *Joinder of a partner abroad.*

Whether, and under what circumstances, a trader can plead in abatement a partner abroad, *Quære*. 6 Ves. 438.

3. *Joinder of a dormant partner.*

Dormant partner, not an ostensible contracting party; a creditor may, but is not bound to, go against him. 17 Ves. jun. 412.

## 32. Privateer.

*Joinder of all parties interested on a bill for an account of captures.*

Bill by one of the officers and crew of a privateer against the owners, for an account of captures, according to the articles. Leave given to amend, by stating, that the bill was on behalf of the plaintiff and all others: and upon that amendment the account was decreed. *Good v. Blewitt*, 13 Ves. 397.

## 33. Receiver.

*Joinder of vendor's receiver on a bill for specific performance.*

To a bill against a vendor for a specific performance, his stewards and receivers ought not to be made parties. A specific performance being decreed, the bill as against them was dismissed with costs. *M'Namara v. Williams*, 6 Ves. 143.

## 34. Remainder-man.

1. *Joinder of remainder-men where the first tenant in tail is a party.*

1. Where the first tenant in tail is a party, not necessary to make the other remainder-men parties. *Reynoldson v. Perkins*, Dick. 427.

2. Rule, established for convenience, that it is sufficient to bring the first tenant in tail before the court. 9 Ves. 55.

3. Where it has been held sufficient to bring before the court the first person, having an estate of inheritance. 16 Ves. 326.

2. *Joinder*

2. *Joinder of remainder-men in order to clear a party's title.*

A party who is plaintiff, has no right, in order to clear his own title, to bring remainder-men before the court, upon a discussion—whether a prior remainder-man has a title or not; and, therefore, a bill, as against them, dismissed. *Pelham v. Gregory*, 1 Eden, 518.

## 35. Revivor.

1. *Joinder of all the plaintiffs upon a revivor by scire facias.*

Upon a revivor by *scire facias*, according to the old practice, all the plaintiffs must have joined. 11 Ves. 311.

2. *Joinder of surviving tenant in common, on a bill of revivor by the representative of the other.*

Vide 11 Ves. 306.

## 36. Ship-owners.

*Joinder of all the part-owners of a ship.*

One part-owner of a ship cannot bring a bill on behalf of himself and the other part-owners, but they must all be parties. *Moffat v. Farquharson*, 2 B. C. C. 338.

## 37. Steward.

*Joinder of vendor's steward on a bill for specific performance.*

Vide 6 Ves. 143.

## 38. Terre-tenants.

1. *Joinder of all the terre-tenants of the premises charged with a charity.*

Vide 11 Ves. 509.

2. *Joinder of the lessee of one tenant in common, on a bill for partition.*

Vide 2 Cox, 27.

## 39. Tithes.

1. *Joinder of the ordinary on a bill to establish a customary payment in lieu of tithes.*

To a bill to establish a customary payment in lieu of tithes, the ordinary must be a party. *Gordon v. Simkinson*, 11 Ves. 509.

2. *Joinder of the patron and ordinary on a bill to establish a modus.*

The patron and ordinary are necessary parties to a bill to establish a modus; and, therefore, where the defendants insisted on several moduses and customs which were in themselves bad, but were established by a decree made in a suit in this court, to which the patron and ordinary were not parties, the court refused to allow them, and decreed an account. *Jenkinson v. Royston*, 1 Dan. 121.

3. *Joinder of a rector in a vicar's suit for an account of small tithes, charged to be withheld by occupiers, on a claim by the rector.*

A rector ought not to be made a defendant in a vicar's suit for an account of small tithes, charged to be withheld by occupiers, on a claim by the rector. *Williams v. Price*, 4 Price, 156.

4. *Joinder of all the persons liable to contribution, on a bill to establish a contributory modus.*

In a bill to establish a contributory modus, all the persons liable to the contribution need not be parties. *Scarr v. Trinity College*, 3 Anst. 768.

5. *Joinder of all the owners of lands in a township, on a bill by one to establish a contributory modus.*

One owner of lands in a township may sue for himself and the others, to establish

establish a contributory modus for all the lands there. *Clayton v. Trinity College*, 3 Anst. 841.

*Joinder of all interested in any one particular adventure, on a bill for tithe of fish.*

In a bill for tithe of fish, all the persons interested in any one particular adventure must be made parties. *Coppard v. Page and others*, Forrest, 1.

#### 40. Trust.

1. *Joinder of a trustee in a will, who released and never acted, on a bill to set aside the will for fraud.*

A trustee in a will, who released and never acted, ought not to be a party in a suit to set aside the will on the ground of fraud, and therefore need not answer as to the charges of fraud, in which he is not personally implicated. *Richardson v. Hulbert*, 1 Anst. 65.

2. *Joinder of trustees and disinherited heir, on an information to apply money given to a charity, to different uses, where there is a residuary gift to trustees for other charitable uses.*

Vide 2 B. C. C. 495.

3. *Joinder of an intermediate trustee of the equitable interest, on a bill by the trustees and cestui que trust of a term to execute the trusts.*

If the trustees of a term and the *cestui que trust* are before the court, an intermediate trustee of the equitable interest need not be party to a bill filed to carry the trusts of the term into execution. *Head v. Lord Teynham*, 1 Cox, 57.

4. *Joinder of the assignee of a trust on a bill against the trustee.*

1. Bill against a trustee, who has assigned his trust, the assignee must be a party, as the decree must be first against him, and the original trustee to stand as a security. *Burt. v. Dennet*, 2 B. C. C. 225.

2. If the trustee of a term, to secure the payment of an annuity, assigns the term to a third person, such third person should be a party to a suit to have the securities delivered up as void. *Bromley v. Holland*, Cooper, 18.

5. *Joinder of cestui que trust on a bill by one trustee of stock against the other, to compel him to replace it pursuant to agreement.*

Bill by one trustee of stock against the other, to compel him to replace it or give security according to his engagement, when the plaintiff joined in transferring the stock into his name: demurrer, because the *cestui que trust* were not parties, overruled. *Franco v. Franco*, 3 Ves. 75.

#### 41. Vendor and purchaser.

*Joinder of retired owners of a colliery, on a bill by those who remained, against the vendor of timber, paid for by the latter.*

Timber purchased for a colliery; before it was applied to the use of the colliery, some of the owners retired; and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those who remained, against the vendor, on account of that sale. *Massey v. Davies*, 2 Ves. 317.

#### 42. Witness.

*A witness ought not to be a party, with some exceptions.*

1. A witness not to be a party. 12 Ves. 343.

2. Rule, that a mere witness, having no interest, ought not to be a party. 1 Ves. & Beam. 550. Exceptions to that rule. *Ibid*.

3. General

3. General rule, that a mere witness is not to be made a party. Exceptions in the cases of arbitrators, and attorneys; and corporations, whose officers and servants are made parties. 14 Ves. 252.

43. Practice connected with the subject of parties.

1. *A decree is void against persons who ought to have been made parties.*

A decree obtained without making parties those whose rights are affected thereby, is fraudulent and void as to those parties: and a purchaser under it, with notice of the defect, is not protected by it. *Giffard v. Host*, 1 Sch. & Lef. 386.

2. *Though a party be named; yet if process against him be not prayed, he is considered not joined.*

Though a party be named in a bill, as a defendant, unless process be prayed against him, an objection at the hearing, that he is not a party, will be allowed. *Windsor v. Windsor*, Dick. 707.

3. *On shewing cause against a decree, want of parties may be objected.*

On shewing cause against a decree by default, want of parties objected; the objection allowed. *Jackson v. Lee*, Dick. 92.

4. *Where the want of parties is apparent, a demurrer lies; where not, a plea.*

Defect of parties the subject of demurrer, or plea; as it appears or not, on the face of the bill. *Cockburn v. Thompson*, 16 Ves. 321.

5. *Of the requisite certainty in the objection for want of parties.*

Upon an objection for want of parties, not necessary to point them out by name; if described so as to enable the plaintiff to make them parties. 11 Ves. 369.

6. *In the case of a general objection by the answer to an information, that all the terre-tenants of the premises charged with a charity, are not parties, without any particular description.*

Vide 11 Ves. 365.

7. *Where the personal representative is a mere formal party, the court will go on, and suffer him to be brought before the master.*

Where the personal representative is a mere formal party, the court will go on, and suffer him to be brought before the master. *Fletcher v. Ashburner*, 1 B. C. C. 497.

8. *Supplemental bill to add parties.*

Parties appeared to be wanting; it was ordered to stand over, with liberty for the plaintiffs to file a supplemental bill, merely to add parties. *Holdsworth v. Holdsworth*, Dick. 799.

9. *Of striking out the name of plaintiff inserted without his consent.*

1. Bill brought by one plaintiff without his consent; his name struck out. *Creswell v. Radcliffe*, Dick. 32.

2. Application by a plaintiff to have his name struck out of the bill, for that it was inserted without his knowledge, refused; but he was ordered to be indemnified by the solicitor. *Titterton v. Osborne*, Dick. 350.

3. The names of two of the petitioners having been made use of without their knowledge, this circumstance must be made the subject of a distinct application against the solicitor, and cannot be insisted on upon the hearing of the petition. *Ex-parte Stuckey*, 2 Cox, 283.

## II. In relation to bills.

## 1. Of the different species of bills.

1. *A bill of interpleader when necessary or appropriate.*

1. Bill of interpleader is, where two persons claim of a third the same debt or the same duty. 2 Ves. 310.

2. A claim is a ground of interpleader. 2 Ves. 107.

3. Interpleader upon opposite claims. *Stevenson v. Anderson*, 2 Ves. & Beam. 407.

4. It is sufficient to support a bill of interpleader, that each of the defendants has a claim to the matter in question, although one only can maintain an action at law, the principle being to prevent a plaintiff from being doubly vexed. It is therefore not necessary that he should have been actually sued. *Morgan v. Marsock*, 2 Mer. 107.

5. Interpleader upon colour of title given to a stranger. *East India Company v. Edwards*, 18. Ves. jun. 376.

6. Plaintiff having parted with the property, cannot file an interpleading bill against different claimants upon an undertaking to pay over the value to the party entitled. *Burnett v. Anderson*, 1 Mer. 405.

7. A banker, with whom property was deposited for safe custody, refused to deliver it to the owner in prison, under actions brought against him as partner in an insolvent mercantile house: the banker was then served with attachments by the plaintiffs in those actions, and held to bail in trover by the owner: held, that he was entitled to relief upon bill of interpleader; but need not have come into equity, as, at law he would have been discharged on common bail, upon bringing the deposit into court, and proceedings in the action would have been stayed, till the attachments were disposed of by the owner of the property in the name of the banker. *Langston v. Boylston*, 2 Ves. 101.

8. Bill of interpleader sustained upon bills of exchange received by the plaintiff, as agent to procure payment for his principal in Scotland, to whom they were remitted against an order for goods, procured in an action of trover by the party, who so remitted them, and by attachment in Scotland, by a creditor of him. *Stevenson v. Anderson*, 2 Ves. & Beam. 407.

9. A tenant cannot file an interpleading bill against his landlord. *Johnson v. Atkinson*, 3 Anst. 798.

10. The rule, that a tenant cannot file an interpleading bill against his landlord, does not hold, where the question arises upon the act of the landlord subsequent to the lease. *Cowtan v. Williams*, 9 Ves. 107.

11. To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure and contract; as in the case of mortgagor and mortgagee, trustee and *cestui que trust*, &c. 2 Ves. 312.

12. Interpleader upon notice of a variety of claims by persons, among whom an entire charge upon an estate was split; though no suit instituted; and but one legal right of entry: the principle being, not merely that the payment cannot be safely made, but that the party, entitled to be discharged by a single payment, should not be harassed by a number of suits. *Angell v. Hadden*, 15 Ves. 244.

13. A tenant, though threatened with suits at law on a title adverse to his landlord's, cannot make them interplead, *comme semble*, *Smith v. Targett*, 2 Anst. 529. *Contrà*, *Surrey v. Lord Waltham*, Id. 531. n.

14. Where one claimant seeks a certain rent from a tenant in possession, the other unliquidated damages for use and occupation, he cannot make them interplead. *Johnson v. Atkinson*, 3 Anst. 798.

15. Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger, under a title adverse to that of the landlord. On suspicion of collusion, an inquiry into the circumstances was directed;

directed; and the report confirming the fraud, the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor; the latter to shew cause why he should not be struck off the roll. *Dungey v. Angove*, 2 Ves. 304.

16. Interpleader may be in favour of an insurance company against the landlord of premises which have been burnt down, but insured by him; and the tenant of the premises under an agreement for a lease; and claiming therefore the right to have the money laid out in rebuilding the premises. *Paris v. Gilham*, Cooper, 56.

17. Where one rector claims a modus, and the rector of another parish claims tithes in kind of the same lands, they cannot be made to interplead. *Woolaston v. Wright*, 3 Anst. 801.

18. Interpleader on an attorney's claim of lien upon a sum awarded as damages under a judgment obtained by the client against the plaintiff. — *v. Bolton*, 18 Ves. jun. 292.

19. An auctioneer is the agent as well of the purchaser as of the vendor; and if the vendor commence an action against him for the recovery of the deposit, he may file a bill of interpleader for the purpose of ascertaining to whom it belongs. *Fairbrother v. Prattent*, 1 Dan. 64.

20. Where money in the public funds is the subject of a suit, to which the bank is made a defendant, the court will not, on the application of the bank, make any order on the litigating parties to restrain them from proceeding at law against the bank to compel a transfer, but they must file a bill of interpleader. *Birch v. Corbin*, 1 Cox, 144.

21. Captain may file a bill of interpleader where parties claim adversely under the bill of lading. *Sed quære* where the adverse claims are paramount to the bill of lading. *Lowe v. —*, 3 Mad. 277.

22. Sheriff levying upon goods alleged to be in settlement, cannot maintain a bill of interpleader. *Slingsby v. Boulton*, 1 Ves. & Beam. 394.

## 2. Value essential to a bill of interpleader.

An interpleading bill, by a tenant against two claimants of the inheritance, where the whole rent actually due is under 10*l.*, will be dismissed, as beneath the dignity of the court. *Smith v. Targett*, 2 Anst. 529.

## 3. An interpleading bill never suggests a case.

An interpleading bill never suggests a case. 2 Ves. 311.

## 4. Form of the affidavit on an interpleading bill.

As to the propriety of the affidavit to an interpleading bill, denying the knowledge of the defendants, *Quære*. 2 Ves. & Beam. 410.

## 5. Force of the affidavit on an interpleading bill.

1. Affidavit, with interpleading bill, conclusive. 2 Ves. & Beam. 410.

2. Collusion not to be presumed against the affidavit of the plaintiff in interpleading bill: nor can counter-affidavit prevail against it. *Langaton v. Boylston*, 2 Ves. 102.

## 6. Questions arising on bills of interpleader, how disposed of.

1. Questions arising on bills of interpleader are disposed of in various modes, according to the nature of the question and the manner in which it is brought before the court. *Angell v. Hadden*, 16 Ves. 202.

2. Interpleading bill is considered as putting the defendants to contest their respective claims; as a bill by an executor or trustee to obtain the direction of the court upon the adverse claims of the defendants. Therefore at the hearing, if the question between the defendants is ripe for decision, the court directs an action, or an issue, or a reference to the master; as best suited to the nature of the case. Accordingly, upon objections under the sanity-act, a reference was directed, whether proper memorials were enrolled,

rolled, and to state the priorities of such as are valid. *Angell v. Hadden*, 16 Ves. 202.

7. *Course of proceeding in a bill of interpleader where one claimant establishes his title by evidence, the other makes default at the hearing.*

Interpleading bill by a tenant to ascertain, to which of two claimants he was to pay his rent. The one establishing his title by evidence, the other making default at the hearing; payment decreed to the former; and a perpetual injunction against the other. 16 Ves. 203.

8. *Course of proceeding in interpleader where some defendants are abroad.*

Interpleader; all the defendants but one residing out of the jurisdiction in Scotland. The plaintiff, after a reasonable time, having used due diligence to bring them in, being decreed to give up the subject to the only defendant appearing, protected afterwards against the others by injunction; and order that service on the attorney should be good. *Stevenson v. Anderson*, 2 Ves. & Beam. 407.

9. *Effect of a bill of interpleader.*

Plaintiff in a bill of interpleader admits a title against himself in all the defendants; and cannot say, that as to some he is a wrong-doer. *Slingsby v. Bolton*, 1 Ves. & Beam. 334.

10. *Bill to perpetuate testimony, when necessary or appropriate.*

1. To support a bill to perpetuate testimony, plaintiff must have an interest; but the minuteness or remoteness of it is no objection. A mere contingency, however near and valuable, (with the exception of the case of a wager,) the expectation of issue in tail, heir apparent, or next of kin of a lunatic, is not sufficient. Therefore, a demurrer to a bill by a tenant in tail in remainder, and his issue, to perpetuate testimony of the validity of his marriage, allowed. Whether a bill could be maintained by the trustees to preserve contingent remainders, representing also the legal inheritance of the whole estate, *Quere*. *Allan v. Allan*, 15 Ves. 130.

2. The court will not perpetuate testimony of a right, which may be immediately barred by the defendant. 6 Ves. 262.

3. Bill to perpetuate the testimony of witnesses will not lie, where the plaintiff may try his right at law. *Lord North v. Lord Gray*, Dick 14.

4. Bill to perpetuate testimony of the legitimacy of the plaintiffs, entitled in remainder in tail after an estate for life: demurrer by the 7th and 8th in remainder after the plaintiffs and the other defendants, all infants, over-ruled: any interest, however slight, being sufficient. *Lord Dursley v. Fitzhardinge*, 6 Ves. 251.

5. The next of kin of a lunatic, however hopeless his condition, have no interest whatever in the property; and therefore cannot sustain a bill to perpetuate testimony. So an heir apparent cannot have a writ *de ventre inspiciendo*. But they may contract upon their expectations; and may perpetuate testimony with reference to the interest so created. 6 Ves. 260.

11. *Preliminaries to a bill to perpetuate testimony.*

1. Demurrer to a bill to examine witnesses to perpetuate their testimony, for that the plaintiff had not established his right at law, over-ruled. *Cox v. Colley*, Dick. 55.

2. Demurrer to a bill to perpetuate the testimony of witnesses, for that the plaintiffs have not ascertained their title at law, and had not proper parties to the bill, allowed. *Dalton v. Thomson*, Dick. 97.

12. *Bill to perpetuate testimony, praying relief on the same matters, is good.*

A bill to perpetuate testimony, going on to pray relief on the same matters, is good. *Scarr v. Trinity College*, 3 Anst. 768.

13. *Of the requisite precision in bills to perpetuate testimony.*

Demurrer allowed to bill to perpetuate testimony to a right of common and of way, because charged so generally, that defendant could not know the point to be examined to. *Cresset v. Mitton*, 1 Ves. 449. 3 B. C. C. 481.

14. *As to bringing on to a hearing bills to perpetuate testimony.*

Bill to perpetuate testimony merely, ought not to be brought to a hearing; but if it pray relief, the defendant may set it down for a dismissal. *Vaughan v. Lord Fitzgerald*, 1 Sch. & Lef. 316.

15. *A bill of discovery, when necessary or appropriate.*

1. After a verdict at law, a bill with proper charges, may be sustained for the discovery of documents necessary to a fair decision. *Field v. Beaumont*, Swast. 209.

2. See in tit. DISCOVERY.

16. *Bill of revivor, when necessary or appropriate.*

1. Upon the marriage of a female plaintiff, revivor alone will not do, where the interests of third persons, viz. trustees and the issue, must be brought forward; making a supplemental bill necessary. But a motion to stay an attachment for want of answer was refused; being made with consent of the husband, in the face of his covenant to permit the suit to be revived and prosecuted by the trustees in his name for the benefit of the family. *Merrywether v. Mellish*, 13 Ves. 161.

2. An abatement by bankruptcy of a defendant, an executor, after a decree for an account; supplemental bill in nature of bill of revivor, necessary. *Russel v. Sharp*, 1 Ves. & Beam. 500.

3. Plea to a bill of revivor, that it was for costs only; the costs having been ordered to be paid into the bank, plea overruled. *Hall v. Smith*, 1 B. C. C. 438.

4. Held, once, no revivor for costs, except after decree to account; but since over-ruled. *Lowten v. Colchester*, 2 Mer. 113.

5. The general rule being, that there shall be no revivor for costs alone, yet, where the costs have been taxed previous to the abatement, it seems there is a right to revive merely for the purpose of having them paid; and where the abatement has happened by the death of the party, in whose favour the costs were awarded, it is the settled practice of the court, that his representative may revive for such purpose. *Lowten v. Colchester*, 2 Mer. 113.

6. Revivor for costs decreed to be paid out of a particular fund, is an exception to the rule of there being no revivor for costs alone. *Lowten v. Colchester*, 2 Mer. 115.

7. A cause is not out of court, for the purpose of revivor for costs, in consequence of the bill being dismissed. *Lowten v. Colchester*, 2 Mer. 115.

17. *Of the time for filing a bill of revivor.*

1. Plaintiff may revive upon the time for answering being out, but the defendant is debarred from making his defence. *Wakelyn v. Wathill*, Dick. 18.

2. Original bill being abated by intermarriage of the plaintiff, and not being revived until after a cross bill is filed, loses its priority. *Smart v. Floyer*, Dick. 260.

18. *A bill of revivor, held bad for not charging that plaintiff had proved her husband's will.*

Demurrer to bill of revivor, for not charging that plaintiff had proved her husband's will, allowed. *Humphreys v. Incedon*, Dick. 38.

19. *Bill of revivor taken pro-confesso.*

Bill of revivor taken pro-confesso. *Seagood v. Ferraud*, Dick. 300.

20. *Re-*



*20. Revivor of original bill by plaintiff in a revived suit.*

The plaintiff in a revived suit may revive the original bill, in the same manner as the original plaintiff might, had he been living. *Philips v. Derby*, Dick. 98.

*21. General rule as to revivor by a defendant.*

Defendant cannot revive, except after a decree to account, or where the defendant has some interest in the farther prosecution of the suit : not, therefore, where his only object was to dissolve an injunction, and proceed at law. *Horwood v. Schmedes*. 12 Ves. 311.

*22. Revivor by defendant after a decree.*

After a decree the suit may be revived by a defendant, or the representative of a deceased defendant. *Williams v. Cooke*, 10 Ves. 406.

*23. Revivor by defendant on plaintiff's neglect to prosecute a bill of revivor.*

If a plaintiff file a bill to revive after a decree, and neglect to revive ; on the time for the defendant's answering being out, the defendant allowed to revive, and carry on the decree under the plaintiff's bill. *Whitehear v. Hughes*, Dick. 283.

*24. Suit revived by scire facias.*

Suit revived by *scire facias*, and costs, of a plaintiff, who had married since the decree, ordered to be taxed. *Sayer v. Sayer*, Dick. 42.

*25. Supplemental bill, when necessary or appropriate.*

1. Supplemental bill allowed for the purpose of adding a party. *Jones v. Jones*, Dick. 96.

2. Supplemental bill to carry a decree into execution after an appeal. *Woodward v. Woodward*, Dick. 33.

3. Where a decree has been had against a prior tenant in tail, affecting the rights of tenants in tail in remainder, the latter may file a supplemental bill to make himself party to the former suit, for the purpose of appealing. *Giffard v. Host*, 1 Sch. & Lef. 386. 412.

4. Bill for account of profits made by breach of trust, and injunction to prevent recovery at law of another sum under the same circumstances ; upon the answer coming in, the injunction was dissolved, and the money paid under the action : not necessary to charge that fact by supplemental bill. *Massey v. Davies*, 2 Ves. 317.

5. Tenant in tail claiming upon the death of a former tenant in tail without issue, not through or under him, but by a new limitation in remainder, entitled to continue the suit of the former tenant in tail, and to the benefit of the proceedings, by a supplemental bill. 9 Ves. 37.

6. It is not necessary to file a supplemental bill, in order to state that an *habere* has been executed and possession changed, pending the cause. 1 Sch. & Lef. 306.

7. After a great lapse of time and the deaths of parties, from the residence abroad of the defendant, and upon an affidavit by him and his solicitor, that they had not discovered deeds material for his defence, until after issue joined ; leave was given to file a supplemental bill to put them in issue, and they were admitted in evidence upon a rehearing. From the evidence of those deeds it appeared, that the acts of the parties, as proved on the original hearing, proceeded from a mistake of their rights, and the decree was accordingly reversed. *Barrington v. O'Brien*, 2 B. & B. 140.

8. Heir at law filing a bill to redeem a mortgage, having also bought in the claim of a third person to the heirship, if he himself is found upon an issue not heir, he cannot, by supplemental bill, have the benefit of the original suit, as the purchase of the heirship of such third person ; on demurrer to supplemental bill. *Tomkins v. Lethbridge*, Cooper, 43.

9. Bill

9. Bill by an administrator, *durante minore etate*. The infant attained twenty-one before the hearing. A supplemental bill is necessary. *Stubbs v. Leigh*, 1 Cox, 128.

#### 26. Structure of supplemental bills.

1. Bill for the purpose of raising a charge against the inheritance, divided into estates tail. An intermediate remainder coming *in esse*, a bill stating the former proceedings is allegation sufficient to put the facts in issue against him; and even if witnesses examined, he shall have the benefit. The principle must be applied both for and against him; subject to this, that where his interest is not affected by the same circumstances, he may bring forward the equities belonging to those different circumstances, as distinguishing his case, whether plaintiff or defendant. 9 Ves. 59, 60.

2. Demurrer allowed to a supplemental bill, as stating circumstances subsequent, not only to the original bill, but to publication; first, as not properly supplemental matter; secondly, as not material. If material, the benefit might be obtained in another shape; perhaps, by a special application for the opportunity of examining witnesses, or a bill of discovery; as the object may be discovery only, or also relief; and in that case, that the answer or evidence may be read at the hearing. *Milne v. Lord Harewood*, 17 Ves. 144.

3. A supplemental bill, stating facts posterior to the original bill, but immaterial, *e.g.* facts which might be considered by the master under the decree to be made in the original suit, held to be demurrable. *Adams v. Dowling*, 2 Mad. 53.

#### 27. Time for hearing a supplemental bill, in nature of a bill of review.

Supplemental bill, in nature of a bill of review, cannot be heard till a petition to rehear the original cause is presented. *Moore v. Moore*, 1 Dick. 66.

#### 28. Supplemental bill, in nature of a bill of revivor, to execute a decree.

Supplemental bill, in nature of a bill of revivor, will not lie to carry a former decree into execution, which has not been made absolute. *Brown v. Heathcote*, 1 Dick. 100.

#### 29. Cross bill, when necessary or appropriate.

1. If defence to bill for specific performance of agreement for a purchase, depends merely on want of title in vendor, defendant ought to rest on his answer, and not file cross bill to have it delivered up, or to prevent an action; for plaintiff cannot succeed at law. *Hilton v. Barrow*, 1 Ves. 284.

2. If a creditor coming in under a decree, requires relief which cannot be had by rehearing the original cause, he ought to file a cross bill. *Latouche v. Ld. Dunsany*, 1 Sch. & Lef. 149.

#### 30. Of using at the hearing of the original cause, a cross bill ordered to be taken *pro confesso*.

A cross bill taken *pro confesso*, ordered upon motion to be read at the hearing of the original cause. *Carey v. Gertcken*, 2 Mad. 43.

#### 31. Bill of review, when necessary or appropriate.

1. Grounds of bill of review: error apparent: new evidence, discovered since publication, as to a material fact. 16 Ves. 350.

2. Error discovered, after report confirmed; ground for bill of review. *Werge v. Bradley*, Dick. 570.

3. Error apparent, to support a bill of review, must be plain and obvious; as, a decree against an infant without a day to shew cause; not merely an erroneous judgment, which might be the subject of a rehearing. *Perry v. Phelps*, 17 Ves. 173.

4. A bill of review, with matter came to the party's knowledge since the hearing, lies, where the plaintiff in his bill has, since the hearing, discovered

covered matter which would vary the decree; and where, if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court: for, if the matter was known to the other party, and such as, in conscience, he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill. *Manaton v. Molesworth*, 1 Eden, 25.

5. Petition for leave to file a bill of review, after a decree, affirmed on rehearing, and pending an appeal to the house of lords, for the purpose of introducing evidence, admitted by surprise, viz. not in answer to an interrogatory, nor the subject directly in issue, the decree not being made upon that evidence, was refused with costs. *Willan v. Willan*, 16 Ves. 72.

6. Bill of review, or a supplemental bill in nature of it, where the decree has not been enrolled, upon new evidence, discovered since publication, not permitted, to introduce a new case, of which the party was sufficiently apprised to enable him, with reasonable diligence, to have put it upon the record originally. *Young v. Keighly*, 16 Ves. 348.

7. Whether a bill can be maintained as a bill of review, in case the decree should have been enrolled, or, if not, as a bill of revivor and supplement, with a prayer in the alternative, adapted to either case; whether there is any instance of a bill in the nature of a bill of review upon error apparent, or matter of law; to be collected from the pleadings and evidence, a supplemental bill being required only to introduce new facts, to come on with a rehearing of the original cause, *Quære*. *Perry v. Phelps*, 17 Ves. 173.

8. To a bill of review and reversal for error apparent on the decree, a plea of the decree, and a demurrer against opening the enrolment, allowed; the facts constituting the error, not forming part of the record of the decree, being neither proved or relied on at the original hearing. *O'Brien v. Connor*, 2 B. & B. 146.

9. Allowance of a debt in the master's report, which had been obtained by fraud, rectified; the proper mode of proceeding being by original bill, not by bill of review; and held, that it was not necessary to pray specifically that the act of the court should be set aside, plaintiff having made a sufficient case to obtain that relief, under the prayer for general relief. *Manaton v. Molesworth*, 1 Eden, 18.

### 32. *Leave of the court, when necessary to a bill of review.*

1. It is in the discretion of the court to give leave to file a bill of review on the discovery of new evidence. It was refused in this case, as it tended to deprive creditors of payment of their just debts. *Wilson v. Webb*, 2 Cox, 3.

2. For a bill of review on newly-discovered facts, the leave of the court necessary. 17 Ves. 177.

### 33. *Bill of review may be also a bill of revivor and supplement.*

Bill of review may be also a bill of revivor and supplement. *Perry v. Philips*, 17 Ves. 173.

### 34. *Distinction between a bill of review, and a supplemental bill in nature of a bill of review.*

1. The distinction between a bill of review, and a supplemental bill in nature of a bill of review. *Gartside v. Isherwood*, Dick. 612.

2. Distinction between a bill of review, and a supplemental bill in nature of it. If the decree is enrolled, it is strictly a bill of review; and prays that the decree may be reviewed and reversed; if not enrolled, the prayer is, that the cause may be reheard. In either, matter of supplement or revivor may be introduced, with the proper prayer. 17 Ves. 177.

### 35. *Original bill to vary a decree.*

Demurrer to an original bill to vary a decree, allowed. *Davis v. Larner*, Dick. 42.

### 36. *Bills*

36. *Bills quia timet, when necessary or appropriate.*

1. Demurrer allowed to a bill to have a presentation to a living upon the next avoidance delivered up; charging the defendant with gross misconduct in obtaining it, and in other respects, while a private tutor in the family. *McNamara v. ———*, 5 Ves. 824.

2. Whether a bill by a remote remainder-man to set aside a deed executed by the tenant for life, who was also trustee, and by the first remainder-man in tail of an estate *per autre vie*, be maintainable during the life of the tenant for life. *Quære*. 1 Ball & Beatty, 53.

37. *Bill for an issue to try a right to a manor, dismissed.*

Bill for an issue to try a right to a manor, dismissed. *Welby v. Duke of Rutland*, Dick. 442.

## 2. Of the structure of bills in general.

1. *Formerly a bill contained little more than the statement.*

Formerly a bill contained little more than the statement. 11 Ves. 574.

2. *The plaintiff's equity must appear in the stating part of the bill.*

The plaintiff's equity must appear in the stating part of the bill. *Flint v. Field*, 2 Anst. 543.

3. *Mere description is not a sufficient averment of fact.*

Mere description in a bill not sufficient as an averment of a fact; but amendment allowed. *Albrectht v. Sussman*, 2 Ves. & Beam. 323.

4. *As to what circumstances the plaintiff may interrogate.*

1. Under the general charge as to the fact of payment, the plaintiff may interrogate as to all the circumstances that go to prove or disprove the truth of the fact, as when, where, &c. without particular charges. *Faulder v. Stuart*, 11 Ves. 290.

2. Though under the allegation of a fact by a bill, the plaintiff may interrogate to incidental circumstances, he cannot as to a distinct subject. *Belleck v. Richardson*, 11 Ves. 373.

5. *Mode of construing the interrogating part of the bill.*

The interrogating part of a bill is to be construed by the alleging part; and not to be considered more extensive. 6 Ves. 62.

6. *The prayer of a bill is material in construing charges not direct.*

Prayer, material in construing charges not direct. 18 Ves. jun. 80.

7. *Relief may be given under the general prayer, if consistent with the case made by the bill.*

Relief under the general prayer, if consistent with the case made by the bill. *Hiern v. Mill*, 13 Ves. 114.

8. *Relief improperly prayed, cannot be given under the general prayer.*

The plaintiff praying relief, to which he is not entitled, viz. a sale under a trust, instead of redemption or foreclosure, as a mortgagee, cannot have a different relief under the general prayer. But the proper relief may be obtained by amendment; and for that purpose another party being necessary, liberty was given to amend by adding parties (which includes the introduction to the statement of facts consequential upon that addition), and praying such relief as he may be entitled to, according to the case made. *Pak v. Lord Clinton*, 12 Ves. 48.

9. *Where the relief sought is inconsistent with the frame of the bill, it cannot be given under the general prayer.*

Testator by codicil in 1776, reciting, that he had devised his real estate by his last will, dated 25th November 1752, charged his real estates with his

his debts, and legacies given by the codicil, and appointed executors: the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil, stating that the will in 1756, was executed in pursuance of an agreement to make mutual wills; that the testator, by the death of the other party, was bound, if not in law, in honour; and did not mean to revoke the will of 1756, and revive that of 1752; and praying that the will of 1756, and the codicil, might be established, the trusts carried into execution, and the legacy paid: upon an issue directed, the will of 1752 was established; evidence of mistake being rejected: on farther directions, the plaintiffs relied on the agreement, and offered evidence in support of it: the bill was dismissed, the lord chancellor being of opinion, that the relief sought was inconsistent with the frame of the bill; and therefore could not be given under the general prayer; that the evidence ought not to be received; and that, upon the evidence, the agreement was uncertain and unfair, and therefore not to be executed. *Lord Walpole v. Lord Orford*, 3 Ves. 402.

10. *Demurrer to a bill, only praying a commission to enable plaintiff to go to law, overruled.*

Demurrer to bill, only praying a commission to enable plaintiff to go to law, over-ruled. *Mendez v. Barnard*, 1 Dick. 65.

#### 11. *Of praying interest.*

Interest refused, because not prayed by the bill. *Weymouth v. Boyer*, 1 Ves. 418.

12. *Relief prayed by the bill, but given up at the hearing, must be expressly waived on the record.*

Relief prayed by the bill, but given up at the hearing, must be expressly waived on the record. *Dundas v. Dutens*, 1 Ves. 197.

#### 13. *In relation to irrelevancy and scandal.*

Scandalous matter, as allegations reflecting upon moral character, and not relevant to the subject, to be expunged from the record, whether in a suit, or bankruptcy, and without an application. 15 Ves. 477.

#### 14. *What allegations are or are not impertinent or scandalous.*

Allegations, material to the issue, are not impertinent, though they may be false; and, of whatever nature, are not scandalous. 15 Ves. 477.

#### 15. *Where some of the parties are out of the jurisdiction.*

The practice in England; when some of the parties are out of the jurisdiction, and others within it, is, to charge the fact in the bill, that such parties are out of the jurisdiction, and then the court can proceed, without prejudice to the rights of such parties. 1 Sch. & Lef. 240.

### 3. *Of the structure of bills in particular cases.*

#### 1. *An ejectment bill.*

Bill charging that the defendants had got the title-deeds and mixed the boundaries, prayed a discovery, possession, and an account; demurrer allowed. *Loker v. Rolle*, 3 Ves. 4.

#### 2. *An injunction bill.*

1. Plaintiff entitled to an injunction on affidavit, as, to stay proceedings at law by a party abroad, must state the whole of his case within his knowledge upon the original bill; and cannot after answer, upon which he neither moved nor excepted, have the injunction upon amendment and affidavit, as a general rule; subject to exception, as circumstances come to his knowledge subsequently: surprise, &c. *Norris v. Kennedy*, 11 Ves. 465.

2. Plain-

2. Plaintiff, in a bill for an injunction, must state at once the whole case within his knowledge: but the court, though very jealous of amendment, without prejudice to the injunction, permits even re-amendment; ascertaining precisely its nature, and by a clear and positive affidavit that the plaintiff had not a knowledge of the facts, enabling him to bring that case upon the record sooner. *Sharp v. Ashton*, 9 Ves. & Beam. 144.

3. The defendant sued at law on an indemnity-bond; the plaintiff filed this bill for an injunction, without offering to make any recompence for the damage actually sustained. The bill was dismissed. *Godbolt v. Watts*, 2 Anst. 543.

4. Demurrer to bill by heir at law, for a discovery, seeking also relief, allowed; the relief sought being, first, that an issue might be directed to try the question in a different county, on an allegation of undue influence — as heir at law not being entitled to any issue except by consent, and a bill in equity not lying to change the venue. Secondly, for the production of title deeds, without its being shown how they can be of service in assisting him to recover at law. Thirdly, to restrain the defendant (devisee) from setting up outstanding terms, unsupported by allegation that there are any outstanding terms, which may be set up. Fourthly, for an injunction to stay waste and destruction, &c. and for a receiver; there being no instance of the court so interfering as between heir at law and devisee, where their adverse rights are in litigation; and on the ground of negligence and delay; the bill having been filed more than two years after the death of the presumed testator, and no action yet brought; although the commission of the alleged acts of waste and destruction stated to have been immediately after his death. Fifthly, that the plaintiff may be let into possession of copyholds unsurrendered to the use of the will; that being mere legal relief, although he might have been entitled to the discovery whether there were any copyholds unsurrendered. The bill also going on to pray, in the character of one of the next of kin, for an injunction from interfering with the personal estate, and a receiver; the injunction asked being for an indefinite period, and no allegation of a suit depending in the ecclesiastical court. And although some of the discovery sought might have been proper to be obtained on a bill for discovery only, yet the demurrer allowed, as to that also, upon the ground that, to support a general demurrer to a bill seeking discovery and relief, it is sufficient to shew that the plaintiff is not entitled to the relief he prays. *Jones v. Jones*, 3 Mer. 162.

3. *Bill to restrain an action upon different policies on different ships, between the same parties, not multifarious.*

A bill filed to restrain a plaintiff at law from proceeding upon five different policies of insurance, effected upon different ships, between the same parties at the same time, is not demurrable for multifariousness. *Kensington v. White*, 3 Price, 167.

4. *The joinder of joint and several demands by the same bill is multifarious.*

Joint and separate demands by the same bill; demurrer allowed. *Harrison v. Hogg*, 2 Ves. 323.

5. *Bill against several purchasers and others, is multifarious.*

A demurrer for multifariousness allowed, the bill being against several purchasers and others. *Brookes v. Lord Whitworth*, 1 Mad. 86.

6. *Distinct bills necessary for distinct invasions of a patent; secus of a right of fishery, or the custom of a mill.*

There must be separate bills upon distinct invasions of a patent; otherwise, of a right of fishery, or the custom of a mill. 2 Ves. 487.

7. *Prayer*

7. *Prayer of costs against an agent involved in a fraud.*

Where an agent is so involved in a fraud that the court will charge him with costs, though relief cannot be prayed against him, yet if the costs are not prayed against him, a demurrer lies. 15 Ves. 164.

8. *A bill to open an account.*

1. Bill to open a settled account must state specific errors. *Johnson v. Curtis*, 3 B. C. C. 266. *Taylor v. Haylin*, 2 B. C. C. 310. *Cox*, 435. 9 Ves. 266. 14 Ves. 579.

2. A settled account between attorney and client opened upon general allegations by the client of error, admitted; though no specific errors were pointed out. *Matthews v. Wallwyn*, 4 Ves. 118.

9. *A bill for an account after a previous arbitrement.*

On a bill for an account after an award, on the ground of matters stated not to have been comprehended in it, it must appear clearly that the award is not final, otherwise a plea of the award is good. *Routh v. Peace*, 3 Anst. 637.

10. *A bill by an attorney for his bill.*

A solicitor suing for his bill, need not state all the circumstances required by the statute 2 Geo. II. c. 23. s. 22.; being matter of evidence. 8 Ves. 9.

11. *Statement of a bargain and sale.*

Defendant cannot demur, because a feoffment is stated without stating livery, or a bargain and sale without stating enrolment; they will be intended perfect. 2 Ves. 327.

12. *A bill demanding writings, not stating them to be in defendants' possession.*

If a plaintiff makes a demand on written instruments, without stating that they are in his possession, whether the court will infer that fact, unless an affidavit is made to the contrary, *quære*. *The Princess of Wales v. The Earl of Liverpool*, Swanst. 22.

13. *Claiming in right of their estates or otherwise, too general.*

To perpetuate testimony of a right of common and way, the plaintiffs claimed in right of their estates or otherwise; this is too loose: a demurrer therefore allowed. *Cresset v. Mylton*, 3 B. C. C. 481. 1 Ves. 449.

14. *A bill stating generally, that under some deeds in defendant's custody plaintiff was entitled to some interest in some estates in their possession, too general.*

Bill stating generally that under some deeds in the custody of the defendants, plaintiff was entitled to some interest in some estates in their possession, prayed a discovery and delivery of the title deeds, possession of the estates, and an account: demurrer to the whole bill allowed. *Ryves v. Ryves*. 3 Ves. 343.

15. *Claiming in right of their estates or otherwise is too loose, on a bill to perpetuate testimony of a right of common and way.*

Vide 3 B. C. C. 481.

16. *A bill to discover money won at play.*

In a bill of discovery to support an action by a common informer, for money won at play, it is sufficient to state that the defendants, or some of them, for the benefit, and on account of all, played and won. *Cowan v. Philips*, 3 Anst. 843.

17. *A bill seeking a discovery of a pedigree.*

Bill prayed, that the defendant might state the particulars of his pedigree as heir, and of the births, baptisms, marriages, deaths, or burials; demurrer allowed. *Ivy v. Kekewick*, 2 Ves. 679.

18. *Statement by an heir at law of his pedigree.*

1. Plaintiff claimed as heir at law of A. stating, that one person, through whom she made title, had three sons, and that she claimed under the second son, but without alleging that the first son died without issue. Demurrer, "for that the plaintiff by the bill had not sufficiently stated the pedigree by which she made title," was overruled. *Delorne v. Hollingsworth*, 1 Cox, 421.

2. Upon bill by heir at law for discovering, and delivering up, or depositing title deeds, against persons in possession of them as executors, and in possession of the premises by agreement with a tenant by the courtesy, plaintiff need not state every link of his pedigree. *Ford v. Peering*, 1 Ves. 72.

19. *Demurrer to the bill, as stating the defendant's estate, viz. that he is seized in fee, or otherwise well entitled to, too generally, overruled.*

Demurrer, for cause, that the bill stated the defendant's estate not with sufficient certainty, viz. that he "is seized in fee, or otherwise well entitled to," and *ore tenus*, that the reversioner was not a party, over-ruled. *Baring v. Nash*, 1 Ves. & Beam. 551.

20. *Statement that a party was factor.*

Charge that defendant was appointed resident at the East India Company's factory at M., not a sufficient charge that he was factor. *East India Company v. Henchman*, 1 Ves. 287.

21. *Statement of a feoffment.*

*Vide* 2 Ves. 327.

22. *General charge of combination to defraud, too loose.*

General charge of combination to defraud, too loose. *East India Company v. Henchman*, 1 Ves. 287.

23. *Of the degree of certainty in charging fraud.*

The charge by the bill of fraud, too general. *Palmer v. Mure*, Dick. 489.

24. *What a sufficient connection of fraud with the particular transaction.*

Demurrer allowed; the bill not connecting the fraud with the transaction sufficiently. *East India Company v. Henchman*, 1 Ves. 287.

25. *What allegation is sufficiently precise to put in issue a person's insanity.*

A charge in a bill that A. "was of a weak and feeble understanding, approaching almost to idiotcy," was an allegation sufficiently precise (no demurrer being taken) to put in issue that A. was "of insane memory." *Carew v. Johnston*, 2 Sch. & Lef. 280. 305.

26. *A bill by judgment-creditors in Jamaica.*

Demurrer allowed to a bill by judgment-creditors in Jamaica, because it did not state the effect of the judgment there. *Cathcart v. Lewis*, 3 B. C. C. 516.

27. *Statement of, by whom the duties, claimed by the city of London, were payable.*

Demurrer allowed: the bill not alleging with sufficient certainty, by whom the duties claimed by the city of London under letters patent, in respect of which a discovery was prayed in aid of an action, were payable. *The Mayor, &c. of London v. Levy*, 8 Ves. 398.



28. *Statement of a valid legal conveyance to the mortgagee, on a bill to redeem.*  
Vide 3 Anst. 715.

29. *As to interrogating to the fact of payment.*  
Vide 11 Ves. 290.

30. *A bill for a specific performance of an agreement.*

1. No relief under an agreement, stated by the answer; the bill not being adapted to that agreement; but framed upon a different ground, which failed. *Pilling v. Armitage*, 12 Ves. 78.

2. To obtain a specific performance of a contract, the subject must be proved, as described. *Daniels v. Davison*, 16 Ves. 249.

3. On a bill for a specific execution, relying on part performance, the agreement must be proved, as stated. 1 Ball & Beatty, 551.

4. The terms of an agreement, sought to be specifically executed, must be accurately stated, and the case must be proved, as stated on the record. *Lord Ormond v. Anderson*, 2 B. & B. 369.

5. Allegation of the bill that the plaintiff, the tenant, was to pay taxes and do necessary repairs, not proved, is no substantial variance; being an admission against himself, and immaterial from a tenant's legal liability. *Gregory v. Mighell*, 18 Ves. 328.

6. Bill for specific performance of a parol agreement to renew, plaintiff having built a house; the only witness for the plaintiff proved an agreement different from that in the bill; two defendants, by answer, stated an agreement different from both; in strictness the bill ought to be dismissed; but specific performance was decreed according to the answers, with costs against the plaintiff. *Mortimer v. Orchard*, 2 Ves. 243.

7. A bill alleging a written agreement may be sustained by evidence of a parol agreement. *Spurrier v. Fitzgerald*, 6 Ves. 548.

8. Bill for specific performance of an agreement dismissed; the agreement appearing from letters produced to have been different from that set up by the bill and proved by one witness. *Leigh v. Haverfield*, 5 Ves. 452.

9. Bill praying execution of an agreement for a lease of lives, ought to name the lives to be inserted. *O'Herlily v. Hedges*, 1 Sch. & Lef. 123. 128.

31. *Extent of the description of the right to tithes in a bill for an account.*

The court will not dismiss the bill of a vicar, who claims by it tithes throughout a whole parish, and only proves his claim in part of it; nor if the issues, directed as to the parts wherein he has not made out his title, should be found against him on the trial. But *semble*, the court will not give him costs, where he seeks tithes generally, and recovers only in part. *Byam v. Booth and others*, 2 Price, 231.

32. *Of waiving the treble value in a bill for an account of tithes.*

In a bill for account of tithes it is not necessary to waive the treble value. *Wools v. Walley*, 1 Anst. 100.

33. *Statement of payment in a bill to establish a modus.*

1. The bill stated the modus to have been immemorially paid by the owners and occupiers, or some of them; this is good. *Scarr v. Trinity College*, 3 Anst. 765-6.

2. The bill stated the modus to have been immemorially paid by the district by contribution. No contribution had ever in fact been made. Yet it was held good; for the payment being in its nature contributory, each payment was, as between the rector and parishioners, a payment by contribution. *Scarr v. Trinity College*, 3 Anst. 767.

34. *A bill to establish a modus in districts.*

A bill to establish a modus stated, that in the parish of A., in Yorkshire, there

there are certain ancient townships, hamlets, or districts, called A., B., and C, "distinguished by certain well-known boundaries and limits," and claimed the modus in respect of each. This is good, without setting forth the limits or extent of each district, or distinguishing whether each is a township, hamlet, or district. *Scarr v. Trinity College*, 3 Anst. 764. *Chaytor v. Trinity College*, Id. 841.

35. *A bill to establish a modus for an ancient farm.*

A bill to establish a farm modus, setting forth the abutments of the farm, and averring that the modus had immemorially been paid for *the said* farm, is sufficient, without expressly averring it to be an ancient farm. *Lord Stawell v. Atkins*, 2 Anst. 564.

36. *A bill to establish a modus for every ancient farm.*

A bill to establish a modus for every ancient farm, stating the whole parish to consist of ancient farms, but not setting forth the abutments of each, is bad. *Scott v. Allgood*, 1 Anst. 16.

37. *A bill to have an usurious security delivered up.*

Demurrer to a cross bill to have an usurious security delivered up, not offering to pay the sum really due, allowed. *Mason v. Gardiner*, 1 B. C. C. 436.

### III. In relation to informations.

#### 1. When appropriate.

*Of the distinction between the course by bill and by information.*

Distinction between information and bill: the former not necessary, where the subject is a public-right, as the election of a minister by the parishioners or congregation, unless connected with the revenue. 3 Ves. & Beam. 154.

#### 2. Structure of informations.

1. *A case in which an information against a corporation was held multifarious.*

Information against a corporation, stating that they were seized of real estates, partly for purposes of public utility, and other part in trust for private charity; and charging a general misapplication of the funds, and praying relief accordingly: a demurrer for multifariousness was allowed. *Attorney general v. Corporation of Carmarthen*, Cooper, 90.

2. *Structure of an information to remove trustees of charity, ordered to be elected out of a certain parish.*

Trustees of a charity are ordered to be elected out of a certain parish; an information to remove them, as not having been so elected, must state that there were inhabitants fit to be elected. *Attorney general v. Cowper*, 1 B. C. C. 439.

### IV. In relation to pleas.

#### 1. When a plea is necessary or appropriate — when not.

##### 1. *Where the bill is demurrable on the face of it.*

Plea to a bill, on the face of it demurrable, overruled. *Billing v. Flight*, 1 Mad. 230.

##### 2. *Plea of a fact in bar to a bill of discovery, does not lie.*

Plea of a fact in bar to a bill of discovery, does not lie, as it would be trying the bar in equity, which is more proper to be tried at law. *Hindman v. Taylor*, Dick. 651.

3. *In the case of an executor relying on the statute of limitations.*

Executor not bound to plead the statute of limitations; but after the decree the objection may be taken against other creditors coming in before the master. 15 Ves. 498.

4. *To a bill of revivor.*

1. Plea to a bill of revivor merely for costs, the costs having been taxed, overruled. Hall v. Smith, Dick. 649.

2. Plea to a bill of revivor, filed in 1781, to prosecute a decree in 1752, and which had slept from that time, overruled, as not being proper; but said by lord chancellor to be such a case as the court could not, on hearing the cause, order to be carried on. Wilkinson v. Lovell, Dick. 601.

5. *To a scire facias to revive.*

Plea to a subpoena scire facias, to revive a decree, allowed. Diddleford v. Tichenor, Dick. 34.

6. *A plea to an amended bill.*

The defendant in his answer stated facts which had occurred since the filing of the bill; upon which the plaintiff amended his bill, stating the facts more fully; and thereupon the defendant pleaded as to part, demurred as to the other part, and answered the rest of the amended bill. Plea and demurrer overruled. Knight v. Matthews, 1 Mad. 566.

2. *Force and effect of a plea.*

*As putting a defendant, suing at law, to his election.*

Defendant having pleaded in bar to part of the relief sought by the bill, and answered as to the remainder, is not entitled to an order to put the plaintiff, suing at law, to his election. A plea cannot be considered as an answer for such a purpose. Fisher v. Mee, 3 Mer. 45.

3. *A plea is in its nature divisible.*

1. *It may therefore be good in part and bad in part.*

Plea may be good in part and bad in part. Ground of the distinction in that respect between a plea and a demurrer. 8 Ves. 433.

2. *Plea allowed as to relief, overruled as to discovery.*

Plea allowed as to relief, overruled as to the discovery. Ansty v. Dowsing, Dick. 95.

3. *As to a plea good to the relief, but bad to the discovery.*

Variation as to a plea good to the relief, but bad to the discovery. 6 Ves. 819.

4. *Plea to the account allowed, as to the real; overruled, as to the personal estate.*

Plea as to the account prayed of the personal estate, allowed; as to the real estate, overruled. Turner v. Mitchel, Dick. 249.

4. *Of successive pleas.*

*Of pleading the same matter more formally than at first.*

A plea was overruled on a ground of form. The defendant pleaded the same matter again more formally. This is irregular, *comme semble*. Free-land v. Johnson, 2 Anst. 407.

5. *Of the structure of pleas in general.*

1. *The office of a plea in general is to confess the right to sue, and avoid it by matter dehors; the excepted cases are, where the plea must be supported by an answer.*

Office of a plea in bar at law to confess the right to sue, and avoid it by matter

*matter dehors*: so in this court in general cases; where the plea must be supported by an answer. 6 Ves. 594.

2. *The true way of pleading is to plead facts.*

True way of pleading is to plead facts. 1 Ves. 285.

3. *A plea must tender issuable matter.*

Plea must tender issuable matter. 1 Ves. 393.

4. *A plea must reduce the defence to a single point; which, however, may consist of a variety of facts.*

A plea must reduce the defence to a single point; which, however, may consist of a variety of facts. 15 Ves. 82.

5. *In relation to duplicity.*

Various facts cannot be pleaded in one plea, unless all conclusive to a single point of defence; as several deeds, tending to establish the single point of title; so in the case of papacy. 2 Ves. & Beam. 154.

6. *Surplusage will not render a plea multifarious.*

An allegation, merely surplusage, does not support an objection to a plea, as multifarious. *Claridge v. Hoare*, 14 Ves. 59.

7. *Two inconsistent facts cannot be joined in one plea.*

Two inconsistent facts cannot be joined in one plea. 2 Ves. & Beam. 153.

8. *As to the effect of many inconsistent defences.*

As to the effect of many inconsistent defences. *Nagle v. Edwards*, 3 Anst. 702.

9. *Of meeting by averment in the plea, the charges in the bill.*

Whether the charges of the bill must be met by way of averment in the plea, as well as by the answer, *Quære*. *Bayley v. Adams*, 6 Ves. 586.

10. *A plea must go to collateral circumstances, charged as evidence of the principal ground of relief.*

Plea to the principal ground of relief, as the statute of frauds, with averment of no agreement in writing, not going to collateral circumstances, charged as evidence of it, overruled. *Evans v. Harris*, 2 Ves. & Beam. 361.

11. *It is no objection, that all matters of the plea, except the denial of collusion, are contained in the bill.*

It is no objection, that all the matters of the plea, except the denial of collusion, are contained in the bill. *Bowser v. Hughes*, 1 Anst. 101.

12. *Distinction as to pleading at law and in equity, the latter admitting the denial of some fact alleged by the bill in some instances, with certain averments, as a good plea.*

Distinction as to pleading between law and equity: the latter admitting the denial of some fact, alleged by the bill, in some instances, with certain averments, as a good plea. 15 Ves. 377.

13. *Office of a plea, generally, not to deny the equity, but to bring forward a fact; the result perhaps of a combination of circumstances, which, if true, displaces the equity.*

Office of a plea, generally, not to deny the equity, but to bring forward a fact; the result, perhaps, of a combination of circumstances, which, if true, displaces the equity. 15 Ves. 377.

14. *A plea stating no new matter in bar of the suit, will be overruled.*

1. A plea stating no new matter in bar of the suit, over-ruled. *Steff v. Andrews*, 2 Mad. 6.

15. *As to a negative plea.*

1. Negative plea, the plaintiff stating himself to be heir at law, for a discovery of title deeds, &c. that the plaintiff was not heir at law, overruled. *Gunn v. Prior*, Dick. 657.

2. Plea, not of a fact *dehors* the bill, but only a negative of some circumstances stated by it. 11 Ves. 302.

3. Plea, merely a negation of the circumstances, stated by the bill. 11 Ves. 305.

4. To a bill for an account of stone, taken from the plaintiff's quarry, under a promise to account, alleging assurances, that accounts were kept. plea, denying only the promise to account, but not that the accounts had been kept, overruled. *Jones v. Davis*, 16 Ves. 262.

5. Negative plea. 16 Ves. 387.

6. Negative plea of no partnership. *Drew v. Drew*, 2 Ves. & Beam. 159.

7. Negative plea, as no partnership, not going to collateral circumstances, charged as evidence of it, insufficient. 2 Ves. & Beam. 364.

8. To a bill brought for the discovery of the defendant's title, stating the particular facts upon which the plaintiff founds his claim, the defendant cannot plead, that the plaintiff is not heir. *Kinnersley v. Simpson and others*, Forrest, 85.

9. Plea to an ejectment bill, stating outstanding leases, and praying relief, that there are no such leases, allowed. *Armitage v. Wadsworth*, 1 Mad. 189.

10. Where a bill is filed by a person claiming as heir at law, *Quære* whether a plea, that the plaintiff is not heir, is a good plea? It seems that if the plea go on to state a pedigree by way of shewing that the plaintiff is not heir, and adds at the end that the plaintiff is not in manner aforesaid, or any other manner heir, this is a good plea in point of form, although the title of the plaintiff is not concluded by the pedigree as stated. *Gun v. Prior*, 1 Cox, 197.

11. The bill alleging the suppression of a codicil, an assurance by the testator, that he had directed his executors and residuary legatees to pay an annuity, and their promise to him accordingly, repeated after his death and acted upon by actual payment for several years; plea, merely denying the execution of any codicil, and any such direction, overruled. *Chamberlain v. Agar*, 2 Ves. & Beam. 259.

16. *Averment to belief as to the transactions of others, sufficient.*

Averment to belief as to the transactions of others, sufficient. *Drew v. Drew*, 2 Ves. & Beam. 159.

17. *Plea, with an exception not requiring a reference to the answer, good.*

Plea, with an exception not requiring a reference to the answer, allowed. *Howe v. Duppa*, 1 Ves. & Beam. 511.

18. *Plea, with exception of matters after-mentioned, bad.*

Plea, with exception of matters after-mentioned, bad. 1 Ves. & Beam, 514.

6. Of the structure of pleas in particular cases.

1. *A plea of account stated and settled, to a bill for an account.*

Plea of account stated and settled, to a bill for an account, must be supported by averments, shewing an actual (though not final) settlement, as from security being given for the balance, and that all the vouchers have been delivered up. Nor is it sufficient that the last fact is stated in a  
schedule

schedule of the statement of the account referred to by the answer, without a positive averment of it in the plea. *Hodder v. Watts*, 4 Price, 8.

2. *The plea of alien enmity.*

In a plea of alien enemy, it is sufficient to state the war subsisting with France, and that the plaintiffs are Frenchmen, aliens, enemies of the king. *Daubegny v. Dunvallon*, 2 Anst. 462.

3. *A plea maintaining an award against a bill invalidating it.*

Where the bill charged an award to have been obtained corruptly, a plea setting up the award and denying the specific charges of fraud, is bad, as not bringing the cause to one point; and an answer to the same charges, overrules the plea. *Pope v. Bish*, 1 Anst. 59. *Edmundson v. Hartley*, *Id.* 97.

4. *Pleas of charters and acts of parliament conferring authority without detailing them.*

Plea by the East India Company, to a bill for an account filed by the nabob of Arcot, that by charter confirmed by parliament, they had certain powers, by virtue of which the acts were done, overruled; it not setting forth the contents of the charters and acts of parliament. *Nabob of Arcot v. East India Company*, 3 B. C. C. 392.

5. *Plea of a fact in bar to a bill of discovery, does not lie.*

*Vide Dick*. 651.

6. *Plea to a bill to discover articles pawned to defendant.*

Upon a bill to discover articles pawned to the defendant, he pleads that being a pawnbroker he lent money, without notice of plaintiff's claim: the plea should aver, that he has no other articles than those specified, and though this was done by the answer, that is not sufficient. *Hoare v. Parker*, 1 B. C. C. 578, 1 Cox 224.

7. *Plea to a bill for discovering defendant's marriage with A., that she is his sister, protects him from discovering any fact forming a link in the chain.*

To a bill stating defendant's marriage with a particular woman, plea that she is his sister, protects him from discovery of any fact forming a link in the chain. 14 Ves. 65.

8. *Plea justifying a distress, not stating that the sum was due.*

Order specifically to restore to a tenant the stock, &c. on the farm, seized by the landlord under a distress and bill of sale: the landlord not stating, whether the sum, under which by the terms of the contract he was not to enforce his remedies, was due. *Nuthbrown v. Thornton*, 10 Ves. 159.

9. *In relation to duplicity.*

1. Question respecting a double plea to discovery and relief against a decree and account taken in another court. *Palmer v. Mure*, *Dick*. 489.

2. Plea of the statute of frauds, to a bill for specific performance of an agreement for the sale of an estate, averring first, that there was no agreement in writing; second, that there was no part-performance of such agreement, is a double plea; ordered therefore to stand for an answer, with liberty to except. *Whitbread v. Brockhurst*, 1 B. C. C. 404.

3. A plea stating that the plaintiffs, who claimed as citizens of London, never were resident there, or paying scot and lot, and that they were admitted freemen by fraud, for the purpose of enjoying a certain exemption, is bad for duplicity. *Corporation of London and others, v. Corporation of Liverpool*, 3 Anst. 738.

10. *Plea of a fine of lands.*

1. To a plea in bar of a fine, a direct, positive averment of seisin is necessary.

sary. A plea therefore alleging seisin only by way of argument, viz. that the party, being in possession and receipt of the rents, and being thereby seised, &c. was overruled; with liberty to amend. *Dobson v. Leadbetter*, 13 Ves. 230.

2. Plea of a fine overruled, because no seisin was alleged. *Page v. Lever*, 2 Ves. 450.

3. To a charge in the bill, that A. died seised in fee of estates in Derbyshire, and elsewhere, plea of fine of all the estates charged in the bill, and of which A. died seised in fee, sufficient without averment that they were in Derbyshire, and none elsewhere. *Butler v. Every*, 1 Ves. 136, 3 B. C. C.

#### 11. *Plea of a former suit.*

1. In pleading a former suit, it is necessary to aver that the present and the former suit are for the same matter. *Devie v. Lord Brownlow*, Dick. 611.

2. Plea of a suit depending in the court of chancery in Ireland, for the same matter, overruled. *Lord Dillon v. Alvares*, 4 Ves. 357.

#### 12. *Plea of a former suit satisfied.*

Plea of payment of a sum into the ecclesiastical court to prevent a commission of appraisement, and accepted, and a receipt given, disallowed, as a plea in bar to a suit, as it does not show that the party had no farther demand. *Samuda v. Furtado*, 3 B. C. C. 70.

#### 13. *Plea of title paramount to a bill to set aside a conveyance for fraud.*

To a bill to set aside a conveyance for fraud, &c., plea of title paramount, under a former conveyance of all the estate and interest, under which the plaintiff claimed, allowed. *Howe v. Duppa*, 1 Ves. & Beam. 511.

#### 14. *Plea of the statute of frauds.*

1. If a defendant plead the statute of frauds to a bill for a specific performance, he must by answer deny the agreement; for if he admit it, he takes it out of the statute. *Child v. Godolphin*, Dick. 39.

2. The admission of a parol agreement takes it out of the statute of frauds. *Lacon v. Mertins*, Dick. 664.

3. In equity, the denial of a parol agreement, within the statute of frauds, by the answer, is conclusive. 6 Ves. 39.

4. Lord Loughborough's opinion, that upon a bill for specific performance of a parol agreement within the statute of frauds, the defendant, though admitting the agreement by his answer, may, if he insists upon the statute, have the benefit of it at the hearing. 6 Ves. 17.

5. Bill for specific performance of a parol agreement to grant a lease for twenty years: plea of the statute of frauds, and answer denying that facts alleged as a part-performance were done in that performance: the plea was saved to the hearing with liberty to except; the lord chancellor inclining to the opinion, that though the agreement is admitted, the statute may be used as a defence to the suit. *Moore v. Edwards*, 4 Ves. 23.

6. Lord Eldon's opinion, that a specific performance of a parol agreement cannot be decreed, though the agreement is admitted by the answer, if the defendant insists upon the statute of frauds: if he does not, he must be taken to renounce the benefit of it. 6 Ves. 37.

7. Whether the answer admitting possession taken under the agreement, takes the case out of the statute of frauds, where it is not clear, what the agreement was, *Quære*. The court endeavours to collect, what are the terms. 6 Ves. 470.

8. To a bill for specific performance of an agreement, a plea of the statute of frauds, being coupled with another defence, was ordered to stand till the hearing. *Cooth v. Jackson*, 6 Ves. 12.

9. Defend-

9. Defendant insisting upon the statute of frauds, admissions by the answer are immaterial. *Blagden v. Bradbear*, 12 Ves. 466.

10. Defendant to a bill for specific performance of an agreement within the statute of frauds, may by answer, admitting the agreement, take advantage of the statute. 15 Ves. 375.

11. A bill for specific performance of a parol agreement for a lease within the statute of frauds, charging possession taken under the agreement and other acts of part-performance: plea of the statute, and answer, not the acts alleged as a part-performance, but stating, that being advised he entered as tenant at will, he gave notice to quit: plea overruled. *Bowers v. Cator*, 4 Ves. 91.

12. After answer admitting an agreement, and submitting to perform it, the bill being amended as to other circumstances, the defendant was not permitted to take advantage of the statute of frauds by the answer to the amended bill; and a specific performance was decreed. *Spurrier v. Fitzgerald*, 6 Ves.

13. Plea of statute of frauds, to a bill for performance of an agreement by parol, but which the bill charges was to be put into writing; the defendant ordered to answer on that charge. *Leake v. Morris*, Dick. 14.; 1 Eq. Abr. 23.; 2 C. C. 135.

15. *Plea denying plaintiff's heirship.*

Plea that the plaintiff is not heir, where he had deduced his title as such, is bad: the title ought to be denied as explicitly as it is laid. *Newman v. Wallis*, 2 B. C. C. 143. So of plea of purchase without notice. *Ibid.*

16. *A plea, under the circumstances, overruled, as tendering an immaterial issue.*

Bill for specific performance: plea to the relief, and to the discovery (except, stating the particulars) of the statute of frauds, with an averment that there was no contract in writing signed, &c., unless the note in the bill mentioned can be so considered; and for answer as to the excepted particulars, admitting the note, &c.; overruled, as tendering an immaterial issue. *Morrison v. Turnour*, 18 Ves. jun. 175.

17. *A plea, under the circumstances, overruled, as inconsistent.*

Pleading inconsistent, overruled. *Nobkissen v. Hastings*, 4 B. C. C. 253.

18. *Plea to discovery as tending, upon a double account, to criminate, held, under the circumstances, inconsistent.*

Plea to discovery, that it may subject defendant to penalties of a statute, and also of articles of impeachment exhibited against him by the commons, is inconsistent, and therefore bad. *Nobkissen v. Hastings*, 2 Ves. 84.

19. *Plea of an insolvent act.*

Bill by an insolvent debtor against his assignees, under the 14 Geo. III. and against a debtor to his estate, stating collusion between them in not recovering the debt, praying that the assignees might be removed, and that specific performance of an agreement for a lease might be decreed against the other defendant. Plea by the debtor the assignment under the act, that the right to sue was vested in the assignees, and denying collusion, is good. *Bowser v. Hughes*, 1 Anst. 101.

20. *Plea to the jurisdiction.*

1. Plea to the jurisdiction must point out where the matter ought to be determined. *Lord Derby v. Duke of Athol*, Dick. 129.

2. Plea to jurisdiction must shew another. *Nabob of the Carnatic v. East India Company*, 1 Ves. 372.

3. Plea



3. Plea to jurisdiction of all courts absurd, because the same as plea in bar. *Nabob of the Carnatic v. East India Company*, 1 Ves. 372.

21. *Plea by executor of the statute of limitations.*

Plea of the statute of limitations by an executor, the testator having died in 1786, though probate was not taken till 1802, allowed; the allegation of the bill upon a fair construction being, that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort*, previously to 1792. *Webster v. Webster*, 10 Ves. 93.

22. *Plea of the statute of limitations.*

1. Plea of the statute of limitations, supported by an answer, ordered to stand for an answer, with liberty to except; the charges of the bill not being sufficiently answered. *Bayley v. Adams*, 6 Ves. 586.

2. The want of averment in a plea of the statute of limitations, that the money was not received within six years, supplied in substance by the averment, that the cause of action, if any, arose above six years before the bill. *Sutton v. the Earl of Scarborough*, 9 Ves. 71.

3. Whether the allegation, that the parties dealt as merchants, implies that the accounts are merchant's accounts, within the statute of limitations, *Quære*. *Foster v. Hodgson*, 19 Ves. 180.

23. *Plea of a traverse to an inquisition of lunacy.*

Manner of pleading a traverse to an inquisition finding a person lunatic. 5 Ves. 452.

24. *Plea to a mortgage bill.*

1. Defendant pleaded forty years possession, without account or admission of any debt, to a bill setting up an old mortgage, and stating an account settled, and that owing to infancy, coverture, and other disabilities, plaintiffs could not proceed; the plea was allowed. *Blewitt v. Thomas*, 2 Ves. 669.

2. Bill of foreclosure as to a messuage and forty acres of land; plea, deducing a title to the premises, and stating them to be a *messuage and tenement*. The plea is bad, as not relating to the land demanded. *Wedlake v. Hutton*, 3 Anst. 633.

25. *Plea of conveyance, and of fine and non-claim, whether multifarious.*

Plea of conveyance, and of fine and non-claim, is not multifarious, but a good plea to a bill impeaching the conveyance, as not being for valuable consideration. *Doble v. Cridland*, 2 B. C. C. 274.

26. *Plea denying notice.*

Plea averring in answer to a charge of constructive notice, that to the defendant's knowledge and belief there was no notice, disallowed: he ought to answer the facts, and the court is to make the construction. *Jerrard v. Saunders*, 2 Ves. 187. 4 B. C. C. 322.

27. *Plea of plenarty.*

Plea of plenarty — *Quære*, if it will hold on a bill seeking possession of a donative living? *Mutter v. Chauvel*, 1 Mer. 475.

28. *Plea of Purchase.*

1. Where the bill states circumstances of notice, a plea of purchase, without notice, alone is not sufficient, but must deny the circumstances. *Newman v. Wallis*, 2 B. C. C. 143.

2. Averments necessary to a plea of purchase for valuable consideration without notice; that the vendor or mortgagor was the owner or pretended owner; and that he was in possession: not, that the purchaser was. 9 Ves. 32.

3. Defendant, pleading purchase for valuable consideration without notice, must

must aver, that the vendor was seised, and was in possession; which would be satisfied by the possession of the tenant. 16 Ves. 52.

4. No instance of purchase for valuable consideration without notice, without an averment, that the party purchased from a person seised, or pretending to be seised, in fee. 17 Ves. jun. 290.

5. Effect of the maxim "*pendente lite nihil innovetur*," limited to the rights and parties in that suit; not absolutely annulling a conveyance, *pendente lite*. Metcalfe v. Pulvertoft, 2 Ves. & Beam. 200. Therefore a plea in bar to a bill by a purchaser from the defendant, with actual notice, overruled. Ibid.

6. Plea of purchase from one having a reversionary estate, and consequently not in possession, overruled, because it did not set out how the person from whom the title was deduced, became entitled. Hughes v. Garth, 2 Eden, 168. Amb. 421.

#### 29. Plea of recovery of land.

Upon an ejectment by an heir in tail, the defendants cannot rest upon the judgment in the recovery: but all proceedings must appear upon the record. 4 Ves. 71.

#### 30. Plea of a release to a bill to set it aside.

1. Bill charging fraud in obtaining a release. Plea, the release supported by an answer denying the fraud. The benefit of the plea was saved to the hearing. Lloyd v. Smith, 1 Anst. 258.

2. Bill to set aside a release for fraud. Plea, the release nakedly and no answer. The court would not give leave to amend, but overruled the plea. Freeland v. Johnson, 1 Anst. 276.

#### 31. A Plea to a bill of revivor.

Defendants to a bill of revivor cannot plead to that suit a plea which had been pleaded to the original suit and overruled. Samuda v. Furtado, 3 B. C. C. 70.

#### 32. A plea of payment to a bill for tithes.

In a plea of payment to a bill for tithes, it is not necessary to set out the time when, or the place where, the agreement was made. Mytton v. Harris, Wightw. 111.

#### 33. A plea of simony to a bill for tithes.

Plea of simony to a bill for tithes; ordered to stand for an answer with liberty to except, as being multifarious. Wood v. Strickland, 2 Ves. & Beam. 150.

#### 34. A plea controverting the plaintiff's title.

Plea that the person, through whom the plaintiff claims, died a bachelor, and without issue; ordered to stand for an answer, with liberty to except. King v. Holcombe, 4 B. C. C. 439.

#### 35. Plea of the statute against buying pretended titles.

Plea of the stat. 32 H. 8. c. 9. s. 3. against buying and selling pretended titles; and also, that there was not any mortgage as mentioned in the bill, that the defendant might redeem a mortgage upon a covenant in a lease from the defendant to the plaintiff; held good, though a negative plea. Hinchins v. Lauder, Cooper, 34.

#### 7. Practice connected with a plea.

##### 1. When a plea must be sworn to.

1. Plea of mere matter of record not filed on oath; being proved by the production of the record. 2 Ves. & Beam. 357.

##### 2. Plea

2. Plea of matter of record, with averments of matters in *pais*, must be filed upon oath. *Wall v. Stubbs*, 2 Ves. & Beam. 354. Therefore, plea of the stat. 32 Hen. 8. c. 9. against selling pretended titles, with the necessary averments of want of possession, &c. not being on oath, ordered to be taken off the file; though set down by the plaintiff for argument, this irregularity not admitting of waiver. *Wall v. Stubbs*, 2 Ves. & Beam. 354.

3. Plea, without oath, of plaintiff's conviction for felony to a bill by the residuary legatee for an account of the personal estate of a testatrix, who died after the conviction, but before sentence of transportation completed, allowed; the conviction proved by the record alone, and not necessary to state even the identity upon oath. ——— *v. Davies*, 19 Ves. 81.

#### 2. *Of severance in pleading.*

Upon bills by rectors and vicars, the defendants may split their titles. 2 Ves. 328.

#### 3. *Of overruling a plea without prejudice to insisting on the same matter by answer.*

Bill by annuitant under a will, for an account of arrears against two administrators, with the will annexed: one pleaded the statute of limitations to so much as sought satisfaction for the arrears, or so much as was stated to have accrued due previous to six years before the bill; he also by answer set up an agreement to relinquish the annuity; plea overruled, without prejudice to insisting on the same matter by answer. *Higgins v. Crawford*, 2 Ves. 571.

#### 4. *Plea covering too much, ordered to stand for an answer, with liberty to except.*

Plea covering too much, ordered to stand for an answer, with liberty to except. *Jones v. Pengree*, 6 Ves. 580.

#### 5. *The plea of outlawry, like other pleas, is to be set down by the defendant for argument.*

A plea for outlawry ought, like other pleas, to be set down for argument by the defendant. *Chapman v. Lansdown*, 2 Anst. 554.

### V. *In relation to demurrers.*

#### 1. When a demurrer is necessary or appropriate, when not.

##### 1. *Where the fact objected is not apparent on the bill.*

1. Demurrer to a bill for redemption, because other defendants had been in possession twenty years, overruled; the fact not appearing on the face of the bill, but by averment in the demurrer. *Edsell v. Buchanan*, 4 B. C. C. 254.

2. Demurrer will not lie to a bill stating a sale of the office of secondary of Wood-street comptroller, and praying an account of the profits of the office; for upon demurrer the nature of the office does not appear, nor, consequently, whether such a sale is illegal under stat. 5 & 6 Edw. 6. *Hicks v. Raincock*, 1 Cox, 40.

##### 2. *Where, taking charges to be true, the bill would be dismissed at the hearing.*

1. If the case as stated in the bill, does not entitle the plaintiff to a decree, a demurrer will lie. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 638.

2. Demurrer lies, where it is clear, that, taking the charges to be true, the bill would be dismissed at the hearing. *Utterson v. Mair*, 2 Ves. 95.

3. The ground of a demurrer must be a short point; upon which it is clear, the bill would be dismissed with costs at the hearing; therefore, upon a bill by assignees of a bankrupt for specific performance of an agreement previous

previous to the bankruptcy to grant a lease, the case consisting of a combination of circumstances, the evidence might sustain the relief with some modification; upon which a demurrer was overruled. *Brooke v. Hewitt*, 1 Ves. 253.

3. *On the ground of multifariousness.*

Demurrer will not lie to a bill for being multifarious. *Rayner v. Julian*, Dick. 677.

4. *To save costs only.*

Demurrer to a bill after a decree, under which nothing remained to be carried into execution, but to save costs only. The demurrer was overruled. *Price v. Humphrey*, Dick. 381.

5. *In relation to the statute of limitations.*

Demurrer upon the statute of limitations to a bill for an account, stating that no demand was made for twelve years. *Foster v. Hodgson*, 19 Ves. 180.

6. *In relation to prayer of relief in a discovery bill.*

Where the plaintiff is entitled to the discovery he seeks in support of an action, a prayer for general relief, or for relief that is consequential to the prayer for discovery (as an injunction), will not sustain a demurrer. *Brandon v. Sands*, 2 Ves. 514.

7. *To a bill for discovery of matter which defendant need not answer.*

Where a bill seeks discovery of matter which the defendant is not obliged to answer, he must take advantage of it by demurrer. *Selby v. Selby*, 4 B. C. C. 2.

8. *To a bill for discovery of matters subjected to penalties.*

If a bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but shall have the benefit on exceptions; but when the time for suing a penalty expires between first and second answers, on exceptions taken to second answer for not discovering, the exceptions shall be allowed, and the party must discover. *Williams v. Farrington*, 3 B. C. C. 38.

9. *To a bill for discovery and relief, charging fraud.*

Demurrer to a bill for discovery and relief, charging fraud, overruled; the bill being for relief against fraud, the defendant must answer. *Maningham v. Lord Bolingbroke*, Dick. 533.

10. *On the ground that defendant is a mere witness.*

Where an exception is taken to an answer, the defendant cannot protect himself by saying that he is a mere witness; but he should have availed himself of that by plea or demurrer; having submitted to answer, he must answer fully. *Cookson v. Ellison*, 2 B. C. C. 252.

11. *Demurrer of another cause depending, overruled, from the other cause being inefficacious.*

Demurrer of another cause depending, overruled, the cause depending being such as would not be effective, and the present bill making new parties. *Law v. Rigby*, 4 B. C. C. 60.

12. *In the case of a bill stating a payment to protect an individual from prosecution for felony, and desiring the assistance of the court.*

Whether a bill, stating a payment to protect an individual from prosecution for felony, desiring the assistance of the court, is not open to demurrer on that ground, *Quare*. *Claridge v. Hoare*, 14 Ves. 59.

13. *No*

13. *No decree, where defendant might have demurred.*

No decree, where the defendant might have demurred. 6 Ves. 686.

## 2. General demurrer, when the appropriate form, when not.

1. *To a bill, proper for discovery only, praying relief.*

A bill, proper for discovery only, prays relief; a general demurrer over-ruled. *Fry v. Penn*, 2 B. C. C. 281. But afterward such a demurrer allowed. *Price v. James*, 2 B. C. C. 319.; 4 B. C. C. 480.; 6 Ves. 63. 686.; 11 Ves. 509.; 13 Ves. 276.; 17 Ves. 216.; 2 V. & B. 328.

2. *Where, though the decree and conveyance were stated only by way of pretence, the whole right as against the defendants, was founded on that conveyance.*

Forty-six years after a decree directing, in execution of the trusts of the will, a conveyance in fee to the tenant in tail male, having also the reversion in fee, with consent of the only intermediate remainder-man in tail male, a bill was filed against their devisees; the plaintiffs claiming under an old voluntary grant out of the reversion, the estates tail being spent and no recovery; and praying a discovery and conveyance. A general demurrer was allowed; though the decree and conveyance were stated only by way of pretence, not expressly charged; the whole right as against the defendants, being founded on that conveyance. *Fletcher v. Tollet*, 5 Ves. 3.

3. *In a miscellaneous case.*

Where the object of a bill, *quia timet*, is to prevent the assignees of a bankrupt, purchaser of an estate, from bringing an action to recover back that part of the consideration-money remaining due to the vendor which had been paid to him subsequent to the commission of the act of bankruptcy, on the ground of his having waived his equitable lien, by taking a bond for the purchase-money, if the bill charge as a fact that the bond was given as a further additional or collateral security, the question of law cannot be raised on a general demurrer, because that fact must necessarily be admitted. *Brazand v. Hoskins*, 3 Price, 31.

## 3. Demurrer ore tenus.

1. *Whether allowable in equity.*

1. Speaking demurrer over-ruled. *Esdell v. Buchanan*, 2 Ves. 83.

2. Demurrer ore tenus. *Pyle v. Price*, 6 Nes. 779.

3. On the argument of demurrer, the defendant is entitled to demur ore tenus, paying the costs of the demurrer on the record. Attorney-general v. Brown, Swanst. 288.

4. To a bill by an heir, against a claim under a devise, for a discovery, and that the witnesses may be examined *de bene esse*, and their testimony recorded, a general demurrer for want of equity being allowed, the defendant was not permitted to demur ore tenus as to the examination of witnesses; not being made the subject of demurrer on the record. *Pitts v. Short*, 17 Ves. jun. 213.

2. *Whether allowable at law.*

Speaking demurrer bad at law. 2 Ves. 83.

4. *Extent of a demurrer.*1. *Demurrer to the whole relief is bad, if plaintiff is entitled to any part.*

If the plaintiff is entitled to any part of the relief sought, a demurrer to the whole relief must be overruled. Attorney-general v. Brown, Swanst. 304.

2. *Demur-*

2. *Demurrer to the whole bill, defendant having answered part, is bad.*

Demurrer to the whole bill; the defendant having answered part, the demurrer was overruled. *Tidd v. Clare*, Dick. 712.

3. *A demurrer in its form applicable to a part of a bill only, is not to be extended to the other part answered by defendant.*

A defendant having demurred to a part only of a bill, and then answered other parts, it is no objection to the allowance of the demurrer, that it is equally applicable to the whole of the bill. *Mayor of Dartmouth v. Seale*, 1 Cox, 416.

4. *Demurrer to the whole bill, with the exception to a small part, may be good in point of form.*

Demurrer to the whole bill, with an exception to a small part, may be good in point of form. *Hicks v. Raincock*, 1 Cox, 40.

5. *Demurrer not going to the whole bill, must clearly express the particular parts demurred to.*

Demurrer not going to the whole bill, must clearly express the particular parts demurred to. 2 Ves. & Beam. 124. Vide infra 6. 7.

6. *In an answer and demurrer, the parts demurred to must be distinctly specified.*

In an answer and demurrer, the defendant ought to specify distinctly what parts of the bill it is intended to cover by the demurrer. It is informal to say, "as to so much of the bill as defendant is advised he is bound to answer;" and then, after answering some parts, to demur "as to all the rest of the matter charged in the bill." It ought to be precisely stated what parts of the bill defendant refuses to answer. *Devonsher v. Newenham*, 2 Sch. & Lef. 499. Vide supra 5. infra 7.

7. *Demurrer overruled, as not stating particularly the parts demurred to.*

Demurrer, not stating particularly the parts demurred to, but generally to the whole bill, with an exception of immaterial facts, which were answered after the usual order for time, overruled. *Wetherhead v. Blackburn*, 2 Ves. & Beam. 121. Vide supra 5. 6.

8. *Demurrer overruled; as covering relief, to which plaintiff was entitled.*

Demurrer overruled; as covering relief, to which the plaintiff was entitled; and not distinctly pointing out what parts of the bill were demurred to, and what answered; viz. demurring to all the discovery except "touching" the several title deeds, creating the intail, &c. and "as to the residue of the said bill not demurred to," answering. *Robinson v. Thompson*, 2 Ves. & Beam. 118.

9. *Defendant may demur to relief, and answer to discovery.*

The rule, that if the plaintiff is not entitled to the relief, though entitled to discovery, a general demurrer holds, does not preclude the defendant from demurring to the relief, and answering as to the discovery. *Hodgkin v. Longden*, 8 Ves. 2.; *Todd v. Gee*, 17 Ves. 273.

10. *Demurrer to bill for discovery and relief, if good as to the relief, is good as to the discovery also.*

Demurrer to bill for discovery and relief, if good as to the relief, is good as to the discovery also. *Williams v. Steward*, 3 Mer. 502. *Baker v. Melish*, 10 Ves. 544.

11. *Demurrer to discovery and answer to relief, is bad.*

Where a bill prays relief as well as a discovery, the defendant cannot demur to the discovery, and answer that part which prays relief. *Waring v. Mackreth and another*, Forrester, 129.

12. On

12. *On a general demurrer to a bill seeking relief, an objection to the discovery, as subjecting the defendant to penalties, is not competent.*

On a general demurrer to a bill seeking relief, an objection to the discovery, as subjecting the defendant to penalties, is not competent. *Whittingham v. Bourgoyne*, 3 Anst. 900.

13. *To an amended bill.*

1. A demurrer to so much of an amended bill as had not been answered in the answer to the original bill, is bad. *Mynd. v. Francis*, 1 Anst. 6.

2. Defendant having answered the original bill, plaintiffs amended it, and the same defendant then put in a general demurrer to the whole amended bill. *Quære*, whether this is a ground for taking the demurrer off the file, or only for overruling it on argument. *Atkinson v. Hanway*, 1 Cox, 360.

5. *Of a second demurrer.*

1. *There cannot be two demurrers to one bill: secus to original and amended bill.*

There shall not be two demurrers to one bill: *secus* to original and amended bill. *Bancroft v. Wardour*, 2 B. C. C. 66.

2. *Demurrer overruled as too extensive, defendant cannot afterwards demur as to part.*

A demurrer having been overruled for being too extensive, a defendant cannot afterwards demur as to part. *Bancroft v. Warden*, Dick. 672.

3. *Demurrer to the whole bill being overruled, demurrer less extended is allowable, by leave of the court, but not otherwise.*

After a demurrer to the whole bill overruled, the defendant may put in a demurrer, less extended; but not without leave of the court. *Baker v. Mellish*, 11 Ves. 68.

6. *A demurrer is, in its nature, entire.*

1. *A demurrer, unlike a plea, cannot be good in part, and bad in part.*

1. Demurrer cannot, as a plea may, be good in part, and bad in part. 11 Ves. 70.

2. Demurrer, not good in part, and bad in part; therefore going to relief, to which the plaintiff was entitled, overruled generally; the plaintiff, a purchaser, not being barred by a report against the title in another suit, upon a bill against him by the vendors. *Todd v. Gee*, 17 Ves. jun. 273.

2. *The rule that a demurrer bad in part is altogether bad, has reference to the matter demurred to.*

Though a demurrer cannot be good in part and bad in part, as to the matter demurred to, it may be good as to one defendant, and bad as to another. 8 Ves. 403.

3. *Demurrer may be good as to one defendant, and bad as to another.*

*Ibid.*

7. *A demurrer operates as an admission.*

1. *Facts only are admitted by a demurrer.*

Demurrer admits only facts well pleaded, and the facts alone without the conclusion of law. 1 Ves. 73.

2. *A demurrer does not admit what, though stated by plaintiff as fact, is merely inference from matter of law.*

A demurrer admits as true what is stated by the bill as matter of fact, not what the plaintiff consider as fact, but what is merely inference from matter of law. *Williams v. Steward*, 3 Mer. 503.

3. *Every*

3. *Every thing well pleaded, is confessed by demurrer.*

On argument of demurrer the allegations of the bill taken as true. 2 Ves. & Benn. 95.; 1 Ves. 289.

## 8. Effect of a demurrer upon the cause.

*Notwithstanding, on a demurrer allowed, bill dismissed, it has been set on foot again.*

Though strictly by a demurrer to the whole bill the bill is out of court, yet even after a bill dismissed by order, the cause has been set on foot again. 11 Ves. 72.

## 9. When an answer shall overrule a demurrer.

*Demurrer to relief overruled by answer to discovery of facts on which relief is prayed.*

A demurrer to the relief is overruled by an answer to the discovery of the facts on which the relief is prayed. Roberts v. Clayton, 3 Anst. 715.

## 10. Demurrer for want of parties.

*No general rule, that demurrer for want of parties must state the parties.*

No general rule, whether a demurrer for want of parties must state the parties. 6 Ves. 781.

## 11. When a demurrer shall be aided by matter dehors.

*Answer read to support a demurrer.*

Answer read to support a demurrer. Heath v. Lake, Dick. 43.

## VI. In relation to answers.

## 1. When an answer is necessary or appropriate, when not.

1. *In general, when a party pleads he must also answer.*

In general, when a party pleads he must also answer. 1 Ball & Beatty, 324.

2. *To support a plea.*

Plea, that the discovery will subject the defendant to penalties, does not require the support of an answer; as a plea of purchase for valuable consideration without notice does, as to facts, from which notice is inferred. *Claridge v. Hoare*, 14 Ves. 59.

3. *In a suit for discovery, the answer of the party interested cannot be dispensed with.*

In a suit for discovery, the answer of the party interested cannot be dispensed with, though an infant, and although the person from whom his father purchased has answered, and denied any knowledge of the circumstances. *Hardcastle v. Shafto*, 1 Anst. 77.

4. *In the case of resisting a discovery.*

1. Whether a defendant can by answer refuse the discovery, insisting, that he is not bound to answer, *Quære*. But, having given part of the discovery, he was compelled to answer as to the rest. *Dolder v. Lord Huntingfield*, 11 Ves. 283.

2. Whether a defendant can by answer refuse the discovery, insisting, that he is not bound to answer, *Quære*. The answer held insufficient, as being argumentative; and not containing positive averment. *Faulder v. Smart*, 11 Ves. 290.

3. Whether a defendant can by answer refuse the discovery, insisting, that he is not bound to answer, *Quære*. *Shaw v. Ching*, 11 Ves. 308.



5. *In the case where the discovery will subject to penalties, and the time of limitation elapses after a first and before the second answer.*

Defendant by his answer insists that he is not bound to make a discovery of certain matters enquired after by the bill, as such discovery would subject him to certain forfeitures under an act of parliament. The plaintiff excepts to this and several other parts of the answer. The defendant submits to the exceptions, and, by his second answer, answers the other points, but insists on the same thing as to the point abovementioned. At the time the first answer was put in, the forfeitures might have been sued for, but when the second came in, the time for suing for the forfeitures had elapsed, and they could not then be recovered against the defendant. Under these circumstances the defendant's answer is insufficient. *Williams v. Farrington*, 2 Cox, 202.

6. *In relation to the statute of frauds.*

Vide Dick. 14.

7. *With reference to the statute of limitations.*

A defendant in a bill for a discovery in aid of an action at law, charging that he has debited the plaintiff with larger sums, as paid on his account by the defendant, than were actually paid by him, is compellable to answer whether that were so or not; and that although the accounts have been settled for several years, for there is no period of limitation in point of time within which such a bill must be filed, and though the defendants (men of good reputation) state a very strong case by their answer; for the facts stated in an answer are not conclusive. *Mant v. Scott*, 3 Price, 477.

8. *Where a plea bars the whole bill, an answer overrules it.*

Where a plea is a bar, to the whole bill, if at law, an answer to any matters which might have been covered by the plea, overrules it. *Blacket v. Langlands*, 1 Anst. 14.

2. Force and effect of an answer.

1. *An insufficient answer is as none.*

1. An insufficient answer is no answer. 8 Ves. 88.

2. An insufficient answer is no answer; and therefore shall not prevent a decree to take the bill *pro confesso*. *Turner v. Turner*, 4 Ves. 619.

2. *Where the plaintiff is misnamed.*

1. Answer taken off the file and re-sworn, where there is a mere mistake of the name. 11 Ves. 63.

2. Misnaming the plaintiff, to be considered as no answer: the defendant therefore not bound by it; and a proper answer being put in, the former ordered to be taken off the file by the description of a paper writing, purporting to be an answer. *Griffiths v. Wood*, 11 Ves. 62.

3. *It must be taken to be true until proved false.*

Answer though said to be false must be taken to be true, until there be proof to the contrary. *Jeffery v. Cameron*, Dick. 734.

4. *The test of its credibility.*

An answer is to be looked at as more or less deserving of credit, according as it more or less fairly meets all the enquiries contained in the bill. *Freeman v. Fairlie*, 3 Mer. 42.

5. *In the case of mistake.*

1. Liberty given to take an answer off the file, and to put in a new answer, upon a discovery that defendant at the time was ignorant of his interest. *Alpha v. Payman*, Dick. 33.

2. De-

2 Defendant not bound by a mistake in his answer as to the effect of an instrument, where the answer referred to the instrument. *Jones v. Smith*. 2 Ves. 372.

3. In a case of mistake in an answer, it was not allowed to be taken off the file; but an additional answer, giving the explanation, was permitted. *Jennings v. Merton College*, 8 Ves. 79.

4. Answer not taken off the file upon mistake; but a supplemental answer permitted. 10 Ves. 285.

6. *Effect of an admission by answer of assets.*

Admission of assets by defendant's answer; he was held to it. *Roberts v. Roberts*, Dick. 573. sed vid. 1d. 95.

7. *Effect of an admission by executor by his answer.*

Executor, charged by his answer, not permitted to discharge himself by his affidavit of payments to the testator in his life. *Ridgway v. Darwin*. 7 Ves. 404.

8. *Force of affidavit against an answer.*

Affidavits not admitted on motion against the answer, except upon waste; and in a case of partnership, those filed originally with the bill for an injunction, merely as to mismanagement or exclusion, not in support of the title. *Norway v. Rowe*, 19 Ves. 144.

3. *Of the structure of answers in general.*

1. *In relation to the title.*

Answer taken off the file, where the title omitted the words, "to the bill of complaint of;" *Pieters v. Thomson*, Cooper, 249.

2. *An answer must correspond to the number of plaintiffs.*

An answer ordered to be taken off the file, it purporting to be an answer to the bill of five complainants only, when there were six. *Cope v. Parry*, 1 Mad. 83.

3. *An answer joint and several for many, taken as the answer of those only who swore it.*

Joint and several answer, including in the title persons who declined joining in it, ordered to be received as the answer of those who swore it without striking out the names. *Done v. Read*, 2 Ves. & Beam. 310. Vide 1 Mad. 265.

4. *An evasive answer is as none, and may be taken off the file.*

An answer, merely evasive, to be considered as no answer, and taken off the file. *Smith v. Serle*, 14 Ves. 415.

5. *An evasive answer is a contempt.*

An answer clearly evasive upon the face of it, and no reason assigned, to be considered in future a contempt. *Thomas v. Lethbridge*, 9 Ves. 463.

6. *A defendant, who might have pleaded or demurred, answering, must answer fully.*

1. If a defendant submits to answer, where he might plead or demur, he must answer fully. *Hall v. Noyes*, 3 B. C. C. 483.

2. Defendant, though perhaps he might have objected to answer, having answered, compelled to make a full disclosure. *Taylor v. Milner*, 11 Ves. 41.

7. *A full answer is always requisite, unless it goes to criminate, or in the case of a purchaser for value without notice.*

A defendant must in all cases put in a full answer, except to criminate himself,

himself, or when purchaser for valuable consideration without notice. 1 Ball & Beatty, 325.

8. *Whether a defendant can by answer refuse to give a full answer.*

Whether a defendant can by answer refuse to give a full answer, *Quære*. Rowe v. Teed, 15 Ves. 372.

9. *Particular charges must be answered particularly.*

Particular charges must be answered particularly; a general denial is not sufficient. Prout v. Underwood, 2 Cox, 135.

10. *Circumstances tending to the point relied, and issue tendered on, by the plea, need not be answered.*

Not necessary to answer to circumstances, tending to the point upon which the defendant relies, and tenders an issue by his plea. Drew v. Drew, 2 Ves. & Beam. 159.

11. *Answer is requisite to the sifting inquiries upon the general question.*

General denial not enough: there must be an answer to the sifting inquiries upon the general question. 6 Ves. 792.

12. *Of the obligation to answer circumstances not connected with defendant's own interest.*

Where a defendant has answered all the circumstances respecting his own interest, he shall not be compelled to answer further circumstances in the bill. Newman v. Godfree, 2 B. C. C. 332.

13. *Defendant cannot by answer refuse a full discovery.*

Defendant refusing a full discovery, not by plea or demurrer, but by answer, compelled to make a full answer; and, on motion, to produce books, &c. Somerville v. Mackay, 16 Ves. 382.

14. *Of answering by reference to a schedule or writings.*

1. Effect of setting forth the contents of an instrument referred to for the truth of the statement; making the instrument part of the answer. 14 Ves. 214.

2. Papers referred to by an answer read as part of it. 2 Ves. & Beam. 376.

3. When sums are specifically charged in the bill to have been received by the defendant, he must answer specifically; and it is not enough to refer to a schedule. Hepburn v. Durand, 1 B. C. C. 503.

15. *A schedule to an answer was, under the circumstances, held impertinent.*

A schedule to an answer containing at length a bill of costs and observations, with reference to a bill formerly delivered for the same business, held impertinent; though the bill called upon the defendant to set forth, how he computes and makes out his demand with all the particulars relating thereto, with interrogatories pointed to the particular items and to a minute comparison of the two bills. Alsager v. Johnson, 4 Ves. 217.

16. *A party charging himself in a schedule to his answer, cannot discharge himself by another schedule stating his disbursements.*

A party charging himself in a schedule to his answer, cannot discharge himself by another schedule stating his disbursements. Boardman v. Jackson, 2 B. & B. 385.

17. *A party charged by his answer, cannot discharge himself by it, unless the whole is stated as one transaction.*

A party charged by his answer or examination, cannot discharge himself by it unless the whole is stated as one transaction; as, that on a particular day

day he received a sum, and paid it over : not, that upon a particular day he received a sum, and on a subsequent day he paid it over. *Thomson v. Lambe*, 7 Ves. 587.

18. *An answer in support of a plea.*

Plea supported by answer, which must also contain a denial generally by averment. 18 Ves. 132.

19. *What shall be scandal in an answer, what not.*

1. Matter in an answer, relevant, according to the case made by the bill, not scandalous ; whatever may be the nature of it. *Lord St. John v. Lady St. John*, 11 Ves. 526.

2. To a bill by a testamentary guardian, and her husband, against the trustee of the property, seeking maintenance for minors : an answer, stating the husband of the guardian to be unfit to have the management of the minors, being a "man of small fortune, encreasing family, and a sectary," deemed scandalous and impertinent. *Corbet v. Tottenham*, 1 Ball & Beatty, 59.

4. Of the structure of answers in particular cases.

1. *Of setting forth an account.*

1. A bill prays that a defendant may either admit assets, or that an account may be taken of the testator's personal estate, &c. ; but does not require the defendant to set forth such account. It was determined that, according to the present practice, he was not bound so to do ; but a submission to account is sufficient. *Misenor v. Burfoot*, 1 Cox, 58.

2. Defendant need not set forth an account of the transactions of a trade in which the plaintiff pretends to have been a partner, if there is a clear denial of the partnership. *Jacobs v. Goodman*, Cox, 282.

3. The answer need not set forth an account, where the ground, upon which it is prayed, is denied : as, where the bill charged a dealing in pictures by commission, and the answer denied that, and stated that the defendant sold them to the plaintiff in the course of his trade. *Marquis of Donegal v. Stewart*, 3 Ves. 446.

4. Where the account is incidental to the plaintiff's title, the defendant need not set it forth. *Hall v. Noyes*, 3 B. C. C. 483.

5. In a suit for an account, an answer going no farther than to enable the plaintiff to go into the master's office, is not sufficient. He is entitled to the fullest information the defendants can give by the answer, not by long schedules, in an oppressive manner, but giving the best account they can ; stating, that it is so ; referring to books, &c., so as to make them part of the answer ; and giving the fullest opportunity of inspection. *White v. Williams*, 6 Ves. 193.

2. *A defendant to bill for discovery and account, objecting, by answer, that he had no concern in the business, must answer fully.*

Defendant to bill for discovery and account, objecting by answer, that he had no concern in the business, must answer fully, though such a plea would bar both discovery and relief. But if the fact is so, there cannot be a decree against him. *Cartwright v. Hateley*, 1 Ves. 292.

3. *An answer to a bill seeking an account, relying on a deed of compromise, as a bar to rendering it, was, on exceptions, considered short.*

An answer to a bill seeking an account, relying on a deed of compromise, as a bar to rendering it, was, on exceptions, considered short. *Leonard v. Leonard*, 1 Ball & Beatty, 323. — Such defence is only available by way of plea, not by way of answer. 1 Ball & Beatty, 323.

4. *When an answer to a bill for an account shall be deemed impertinent,*

An answer to a bill for an account, setting out particulars in detail, although

though in some sense to be called pertinent, yet, if manifestly not called for by the nature of the case, may be held impertinent as being vexatious and oppressive. *Norway v. Rowe*, 1 Mer. 347.

5. *An agent, charged with personal fraud, must answer fully.*

An agent, charged with personal fraud, must answer fully. *Bulkeley v. Dunbar and others*, 1 Anst. 97.

6. *Admission of the receipt of sums, which sums he had paid, &c., a good discharge.*

Admission of the receipt of sums, which sums he had paid, &c., a good discharge. 7 Ves. 405.

7. *The case of an answer by bankers, denying any concern in the affair for which an injunction and discovery was sought.*

On an application for an injunction to restrain bankers from proceeding at law, to recover the amount of cheques paid by them, on account of the plaintiff in equity, where the bill, which also prays a discovery, states that a partnership subsisted between the plaintiff and the deceased principal of a banking firm, in another concern, of which the plaintiff had the conduct and management, and that the cheques were drawn under special circumstances founded upon a mutual understanding between the plaintiff and the deceased, to which the defendants in equity (the surviving partners in the banking concern) were not privy, they denying positively, by their answer, that they were in any manner engaged in the concern as partners or otherwise; it is not matter of material exception to the defendant's answer, that under such circumstances they do not set forth, as required, the language of the body of the cheques drawn by the plaintiff as such managing partner, for, having denied that they were in any way concerned or interested in the business, it would be of no service to the plaintiff if it were so set forth, as that (if it were true), would avail him on the trial at law. *Askam v. Thompson*, 4 Price, 330.

8. *To a bill for discovery of a correspondence.*

Where a discovery is sought of a correspondence, if the defendants set forth extracts of letters, and swear that those are the only parts of the correspondence upon the subject, this is sufficient. *Campbell v. French*, 1 Anst. 58.

9. *Discovery by a miller carrying on the trade of a mealman.*

A miller, carrying on the trade of a mealman, is obliged to set out in his answer to a bill for the discovery of tithes, what quantity of meal ground at his mill he has sold, though not the prices for which he has sold it. *Chapman v. Pilcher*, Wightw. 15.

10. *A schedule to an answer was, under the circumstances, held impertinent.*

The bill required the defendant to set forth an account of all and every the quantities of metals and minerals dug, &c., distinguishing from which of the mines the same were respectively raised, &c., and when, &c., and the full value thereof, and of every particular; and how he computes the same, and when and to whom, and for what he has sold and disposed of the same, or so much thereof as, &c., and where and in whose custody or power the residue thereof remaining unsold, now is, and the costs and expences of working the mines, and the clear profits made thereby; and how he computes the profits. A schedule to the answer, setting forth a transcript of all the items in tradesmen's bills, &c. was held impertinent; and the master having reported the whole of the schedule impertinent, without distinction of the particular items, an exception to that report was overruled. *Norway v. Rowe*, 1 Mer. 347.

11. *Defendant stating himself trustee for mortgagees, decreed to deliver up deeds, because he did not name them, so that plaintiff could amend.*

Defendant stating himself trustee for mortgagees, decreed to deliver up deeds, because he did not name them, so that plaintiff could amend. *Earl of Scarborough v. Parker*, 1 Ves. 267.

12. *Of intimating an intention to rely on the insufficiency of a notice.*

A general allegation in an answer that defendants could not be affected by the notice in any way, is not a sufficient intimation to plaintiff that defendant intended to rely on the insufficiency of the notice. *Bennett v. Neal* and others, Wight. 324.

13. *Answer, a purchase for value without notice ; further answer not requisite.*

Defendant, stating by answer a purchase for valuable consideration without notice, shall not be compelled to answer further. *Jerrard v. Saunders*, 2 Ves. 454.

14. *Answer to a bill of revivor.*

Answer to bill of revivor cannot contest the justice of a decree, but can only shew cause against it. *Clare v. Warden*, Dick. 20.

15. *In an answer to a bill for tithes, it is sufficient if plaintiff has notice of the general nature of the defence.*

In an answer to a bill for tithes, it is sufficient if the plaintiff has notice of the general nature of the defence. *Atkyns v. Lord Willoughby*, 2 Anst. 402. *Baker v. Atbill*, Id. 493.

16. *In laying a modus.*

1. In laying a modus in an answer, it is sufficient if it give the plaintiff notice of the general nature of the defence. *Atkyns v. Lord Willoughby*, 2 Anst. 397. *Baker v. Atbill*, Id. 493.

2. Unnecessary words used in laying a modus, which would make it indefinite, may be expunged. *Ellis v. Saul*, 1 Anst. 341.

3. If it is not stated in an answer to a bill for tithes which sets up a modus, in respect of what titheable article the modus is laid, it is bad for uncertainty : and the omission is a substantial defect which no evidence can supply. But if it can be collected from the whole answer, to what article it refers, it will be sufficient. *Bourke v. Isaac* and others, 2 Price, 299:

4. The answer insisted on a modus (for a place described only by a map annexed to the answer) in lieu of all tithes, or at least in lieu of tithe-hay. This is sufficient. *Clarke v. Jennings*, 2 Anst. 498.

5. Modus for every garden and orchard in lieu of all tithes of all titheable matters or things arising therein ; sufficiently laid without stating them to be ancient gardens, &c. and not too extensive. *Blackburne v. Jepson*, 17 Ves. 473.

6. A modus claimed for lands, as being part of an ancient estate, without naming the ancient estate or setting forth the abutments or any description of it, or of the lands of the defendant in it, is bad. *Wood v. Wray*, 3 Anst. 838.

7. Although it is not necessary in an answer to set out the metes and bounds of lands claimed to be exempted by reason of a modus, yet they must be described in such a manner that it may appear with certainty what the lands are in respect of which the exemption is claimed. And when the land in question is part of a larger portion, covered by a general modus, it is not sufficient to describe only the particular part, but the whole of the land over which the modus extends must be pointed out. *Gillebrand v. Scotson*, 1 Dan. 27.

8. It seems to be no objection to the laying a modus, that it except articles of modern introduction, *speciatim*. *Jee v. Hockley*, 4 Price, 87.

9. The claim of exemption from tithes, or any other satisfaction for the same

same, than the sum of 4s. 1d., is a sufficient averment that that sum is due and payable. *Scarr v. Trinity College*, 3 Anst. 765, 6.

10. A modus of 2l. 8s. 1d. payable for certain tithes within a township, the occupier of each farm or tenement within the said township respectively paying his rateable proportion, is bad for uncertainty, even in an answer. It is defective in form and substance; neither can it be treated as a composition, for the same reason. *Wolley v. Hadfield*, 3 Price, 210.

11. Where a modus set up by way of defence to a bill for tithes, against the occupier of a certain farm, was pleaded thus: that the said farm is parcel of the demesne lands of a certain mansion-house, called, &c., and which comprises, &c.; for which from time, &c. the modus has been payable by the proprietor of the said mansion-house and demesne lands; it was held to be ill laid for want of a sufficient description of the lands claiming to be protected by it. And that although the payment was clearly proved; for pleading a modus for a whole district, and then averring that the particular lands are part of such district, without describing it by metes and bounds, is insufficient and bad, and cannot be aided by the evidence applying the description by its boundaries. Therefore an account was decreed, but *without costs*, in consideration of the merits of the defence. *Gillibrand v. Scotson*, 4 Price, 267.

12. Where a defendant in his answer states, that a modus has been immemorially paid to the vicar in lieu of tithes, and the vicarage be shewn to have been *established and endowed within time of legal memory*, the court will, notwithstanding the modus be so incorrectly laid, permit it to be restated for the purpose of taking issue to try the true modus, if an immemorial payment in lieu of tithes has been proved. *Provost v. Bennett*, 1 Price, 236.

17. *A witness (made defendant) answering, must answer fully.*

A person made defendant who is only a witness, must, if he answers, answer fully, though he might have pleaded it. *Cartwright v. Hatley*, 3 B. C. C. 238. *Shepherd v. Roberts*, 3 B. C. C. 239.

5. Supplemental answer when necessary or appropriate, when not.

1. *General rule upon the subject.*

Additional answer admitted with difficulty, if prejudicial to the plaintiff; easily, if for his benefit: subject, if no such objection, to the propriety of a prosecution for perjury. 2 Ves. & Beam. 257.

2. *In the case of mistake.*

1. The practice formerly was to permit the amendment of an answer in case of mistake: now a supplemental answer is put in. And the affidavit must state, that the defendant, when he put in his answer, did not know the circumstances upon which he applies, or any other circumstances, upon which he ought to have stated the fact otherwise. *Wells v. Wood*, 10 Ves. 401.

2. A defendant will not be allowed to take his answer off the file for the purpose of correcting a mistake; the course is, to file a supplemental answer. *Taylor v. Obee*, 3 Price, 83.

3. Supplemental answer permitted to correct mistake: but held strictly to mistake, clearly sworn to and probable in itself; the solicitor who put in the former answer being dead; whose letter, admitting the fact contrary to that answer, would not be evidence in a prosecution for perjury against the defendant; which ought not to be influenced by the admission or refusal of the application. *Strange v. Collins*, 2 Ves. & Beam. 163.

4. Liberty by supplemental answer to correct a fact, by stating that possession was taken under the contract of part of the premises only, not of the whole, as stated in the answer, the defendant being previously in possession as tenant of the other part, and swearing that the misstatement was merely from

from not conceiving it material, refused, without an affidavit, that he meant by the original answer to swear to the fact, as it really was. *Livesey v. Wilson*, 2 Ves. & Beam. 149.

4. Liberty to file a supplemental answer relative to a fact on defendant's affidavit, that at the time of filing the answer, he had no recollection of the fact; and had since discovered it. *Edwards v. M'Leay*, 2 Ves. & Beam. 256.

### 3. Upon discovery of a new matter after replication.

Upon discovery of new matter in an account, the court will permit a supplemental answer after replication. *Maggridge v. Hodgson*, 2 Anst. 443.

### 4. In a miscellaneous case.

A. contracts with B. to purchase an estate, and after accepting the title, agree to sell to C., who refuses to complete his purchase on the ground of his having discovered a will, made eighty years ago, not set forth in the abstract, but supposed to affect the title. Upon a bill for specific performance by the original vendor against A., who by his answer (which was put in, and the cause set down for hearing, before this discovery was made) admitted the title. *Quære*, if he may be allowed to set up the will as an objection to the title by a supplemental answer. *Const v. Barr*, 2 Mer. 57.

### 6. Of an answer by a foreigner.

*A sworn translation must be filed with an answer in a foreign language.*

Where a foreigner puts in an answer in his own language, a sworn translation must be filed with it. *Simmonds v. Countess du Barre*, 1 B. C. C. 263.

### 7. Answer to a cross bill.

*Cannot be read where there have been no ulterior proceedings.*

The answer to a cross bill not allowed to be read, though the original bill and answer was read, there having been no further proceedings on the cross bill and answer. *Bennett v. Neale and others*, Wightw. 325.

### 8. Answer to an amended bill.

*Of the obligation to answer an amended bill with the consequences of omission.*

When a bill is amended, though a defendant is not bound to answer, he may, if his interest is affected; and if he does not, he shall be bound by the charges. *Foster v. Foster*, 3 B. C. C. 616.

### 9. In relation to exceptions.

#### 1. When exceptions are answered, the whole taken in one answer.

When exceptions are answered, the whole taken as one answer. 2 Ves. & Beam. 258.

#### 2. That defendant does not speak to his knowledge and belief, is no objection at the hearing to the manner of stating a *modus*.

It is no objection at the hearing to the manner of stating a *modus*, in an answer, that the defendant does not speak to his knowledge and belief. If the answer be not sufficient, it should be excepted to. *Williamson v. Lord Loadale*, 1 Dan. 58.

### 10. Of using an answer as evidence.

#### 1. An answer, though not used as evidence in the cause, may be read as to costs.

An answer, though not used as evidence in the cause, may be read as to costs. *Howell v. George*, 1 Mad. 13.

#### 2. A guardian's answer may be read against himself in his individual character.

Answer, purporting to be the answer of a minor by his mother and guardian,



ian, may be read against the mother, in another cause, where she is defendant in her own capacity. *Beasley v. Magrath*, 2 Sch. & Lef. 34.

3. *Answer read as evidence contrasted with the other evidence, not for the purpose of discrediting it.*

Answer read as evidence contrasted with the other evidence, not for the purpose of discrediting it. *Savage v. Brocksopp*, 18 Ves. jun. 335.

4. *One defendant's answer read to support another's plea.*

The answer of one defendant, read as evidence to support the plea of another defendant. *Bennet v. Walker*, Dick. 130.

5. *One defendant's answer cannot be read against the other.*

Answer of one defendant not evidence against another. As to the answer of a mere trustee, against whom the plaintiff does not desire a personal decree, *Quære*. *Morse v. Royal*, 12 Ves. 355.

6. *Distinction at law and in equity as to reading the answer.*

Distinction at law and in equity as to reading the answer. At law the whole must be read. 18 Ves. jun. 336.

7. *The whole answer to a discovery bill must, when used, be read.*

Where the answer to a bill for discovery only is used as evidence, the whole must be read. *Lady Ormond v. Hutchinson*, 13 Ves. 47.

8. *Of allowing the original answer to be used on a trial at law.*

Where an answer is required as evidence upon a trial, the court, except in a criminal case, does not permit the record itself to go, but an office copy; unless proof of the signature is necessary. Not granted, where the action is by a stranger unconnected with a suit in equity. *Jervis v. White*, 8 Ves. 313.

9. *The propriety of using an answer at law is for the consideration of the court.*

Whether an answer may be used, or may be useful, if used in a court of law, is for the consideration of the court. *Mant v. Scott*, 3 Price, 477.

11. Practice connected with an answer.

1. *In relation to the oath and signature — where defendant is abroad.*

1. Order, that the six-clerk may receive the answer without signature: the defendant having gone abroad, and forgot to sign it: the motion being consented to. — v. Gwillim, 6 Ves. 285.

2. Answer of a defendant, abroad, (not required to be on oath,) ordered to be put in by a person, having a general power of attorney to defend suits, &c. without signature. *Bayley v. De Walkiers*, 10 Ves. 441.

3. Order to take the answer of defendants, out of the jurisdiction, without oath and signature. *Harding v. Harding*, 12 Ves. 159.

2. *In relation to the oath and signature — where the defendant is a quaker.*

If one puts in his answer without oath, as being a quaker, the court will not inquire whether he is such; for he is concluded from denying that fact on an indictment for perjury in the answer. *Marsh v. Robinson*, 2 Anst. 479.

3. *In relation to the oath and signature — course upon an irregularity.*

1. An answer stated to be the joint and several answers of two, but sworn only by one, ordered to be taken off the file, with costs. *Cooke v. Westall*, 1 Mad. 265.

2. If a defendant have only signed one (the first) skin of his answer, which is an irregularity, the court will not order it to be taken off the file, but will permit the defendant to sign the others. And if he reside in the country,

try, they will give him an opportunity of coming to town for that purpose. *Clarke v. Mansfield*, 3 Price, 605.

4. *An answer must be signed by counsel.*

The signature of counsel is necessary to an answer. *Brown v. Bruce*, 2 Mer. 1.

5. *Of taking an answer off the file in case of mistake.*

Vide *Dick*. 33.; 2 Ves. 372.; 8 Ves. 79.; 10 Ves. 285. 401.; 11 Ves. 62. 63. 3 Price, 83.

6. *A scandalous answer will be taken off the file.*

Answer taken off the file, it respecting the bartering for boroughs. *Warburton v. Hankey*, *Dick*, 224.

7. *A scandalous answer may be referred, on the motion of another defendant.*

Answer referred for scandal, on the motion of another defendant. *Coffin v.* 6 Ves. 514.

8. *Of taking an answer off the file to found a prosecution for perjury.*

An application to take an answer off the file, in order to prosecute the defendant for perjury, granted as a matter of right, being in furtherance of public justice. *Stratford v. Greene*, 1 Ball & Beatty, 294.

9. *Order relative to references of answers for insufficiency, scandal, for impertinence.*

Order relative to references of answers for insufficiency, scandal, for impertinence. 3 Mad. 317.

10. *An answer cannot be referred for impertinence, after a reference for insufficiency.*

After a reference for insufficiency, the answer cannot be referred for impertinence. 6 Ves. 458.

11. *Of the affidavit for a supplemental answer.*

Vide 10 Ves. 401.

## VII. In relation to disclaimers.

### Of retracting a disclaimer.

*Defendant cannot get rid of a disclaimer without a strong case on affidavit.*

A defendant cannot get rid of a disclaimer without a strong case on affidavit. *Seton v. Slade*, 7 Ves. 265.

## VIII. In relation to replications.

### Of the structure of a replication.

#### *General or special.*

Question whether to a plea the plaintiff had a right to reply generally, and examine at large. *Ord v. Huddleston*, *Dick*. 510.

## CHANCERY PRACTICE.

### I. Officers of the court of chancery.

1. Vice-chancellor.
2. Six clerks.
3. Clerk in court.

#### *Remedy for his fees.*

4. As to the M. R. see in tit. CHANCERY.

### II. *fil.*

II. *Filing of bill and process.*

## 1. Commencement of suit.

*Counsel's signature to the bill.*

## 2. Subpoena.

1. *Service of a copy of the writ.*
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3. *Service upon solicitor or clerk in court.*
4. *Service upon the father of an infant.*
5. *Service upon an appointee in a mortgage deed.*
6. *Service upon a partner.*
7. *Service upon a servant.*
8. *Service upon defendant's wife.*
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## 3. Letter missive.

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4. *Computation of time with respect to its return.*
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6. *Priority between attachment and answer.*
7. *Discharge from custody on putting in answer.*
8. *Discharge from custody on putting in examination.*
9. *Discharge of, by obtaining order for time.*
10. *Discharge from custody under an insolvent act.*
11. *Officer's duty on a conditional order of discharge from custody.*
12. *For want or insufficiency of answer.*
13. *For non-payment of money.*
14. *For non-performance of award.*

## 5. Commission of rebellion.

1. *Bail thereon.*
2. *Out of the ordinary course.*

## 6. Serjeant at arms.

1. *Revival of after sequestration.*
2. *Contempt in relation to.*
3. *For insufficient answer.*
4. *For want of farther answer.*
5. *Under an order to bring in papers before the master.*
6. *Against one secreting himself from messenger.*

## 7. Sequestration.

1. *Grounds of.*
2. *Form of order for.*
3. *Amendment of order for.*
4. *Amendment of.*
5. *After a single *distringas*.*
6. *Services relative to.*
7. *Against choses in action.*
8. *Against a pension or salary.*
9. *Against an equity of redemption.*
10. *Against trust money.*

11. *Ex-*

11. *Execution of, on mesne process, or on decree pro confesso.*
12. *Motion for sale under.*
13. *Sale of leasehold under.*
14. *Authority of commissioners under, to break doors.*
15. *Authority of commissioners under, to seize corporation papers.*
16. *Attornment to sequestrators.*
17. *Lease by sequestrators.*
18. *Allowance to sequestrators.*
19. *Contempt in relation to.*
20. *Discharge of, in part.*
21. *Discharge of, by appointing a receiver*
22. *Abatement of, by plaintiff's death.*
23. *Against a stranger.*
24. *Against a prisoner.*
25. *Against a peer or member.*
26. *For want of an answer.*
27. *Against an officer of the court.*
8. *Distringas.*
9. *Commitment for contempt.*
10. *Habeas corpus.*
1. *To found an attachment.*
2. *To found a sequestration.*
3. *To charge a prisoner, in execution for a crime, with a contempt.*
4. *For a party committed for marrying a ward of court.*
5. *Officer's duty on receiving the writ.*
11. *Taking bill pro confesso.*
1. *Whether cause must be set down in order to.*
2. *Removal of defendant to the prison of the court.*
3. *Affidavit of defendant's having been in England.*
4. *Affidavit of defendant's absconding.*
5. *In relation to st. 5 Geo. II.*
6. *After subpoena served.*
7. *On avoiding the service of subsequent process.*
8. *Bill of revivor.*
9. *Supplemental bill.*
10. *Amended bill.*
11. *For want of a better answer.*
12. *Against one of several defendants.*
13. *Against a prisoner in custody for a crime.*
14. *Against a member of parliament.*
15. *Order for, how prevented.*
16. *Order for, how discharged.*
12. *Taking information pro confesso.*
1. *Upon insufficiency of answer.*
2. *Course on a writ being improvidently issued.*

### III. *Proceedings by defendant previous to, and the mode of putting in his defence.*

1. *Appearance.*
1. *Who are bound to appear.*
2. *Time of appearance.*
3. *Compulsory.*
2. *Reference of bill for scandal and impertinence.*
1. *Who may refer.*
2. *Nature of the motion for.*
3. *At-*

3. *After an order for time.*
3. *Demurrer.*
  1. *Time of putting in.*
  2. *After an order for time.*
  3. *After an attachment for want of an answer.*
  4. *After an injunction upon a *dedimus*.*
  5. *Allowance of, to save time.*
  6. *Reforming informality in.*
  7. *Withdrawing of.*
4. *Plea.*
  1. *After an order for time.*
  2. *To amended bill.*
  3. *Entry of.*
  4. *Setting down of, for argument.*
  5. *Defendant's default, on its being called on.*
  6. *Allowance of.*
  7. *Found false.*
  8. *Restoration of, after being struck out.*
5. *Answer.*
  1. *Defendant's oath and signature.*
  2. *By peeress upon honour.*
  3. *Counsel's signature.*
  4. *Supplemental.*
  5. *Re-swearing and re-attesting of, after amendment.*
  6. *To amended bill.*
  7. *Commission for, by defendant in custody.*
  8. *Messenger's oath.*
  9. *Time of.*
  10. *Extension of time for, how obtained.*
  11. *Special order for time for, in the first instance.*
  12. *Service of the petition for time for.*
  13. *Usual orders for time for.*
  14. *Construction of the general order of 23d January 1794, relative to time for, in the case of a peer.*
  15. *Duration of an order for time for.*
  16. *Order for time for, when precluded from.*
  17. *Order for time for, after submitting to answer exceptions.*
  18. *Order for time for, after exceptions allowed.*
  19. *Order for time for alteration of.*
  20. *Order for time for, what a compliance with.*
  21. *Priority between motion for time for, and an attachment.*
  22. *After an order not to demur alone.*

#### IV. Mode of proceeding in interlocutory matters.

1. *Motions and petitions.*
  1. *Distinction between.*
  2. *Subjects of.*
  3. *Which the appropriate course.*
  4. *Motion whether the appropriate course.*
  5. *Union of two subjects in one motion.*
  6. *In relation to time.*
  7. *Postponement of motion.*
  8. *Form of motion to enforce payment of money.*
  9. *To consolidate causes.*
  10. *To examine a person *pro interesse suo*.*
  11. *Counsel's privilege as to number of motions.*
  12. *No-*

12. *Motions before lord chief baron.*
13. *Petition whether the appropriate course.*
14. *Service of petition upon an agent.*
15. *Dismissal of petition failing as to principal object.*

2. *Affidavits.*

1. *Where and before whom sworn.*
2. *Time of filing.*
3. *Made in one cause, used in another.*

3. *Notices.*

4. *Interlocutory orders.*

1. *Subjects of.*
2. *Conditional.*
3. *Order in nature of a decree.*
4. *Drawing up order of, preceding lord chancellor, preparatory to re-hearing.*
5. *Service of.*
6. *Loss of.*
7. *Mode of enforcing obedience to.*
8. *Reference to master — preparatory to the institution of a suit.*
9. *Reference to master — before decree.*
10. *Reference to master — to correct the generality of a bill.*
11. *Reference to master — touching the pendency of a former suit.*
12. *Reference to master — touching a coming of age.*
13. *Reference to master — touching a legitimacy.*
14. *Reference to master — touching scandal and impertinence in general.*
15. *Reference to master — touching scandal or impertinence in affidavit.*
16. *Reference to master — touching impertinence in a discharge.*
17. *Reference to master — touching a contempt.*

V. *Interlocutory applications by plaintiff or defendant.*

1. *Dismission of bill by plaintiff.*

1. *After issue directed.*
2. *By a co-plaintiff as to himself.*
3. *With or without costs.*
2. *To restore bill after dismissal.*
3. *To revive after an abatement.*
4. *Reference of answer for insufficiency, scandal, and impertinence.*
1. *Principle of the practice.*
2. *Distinctions as to exceptions in chancery and in exchequer.*
3. *Preliminaries to exceptions.*
4. *Time of excepting.*
5. *Filing exceptions nunc pro tunc.*
6. *Exceptions after amending bill.*
7. *New exceptions after amending bill.*
8. *After an order nisi to dissolve an injunction.*
9. *Effect of excepting to answer pending demurrer to discovery.*
10. *Exceptions in case of separate answers.*
11. *Exceptions to joint answer, and death of one defendant.*
12. *Amendment of exceptions.*
13. *Subpoena for better answer after exceptions allowed.*
14. *Joinder of exceptions, and subpoena for a better answer.*
15. *Exceptions to an infant's answer.*
16. *Scandal defined.*
17. *To what master reference shall be.*

18. *Ju-*

18. *Jurisdiction of the master thereon.*
19. *Reference of insufficiency pending reference for impertinence.*
20. *Practice on establishing one or more exceptions only.*
21. *Reference, by whom moved.*
22. *Submission to exceptions.*
23. *Waiver of reference, by setting down plea for argument.*
24. *Waiver of reference, by subsequent reference.*
25. *Miscellaneous.*

#### 5. Amendment of bill.

1. *Preliminaries to.*
2. *New record, when necessary.*
3. *Subjects of.*
4. *Time of application to amend; conditions upon which it will be granted; with its effect.*
5. *Form of motion for.*
6. *Drawing up and serving order for.*
7. *Effect of making it without leave.*
8. *Acceptance of copy of amended bill, its effect.*
9. *Practice where no answer is required.*

#### 6. Amendment of answer.

1. *Subjects of.*
2. *Pending exceptions in injunction cause.*
3. *To avoid a prosecution.*
4. *By supplemental answer.*

#### 7. Amendment of plea.

1. *Subjects of.*
2. *Conditions of.*
3. *Form of motion for.*
8. *Production of deeds and writings*
9. *Appointment of receiver.*

1. *Control over master's appointment of.*
2. *Recognizance of.*

#### 10. Injunction.

1. *Origin of the jurisdiction.*
2. *Distinction between the several classes of.*
3. *Implied.*
4. *Whether grantable without bill, and by original motion.*
5. *Preliminaries to obtaining.*
6. *An interlocutory application is necessary to obtain.*
7. *And anciently a motion in open court was necessary*
8. *Notice of motion for.*
9. *Nature and form of the motion for.*
10. *Affidavits for.*
11. *On falsification of answer.*
12. *Affidavits contradicting answer.*
13. *Reading answer in support of injunction.*
14. *What proceedings are stayed thereby.*
15. *Available and obligatory for parties only.*
16. *General grounds for.*
17. *From subsequent discovery of facts.*
18. *Threats, a ground for.*
19. *Time of obtaining.*
20. *After reference of bill for impertinence.*
21. *From want of an answer.*
22. *From insufficiency of answer.*

23. *From*

23. *From implied admissions in answer.*
24. *From demurrer to bill being overruled.*
25. *On amended bill.*
26. *Services relative to.*
27. *Commencement of its operation.*
28. *Its effect on motion to dismiss for want of prosecution.*
29. *Its effect upon an inchoate execution.*
30. *Discharge from custody on obtaining.*
31. *Continuation of—preliminaries to.*
32. *Continuation of—notwithstanding the doubtfulness of legal title.*
33. *Continuation of—conditions of—payment of money into court.*
34. *Continuation of—to stay trial.*
35. *Continuation of—from replying to answer.*
36. *Continuation of—from reference of answer for scandal or impertinence.*
37. *Breach of—from proceeding after injunction, but before notice.*
38. *Breach of—from proceeding after notice.*
39. *Breach of—from proceeding against a co-defendant.*
40. *Breach of—from delivering a declaration.*
41. *Breach of—from attaching for costs taxed before injunction.*
42. *Breach of—from calling on sheriff to pay over money.*
43. *Breach of—from attaching money levied before bill filed.*
44. *Breach of—from attaching for non-performance of award.*
45. *Breach of—from proceeding against bail.*
46. *Breach of—from showing cause against a rule nisi for a new trial.*
47. *Breach of—from motion for commitment on.*
48. *Breach of—from service of notice of motion for commitment on.*
49. *Breach of—from discharging process issued on, from injunction being irregular.*
50. *Dissolution of—motion for.*
51. *Dissolution of—in part.*
52. *Dissolution of—against some defendants.*
53. *Dissolution of—grounds of the motion to dissolve nisi.*
54. *Dissolution of—time of moving for.*
55. *Dissolution of—course of proceeding in a doubtful case.*
56. *Dissolution of—from amending bill.*
57. *Dissolution of—from variance between bill and affidavit.*
58. *Dissolution of—preliminaries to.*
59. *Dissolution of—nature of the motion for.*
60. *Dissolution of—from dedimus being granted.*
61. *Dissolution of—from the answer swearing to belief only.*
62. *Dissolution of—from the answer's denying plaintiff's title.*
63. *Dissolution of—from the answer denying the alleged equity.*
64. *Dissolution of—from the master's reporting in favour of the answer.*
65. *Dissolution of—from allowance of plea.*
66. *Dissolution of—from allowance of demurrer to prayer of injunction.*
67. *Dissolution of—to secure money in danger.*
68. *Dissolution of—from fear of losing evidence.*
69. *Dissolution of—on affidavits of waste.*
70. *Dissolution of—from answer showing consent and contradicting affidavits.*
71. *Dissolution of—from waiver.*
72. *Dissolution of—miscellaneous.*
73. *Dissolution of—cause against—reference of answer for impertinence.*
74. *Dissolution of—cause against—exceptions to answer for impertinence.*
75. *Dissolution of—cause against—exceptions to answer for impertinence.*
76. *Dissolution of—cause against—miscellaneous.*



77. *Dissolution of—time for showing cause against.*
78. *Revival of—preliminaries to.*
79. *Revival of—on amending bill.*
80. *Revival of—on prayer of dedimus to answer amended bill.*
81. *Revival of—from indictment for perjury having been found against defendant.*
82. *Revival of—election of compulsory.*
83. *Revival of—miscellaneous.*
84. *Perpetual.*
85. *Continuation of perpetual injunction on an abatement.*
86. *Form of affidavit to stay trial.*
87. *To stay indictment pending bills for the same subject.*
88. *To stay suit at law pending bill in equity.*
89. *To stay suit at law, after refusal of court of law to stay proceedings.*
90. *To stay suit in spiritual court for legacy.*
91. *To stay suit in spiritual court for wife's legacy.*
92. *To stay suit in spiritual court to invalidate will.*
93. *To stay suit at law barred by bankruptcy and certificate.*
94. *To stay suit at law after executory satisfaction of demand.*
95. *To stay suit at law for mortgage-money after foreclosure.*
96. *To stay suit at law, on the ground of set-off.*
97. *To stay suit at law, founded in duress.*
98. *To stay suit at law, founded in undue influence.*
99. *To stay suit at law, on suspicion of fraud.*
100. *To stay suit at law, founded on a misrepresentation.*
101. *To stay suit at law for a rent-charge granted as a parliamentary qualification.*
102. *To stay vexatious suit at law.*
103. *To stay foreign attachment.*
104. *To stay suit at law for penalty of bond.*
105. *To stay execution beyond the bond-debt actually due.*
106. *To stay suit at law on illegal bond.*
107. *To stay suit at law on bail-bond.*
108. *To stay suit at law on replevin-bond after agreement to refer.*
109. *To stay suit at law on post-obit bonds under circumstances.*
110. *To stay suit at law on gambling securities.*
111. *To stay execution for securities arising out of gambling transactions.*
112. *To stay judgment-creditors' execution upon lands imperfectly conveyed before judgment.*
113. *Against turning out of possession for breach of covenant.*
114. *To stay execution against property leased to plaintiff himself.*
115. *To stay execution in ejectment arising out of confusion of boundaries.*
116. *To stay suit at law for not repairing.*
117. *To stay suit at law for rent of premises destroyed by fire.*
118. *To stay ejectment for not insuring.*
119. *On affidavit of insolvency and absconding of defendant in replevin.*
120. *To stay suit at law against auctioneer for deposit.*
121. *To stay suit against executor after decree for creditors to come in.*
122. *To ground writ of assistance.*
123. *In relation to the forfeiting act in America.*
124. *To restrain arbitration.*
125. *To protect enjoyment of specific chattel.*
126. *To restrain a breach of contract.*
127. *For creditor, to restrain payment of money to heir.*
128. *To restrain executor from receiving assets.*
129. *To restrain sales by executors.*
130. *Against building by Foundling-hospital.*
131. *Against commissioners under an inclosure act.*

132. To

132. *To restrain nuisance — prejudicing a canal.*
133. *To restrain nuisance — digging a ditch.*
134. *To restrain nuisance — injuring fish-ponds.*
135. *To restrain nuisance — obstructing lights.*
136. *To restrain nuisance — obstructing stream.*
137. *To restrain nuisance — offensive process in trade.*
138. *To restrain partner from recovering partnership funds.*
139. *To restrain surviving partner from disposing of joint stock.*
140. *Against publishing judicial proceedings.*
141. *Against publishing letters.*
142. *To stay executor's suit for the transfer of stock.*
143. *To stay the transfer of stock pending litigation of will.*
144. *To stay the transfer of stock standing in an agent's name.*
145. *To stay sales by trustees.*
146. *To restrain vendor from conveying.*
147. *To restrain a vessel from sailing.*
148. *To stay waste — in general.*
149. *To stay waste — proof of title essential to.*
150. *To stay waste — on doubtful title.*
151. *To stay waste — against one not party.*
152. *To stay waste — on belief of intention.*
153. *To stay waste — permissive waste.*
154. *To stay waste — notwithstanding covenant.*
155. *To stay waste — a mere trespass.*
156. *To stay waste — defendant being in possession under plaintiff's tenant.*
157. *To stay waste — in tenant from year to year.*
158. *To stay waste — by one tenant in common.*
159. *To stay waste — by copyholder.*
160. *To stay waste — mortgagor from felling timber.*
161. *To stay waste — felling young or ornamental trees.*
162. *To stay waste — in cutting turf.*
163. *To stay waste — alterations in a house, changing the nature of the subject.*
164. *To stay waste — by sowing pernicious crop.*
165. *Miscellaneous causes for, arising out of the relation of landlord and tenant.*
166. *Refused in a miscellaneous case, arising out of a partnership.*

#### 11. Writ of ne exeat regno.

1. *Original object of the writ.*
2. *Its general nature and application.*
3. *Whether grantable by exchequer.*
4. *Analogy between the writ, and an application to hold to bail.*
5. *A foreign country defined.*
6. *On threatening to go abroad.*
7. *On belief.*
8. *From demand being in danger.*
9. *Against one leaving England in the course of duty.*
10. *Against a foreigner, or foreign resident.*
11. *Against a feme covert.*
12. *Against a co-debtor, the other remaining here.*
13. *After a previous holding to bail.*
14. *Grantable for equitable demands only.*
15. *For demands arising under agreements.*
16. *To compel payment of alimony.*
17. *For assignee of bond.*
18. *To compel payment of costs.*

19. *Against the agent of an executor possessed of bond, securing plaintiff's residue.*
20. *Upon an undertaking for indemnity.*
21. *Refused under circumstances.*
22. *Mode of obtaining.*
23. *On affidavit of committee of lunatic.*
24. *Affidavit for — by whom sworn.*
25. *Affidavit for — must be positive.*
26. *Affidavit for — statement of evidence.*
27. *Affidavit for — certainty as to debt.*
28. *Affidavit for — statement of intention to go abroad.*
29. *Affidavit for — statement of danger of losing debt.*
30. *Affidavit for — before whom sworn.*
31. *Amount for which the writ shall be marked.*
32. *Service of the writ.*
33. *Bail thereon.*
34. *Enforcement of bail-bond, and recognizance given thereon.*
35. *Discharge of recognizance.*

12. *Payment of money into or out of court.*

1. *General rule respecting.*
2. *Preliminaries to motion for — defendant's answer.*
3. *Preliminaries to motion for — account before master.*
4. *Preliminaries to motion for — master's report.*
5. *Balance ascertained by report.*
6. *Interest.*
7. *A trust-fund in danger.*
8. *Purchase-money.*
9. *Purchaser's right to possession and profits.*
10. *Money raised by sequestration, though contempt cleared.*
11. *On defendant's admission.*
12. *On petition of appeal.*
13. *On obtaining injunction to stay execution pending application for new trial.*
14. *With or without the addition of costs incurred.*
15. *Form of motion for.*
16. *After bill dismissed.*
17. *After abatement of a suit that could not be revived.*
18. *To party entitled, in spite of his request to the contrary.*
19. *Retainer of, on application of claimants thereon.*
20. *Money decreed to be laid out in land.*
21. *Payment of money under attachment.*

VI. *Dismissal of bill by defendant on interlocutory application, after defence put in.*

1. *Dismissal of bill for want of prosecution.*

1. *On neglect to procure a reference of plea of former suit depending.*
2. *After an abatement.*
3. *After general demurrer to the bill.*
4. *After order to amend neglected.*
5. *After order to speed the cause.*
6. *After waiver of contempt by accepting answer.*
7. *Pending demurrer.*
8. *Pending reference.*
9. *Saved by a reference for scandal.*
10. *In case of defendant's bankruptcy.*

11. *No-*

11. *Notice of motion for.*
12. *Motion for, when made.*
13. *Form of order for.*
14. *Setting aside order for.*
15. *Motion for, how repelled.*
16. *Undertaking to speed the cause.*
17. *Effect of an abatement upon an order to speed the cause.*

2. Putting plaintiff to his election.

1. *Nature and grounds of the motion for.*
2. *Time of making election.*
3. *Grounds and mode of discharging order for.*

VII. **Proceedings preparatory to, and the mode of, examining witnesses.**

1. *Subpœna duces tecum.*
2. *Commission.*

1. *To examine witnesses abroad.*
2. *To examine witnesses de bene esse, &c. and examination thereon.*
3. *To examine before the master witnesses examined in the cause.*
4. *To falsify examination before the master.*
5. *Renewed commission.*
6. *Amendment of title.*
7. *By whom sued out.*
8. *Time of obtaining.*
9. *Notice of executing, to whom given.*
10. *Time of executing.*
11. *Execution of, the act of the court.*

3. Commissioners.

1. *Are officers of the court.*
2. *Who eligible as.*
3. *Their discretion over examination.*
4. *Confirmation of their certificate.*
5. *Clerk of.*
6. *Attendance of witnesses.*

4. Examination of witnesses.

1. *Number of witnesses.*
2. *Parties to suit.*
3. *Attesting witness.*
4. *Mode of examination.*
5. *Vivâ voce.*
6. *Time of examination.*
7. *Before whom.*
8. *Peer.*
9. *Foreigner.*
10. *Interrogatories — to executor under decree to account.*
11. *Interrogatories — new.*
12. *Interrogatories — custody.*
13. *Interrogatories — to falsify examination pro interesse suo.*
14. *Interrogatories — on a reference to master.*
15. *Interrogatories — suppression of when impertinent.*
16. *Interrogatories — tending to criminate.*
17. *Interrogatories — settled by master.*
18. *Demurrer by witness.*
19. *Cross-examination.*

20. *Depositions.*
21. *Rectifying depositions.*
22. *Second or re-examination — examination before the master — evidence on appeals, and re-hearing.*
23. *To credit.*

5. *Publication.*
6. *Reference of interrogatories and depositions for scandal and impertinence.*
7. *Who entitled to a copy of examination.*
8. *Replication and rejoinder.*

1. *Rejoinder gratis.*
2. *Replication, pending rule to dismiss bill.*

### VIII. Proceedings preparatory and at the hearing.

1. *Setting down cause for hearing.*

1. *The return of the postea on an issue is such.*
2. *Time of.*
3. *Short cause.*
4. *Demurrer in the petty bag.*

2. *Subpoena to hear judgment and hearing.*

1. *Days of hearing in the exchequer.*
2. *Days of hearing before the lord chief baron.*
3. *Advancing demurrer by vice-chancellor.*
4. *Who is to open.*
5. *Cause heard on bill and answer.*
6. *Private hearing.*
7. *After setting down cause on peremptory undertaking.*
8. *Hearing against some of several defendants.*
9. *Reading admissions.*
10. *Dismissal of bill as to a joint plaintiff.*
11. *Dismissal of bill, though defendant made default.*
12. *Dismissal of bill by consent after decree.*
13. *Dismissal of bill against defendant in contempt.*
14. *Dismissal of bill under circumstances.*
15. *Retaining bill.*
16. *Hearing after decree by default.*
17. *Re-argument.*
18. *New subpoena on defendant's death.*
19. *Order for time on demurrer overruled.*
20. *Order for cause to stand over to add parties.*
21. *Putting off cause.*
22. *Certiorari cause.*

3. *Rectifying minutes and decree.*

1. *Decree pro confesso distinguished from decree nisi.*
2. *Decree ex parte.*
3. *Decree upon interlocutory order.*
4. *Decree on default at hearing postponed.*
5. *Decree in a suit of interpleader on default at hearing.*
6. *Decree founded on collateral pleadings and proofs.*
7. *Decree for balance reported due to defendant on a bill to account.*
8. *Decree establishing rights of lord of manor.*
9. *Decree for payment of surplus of sale.*
10. *Decree against trustees on default of the other defendants.*
11. *Form of decree in general.*

12. *Form*

12. *Form of decree dismissing bill for specific performance.*
13. *Form of decree dismissing bill to perpetuate testimony.*
14. *Entry of evidence.*
15. *Interest.*
16. *Drawing up decree.*
17. *Varying minutes of decree before chief baron sitting alone.*
18. *Legal effect of decree.*
19. *Who are bound by a decree.*
20. *Who are not bound by a decree.*
21. *Amendment of decree.*

## IX. Proceedings upon interlocutory decrees.

### 1. General mode of proceeding in master's office under decrees.

1. *General rules.*
2. *Reference of the question of intention.*
3. *To ascertain a child's existence.*
4. *To ascertain the existence of a debt.*
5. *Affidavit in support of creditor's claim.*
6. *Investing money in the funds.*
7. *Decree for money to be laid out in land.*
8. *Of proceeding de die in diem without an order.*
9. *Of changing the master.*

### 2. Accounting before the master.

#### *Of making rests.*

### 3. Sales before the master.

1. *Preliminaries to.*
2. *Sale decreed — under a will.*
3. *Sale decreed — of real estate provisionally.*
4. *Sale decreed — to satisfy encumbrancers.*
5. *Sale decreed — to satisfy judgments.*
6. *Sale decreed — excess in.*
7. *Bidders — sham.*
8. *Bidders — lunatic.*
9. *Bidders — mortgagee.*
10. *Opening biddings — from inadequacy of price.*
11. *Opening biddings — upon advance offered.*
12. *Opening biddings — by one present at the sale.*
13. *Opening biddings — as to one or all the lots of a purchase.*
14. *Opening biddings — after confirmation of report.*
15. *Opening biddings — deposit thereon.*
16. *Of compelling the purchaser to complete, or discharging him from his purchase.*
17. *Purchase-money — to whom paid.*
18. *Purchase-money — payment of before taking possession or conveyance.*
19. *Purchase-money — payment of by one antecedently in possession.*
20. *Purchase-money — payment of joint purchasers' proportion.*
21. *Purchase-money — disposition of, on adverse claim made.*
22. *Mode of computing value of premises.*
23. *Invalidating of.*
24. *Appointment by purchaser of clerk in court.*

### 4. Master's report and exceptions thereto.

1. *Of anticipating the opinion of the court respecting its form.*
2. *Annexation of schedules to report.*
3. *Form of a report touching an uncertain surplus to be distributed.*
4. *Separate reports.*

5. *Precedence of separate over the general report.*
6. *Amendment of report.*
7. *Admission of evidence after closing report.*
8. *Service of order nisi to confirm report.*
9. *Cause against confirming report, filing exceptions, and making deposit.*
10. *Reviewing report, after confirmation.*
11. *Report relative to infant trustees.*
12. *Report approving of draft of conveyance directed.*
13. *Touching trustees approved of by him..*
14. *Motion anticipating his certificate.*
15. *Whether a certificate countervails a report.*
16. *Preliminaries to exceptions.*
17. *Deposit.*
18. *Reviewing report, to found exceptions.*
19. *Exceptions to report, after passing over draft.*
20. *Time of excepting to report.*
21. *Filing exceptions nunc pro tunc.*
22. *Form of excepting.*
23. *Setting down exceptions.*
24. *Taking exceptions off the file.*
25. *Exception as too general.*
26. *Exception, as stating circumstances, instead of conclusions.*
27. *Exception to report in favour of title.*
28. *Exception to award of referee under a decree.*
29. *Exception to certificate of opinion.*
30. *Exception to report for costs.*
31. *Exception to report for maintenance.*
32. *Exception to report relative to suit by prochein amy.*
33. *Exception to certificate of settlement of interrogatories.*
34. *Miscellaneous.*

#### 5. Issue and special case.

1. *General rules as to granting an issue.*
2. *Issue when granted — to try the genuineness of papers.*
3. *Issue when granted — to try the validity of a will.*
4. *Issue when granted — to try testator's title.*
5. *Issue when granted — to try the amount of a legacy.*
6. *Issue when granted — upon the question as to residue between executor and next of kin.*
7. *Issue when granted — to try the question of heirship.*
8. *Issue when granted — to try the existence of an illegal agreement.*
9. *Issue when granted — to try the competency of a witness examined.*
10. *Issue when granted — to assess damages for breach of covenant to settle estate.*
11. *Mode of obtaining an issue.*
12. *Order for issue nisi or absolute.*
13. *Time of obtaining an issue.*
14. *Who is to be the plaintiff in an issue.*
15. *Form of an issue to try who were the co-heirs of B.*
16. *Trial of issue at bar.*
17. *Evidence on an issue regulated.*
18. *New trial — from misdirection of the judge.*
19. *New trial — from rejecting material evidence.*
20. *New trial — to adduce new evidence.*
21. *New trial — after perpetual injunction.*
22. *New trial — in case of bankruptcy.*
23. *New trial — where inheritance will be bound.*
24. *New trial — terms of.*

25. *New*

- 25. *New trial — after trial at bar.*
- 26. *New trial — third trial.*
- 27. *New trial — fourth trial.*
- 28. *New trial — fifth trial.*
- 29. *New trial — application for, to what court made.*
- 30. *Summary of proceeding in case of an issue.*
- 31. *Special case.*

#### 6. Further directions.

- 1. *Discharge of decretal order made thereon.*
- 2. *Opening questions without exceptions.*
- 3. *When the appropriate occasion for litigating questions.*
- 4. *Setting down for.*
- 5. *Miscellaneous.*

### X. Reversal and execution of decrees.

#### 1. Re-hearing.

- 1. *When the appropriate course.*
- 2. *Grounds of.*
- 3. *For costs.*
- 4. *Upon what terms.*
- 5. *When of course on the certificate of counsel.*
- 6. *Form of petition for.*
- 7. *Withdrawing petition for.*
- 8. *Duration of notice.*
- 9. *Deposit.*
- 10. *Of decree by vice-chancellor of the duchy Lancaster.*
- 11. *Of decree at the rolls.*
- 12. *After order made on argument of exceptions.*
- 13. *On decree made on defendant's default.*
- 14. *On dismissal of bill for default at hearing.*
- 15. *On dismissal of bill through solicitor's negligence.*
- 16. *After proceedings before the master.*
- 17. *After decree by consent.*
- 18. *In spite of agreement to the contrary.*
- 19. *A second time.*
- 20. *Miscellaneous.*

#### 2. Bill of review.

- 1. *Limitation of in point of time.*
- 2. *Deposit.*
- 3. *Re hearing of.*

#### 3. Appeal to the house of lords.

- 1. *To what ends essential.*
- 2. *Grounds of.*
- 3. *Subjects of.*
- 4. *Its effect.*
- 5. *Who entitled to appeal, or precluded from.*
- 6. *Answer to petition for.*
- 7. *Signature of counsel.*
- 8. *Order of the house to print the case forthwith.*
- 9. *Dismissal of.*
- 10. *Revival of, on its abating.*

#### 4. Enrolment of decrees.

- 1. *To what ends essential.*
- 2. *Signature.*
- 3. *After a year.*



4. *On loss of original.*
5. *Decree ad computandum, omitting the answers.*
6. *Caveat.*
7. *Vacating or opening of.*
5. *Execution of decrees.*
  1. *Who may execute.*
  2. *Against a stranger.*
  3. *Short execution.*
  4. *Suspension of.*
  5. *After twenty years.*
  6. *Contempt.*
  7. *Confirming report in defendant's favour.*
  8. *Writ of assistance.*
6. *Opening and invalidating of, by other modes.*
  1. *Decree pro confesso.*
  2. *By motion.*
  3. *By petition.*
  4. *On new person or interest being brought before the court.*
  5. *By new plaintiff by supplemental bill.*
  6. *In a collateral cause.*
  7. *By plea of fraud.*
  8. *By another suit for the same cause.*
7. *Court of delegates.*
- Preliminaries to the appointment of.*
8. *Commission of review.*
  1. *When granted.*
  2. *On the sentence of the court of delegates.*
  3. *Form of.*
9. *Commission of escheat.*
- Traverse of.*

## XI. Costs.

1. *Are in the discretion of the court.*
2. *Security for.*
1. *General rule.*
2. *From plaintiff resident abroad.*
3. *Where one of the plaintiffs reside in England.*
4. *From one under the protection of a foreign ambassador.*
5. *From plaintiff made a bankrupt.*
6. *From insolvent plaintiff residing elsewhere than described in bill.*
7. *After steps taken by defendant.*
8. *From prochein amy.*
9. *When required from defendant.*
10. *Form of affidavit for.*
11. *To what amount.*
3. *Quantum.*
  1. *In the case of causes set down on bill and answer.*
  2. *In the case of vexatious litigation.*
  3. *On demurrer to a third bill for the same cause.*
  4. *On a bill for partition.*
  5. *In the case of costs decreed out of the estate.*
  6. *To one living in forma pauperis.*
  7. *To a prochein amy.*

4. *Tax-*

## 4. Taxation of.

1. *Whether dispensed with where the amount is trivial.*
2. *Motion for, when made.*
5. *Out of what fund payable.*
6. *By whom payable in general.*
7. *Remedy for.*

1. *Whether by petition or exception.*2. *Subpoena for.*3. *Separate attachment for debt and costs.*4. *By a proceeding at law.*5. *By giving time until, &c.*6. *By staying proceedings until, &c.*7. *By restoring bill after a regular dismissal.*8. *By sale of estate out of which they were decreed.*9. *Against one of two parties liable.*10. *Against one made plaintiff against his consent.*11. *After decree passed.*12. *Payment of postponed.*

## 8. Refunding of.

## 9. Discharge from.

1. *On discovering a mistake after decree.*2. *By acceptance of answer.*3. *By excepting to answer.*4. *By act of indemnity.*5. *On the ground of previous insolvency.*

## 10. Set-off.

1. *Of reciprocal costs in the same cause.*2. *Of reciprocal costs at law and in equity.*11. *Against defendants contesting the mode of taking accounts.*12. *To agents, receivers, and trustees accounting fairly.*13. *Of amended bill.*14. *Of long answer.*15. *Of answer held insufficient upon exceptions to report.*16. *Of insufficient answer.*17. *Of answer referred as, but reported not, impertinent.*18. *On a voluntary appearance.*19. *Apportionment of, between parties whose claims have entailed different degrees of expense.*20. *Against an arbitrator combining.*21. *To bank of England made parties for security of legacy.*22. *To bank of England resisting a transfer of stock.*23. *Against bank of England resisting a transfer of stock.*24. *To bank of England made parties unnecessarily, from 39 & 40 Geo. 3.*25. *In the case of a fraudulent bankruptcy.*26. *On application to put creditor in bankruptcy to election.*27. *To commissioners in bankruptcy unnecessarily made parties to petition.*28. *Awarded in bankruptcy, remedy for.*29. *On opening biddings.*30. *On a caveat.*31. *In charity causes.*32. *To*

32. To a college.
33. Against a creditor decreed to re-convey.
34. For proof under a creditor's bill.
35. Of a cross bill.
36. Of a demurrer.
37. Of a bill of discovery.
38. On plaintiff dismissing his own bill.
39. On dismissal of bill at hearing.
40. Decree to one defendant on dismissal of bill, given over against the other.
41. In a bill of dower.
42. In a suit of dower.
43. In bills to recover estates.
44. Of insufficient examination to interrogatories.
45. Of defendant's examination reported insufficient.
46. Of exceptions.
47. For an executor.
48. Against an executor.
49. A defendant fraudulently conducting himself, will be deprived of costs.
50. Upon a groundless imputation of fraud.
51. For or against an heir in general.
52. For an heir in a charity cause.
53. For the heir of a mortgagee in a bill of foreclosure by devisee.
54. For an heir in a bill of revivor.
55. To infant defendant, charged upon his own share.
56. To an infant legatee.
57. To an infant trustee.
58. To infant's prochein amy.
59. Against infant defendant for a contempt.
60. Against infant's prochein amy.
61. Of an injunction.
62. Of an interpleader.
63. Of irregularity in proceedings.
64. Of an issue tried.
65. Of an issue withdrawn.
66. In suits for legacies.
67. In legal proceedings.
68. To party suing out commission of lunacy.
69. To the committee of a lunatic.
70. To a mortgagee.
71. Against a mortgagee.
72. Priority of claim for, on sale of mortgaged premises.
73. On motions.
74. On application for new trial of issue.
75. Of notice of motion abandoned.
76. For disobeying an order of court.

*To produce papers.*

77. To a member of parliament arrested.
78. Of objection for want of parties made at the hearing, but not made in the answer.

79. Of

79. Of commission of partition.
80. To pauper appealing.
81. To pauper, suing as such, after examination pro interesse suo.
82. To pauper suing as executor.
83. To pauper claiming as heir.
84. To pauper suing as next friend.
85. To pauper — influence of his misconduct in a former cause, on the question of.
86. To pauper — dispaupering.
87. To pauper — affidavit of poverty, by whom made.
88. To pauper — form of affidavit of poverty.
89. To pauper — commitment of, for filing improper bill.
90. To pauper — signature of notice of, motion by.
91. To pauper — amount of.
92. Against one suing in formâ pauperis.
93. Of petition to stay bankrupt's certificate.
94. Of plea directed to stand for an answer, with liberty to except.
95. Of plea not argued, from plaintiff intending to amend.
96. Of process improperly issued.
97. On re-hearing.
98. On withdrawing replication.
99. Of report of regularity of proceedings, held otherwise on exceptions.
100. On bill of review.
101. Of sales.
102. Of scandal and impertinence.
103. Of sequestration.
104. In a suit by a tenant for a renewal rendered doubtful by his conduct.
105. Of perpetuating testimony.
106. In tithe causes.
107. To a trustee.
108. Against a trustee.
109. In suits between vendor and vendee.
110. In suits to establish or invalidate a will.
1. *General rules.*
2. *For or against the heir at law.*
3. *Miscellaneous.*
111. Of examination of witness abroad.

**XII. Miscellaneous doctrines relating either to practice in general, or to particular courts, persons, proceedings, or situations.**

1. Proceedings in the petty bag.
  1. *Demurrer.*
  2. *Motion for new trial, where made.*
  3. *Motion to discharge for not charging in execution, where made.*
2. Doctrines relating to practice in general.
  1. *Usage, without an order, establishes a rule.*
  2. *And even supersedes an order.*

3. In-

3. Inflexibility of general rules.
4. Relative to parties.
5. Account.
1. *Reference to master before answer.*
2. *Production of accounts before answer.*
3. *Opening of, surcharging and falsifying.*
4. *Subjects of—illegal items.*
6. Interlocutory applications in miscellaneous cases.
- Amendment of submission-bond.*
7. Privilege from arrest or detainer.
1. *Ambassador's servant.*
2. *Bankrupt during his examination.*
3. *Bankrupt, attending commissioners, independent of the statute.*
4. *Creditor attending bankrupt commissioners.*
5. *Suitor attending the cause.*
6. *Solicitor attending the cause.*
7. *Party attending an arbitration.*
8. *Witness attending the cause.*
9. *Witness attending an arbitration.*
10. *Witness attending bankrupt commissioners.*
11. *On invalidating original proceedings.*
12. *Duration of privilege.*
13. *Discharge from, application for, to whom made.*
8. Bankruptcy.
1. *Reference to master, to examine on interrogatories.*
2. *Notice to dispute commission.*
9. Charity.
1. *Petition in case of abuse of.*
2. *Reference of petition relating to abuse of.*
10. Contempt in general.
- Aggravated by immorality.*
11. Extraordinary contempt.
1. *By proceeding at law after suit attached in equity.*
2. *Publication of proceedings, or relative thereto.*
3. *Writing letter to chancellor.*
4. *Marrying ward of court.*
12. Bill of discovery.
1. *Affidavit.*
2. *Search in furtherance of.*
13. In action of ejectment.
14. Under ejectment statutes.
15. Election of Scotch representative peers.
16. In case of election between jointure and bequest.
- Preliminaries to.*
17. Election against an heir.
- What instruments may be read.*
18. Writ of error.
19. Executors.
1. *Right of to account, notwithstanding admission by mistake of assets.*
2. *Mode of obtaining payment to.*

3. *Mode*

3. *Mode of securing testator's rights.*

4. *Mode of securing legatee's rights.*

5. *Miscellaneous.*

20. *Extent in chief.*

*When appropriate.*

21. *Extent in aid.*

*When appropriate.*

22. *Friendly society act.*

23. *Habeas corpus.*

24. *Heir.*

1. *Parol demurrer.*

2. *Keeping heir before the court.*

25. *Homine replegiando.*

26. *Infant.*

1. *Service of process against.*

2. *Form of his petition.*

3. *Form of motion by, to answer by guardian.*

4. *Appointment of guardian to, on plaintiff's motion.*

5. *Amendment by, of answer.*

6. *His answer cannot be read against him.*

7. *Fresh answer by, on coming of age.*

8. *Course after attachment against for want of answer.*

9. *Form of decree against.*

10. *Invalidating of, by decree on coming of age.*

11. *Bound by laches.*

12. *Re-hearing for after dismissal through neglect of solicitor.*

13. *Reference relative to his interests.*

27. *Infant mortgagee.*

28. *Inquisition.*

*Traverse of.*

29. *Lunacy.*

*Master's report after death of lunatic.*

30. *Mortgage.*

1. *In relation to 5 Geo. 2. c. 25.*

2. *In relation to 7 Geo. 2. c. 20.*

3. *Inquiries relative to.*

4. *Setting down bill for foreclosure as a short cause.*

5. *Extension of time of sale.*

6. *Dismissal of bill for redemption, on non-payment at the time appointed.*

31. *Officer executing process.*

32. *Original writ.*

33. *Partition.*

*Examination of witnesses.*

34. *Writ of restitution.*

35. *Records, supplying loss of.*

36. *Scire facias to repeal a patent.*

*Changing venue.*

37. *Solicitor and client.*

1. *Bill of—taxation of.*

2. *Bill of—costs of taxation of.*

38. *Supplicavit.*

39. In relation to 40 Geo. 3. c. 56.

40. Tithe causes.

1. *Issue — barren land.*
2. *Issue — composition real.*
3. *Issue — exemption from.*
4. *Issue — grant or endowment.*
5. *Issue — modus.*
6. *Issue — general rule as to rector's right to.*
7. *Evidence.*
8. *Payment of money into court.*

41. Vendor and purchaser.

*Reference to the master.*

42. Writ de ventre inspiciendo.

43. Will.

*Establishment of.*

## I. Officers of the court of chancery.

### 1. Vice-chancellor.

Notices of motions intended to be made before the vice-chancellor, shall express the same; unless by consent of parties to the contrary; or by the chancellor's order. And motions, upon such notices, shall be made only before the vice-chancellor, unless the chancellor shall otherwise direct. Ord. Can. 13 Dec. 1814, 2 V. & B. 419.

### 2. Six clerks.

1. In former times the six clerks were the only attorneys of the court, 13 Ves. 197.

2. Establishment of the sixty clerks under them. Ibid.

3. Under the order of the 18th June, 1668, regulating the office of the six clerks, they are entitled to receive their proportion of the fee from the sworn clerk, though he has given credit to the client. *Ex parte*, the Six Clerks, 3 Ves. 589.

### 3. Clerk in court.

*Remedy for his fees.*

1. A bill is maintainable by a clerk in court against a solicitor for his fees; and therefore a demurrer to the relief sought by a bill for payment of a certain sum, stated as the amount of the plaintiff's bill for fees and disbursements, was overruled. *Barker v. Dacie*, 6 Ves. 681.

2. So he, and a six clerk also, has a lien upon the duty recovered by him. 2 Ves. sen. 25.

3. Nor is he obliged to deliver up papers till he is satisfied his fees, though the client has paid them to the solicitor, and he to the other clerk, who absconds. 3 Atk. 727.

4. This lien extends as well to collateral proceedings as to decree. 2 Ves. sen. 25.

5. Though his claim can only be enforced by a direct application. *Holworthy v. Mortlock*, 2 Cox, 202.

6. And therefore the court will not consider the lien of the clerk in court upon the costs, on any collateral application between the parties; but the clerk in court must make his claim. Ibid.

7. The lien cannot be defeated by a voluntary release from his client. 2 Ves. sen. 25.

8. Though

- 8. Though it may lay upon consideration. Ibid.
- 9. It does not extend to a loan from the clerk to the solicitor. Ibid.
- 10. The client will be restrained from paying any part of the bill of fees, &c. due to his solicitor, until the clerk in court employed by him in the cause, has been fully paid his bill. *Stevens v. Avery*, Dick. 224.

## II. Filing of bill and process.

### 1. Commencement of suit.

#### *Counsel's signature to the bill.*

- 1. As well a bill, as an answer taken in town, must have counsel's signature. 2 V. & B. 358.
- 2. Or it will be taken off the file. *Dillon v. Francis*, Dick. 68.

### 2. Subpoena.

#### 1. *Service of a copy of the writ.*

Where there is only one defendant, the *subpoena* itself must be served. *De Tillou v. Sidney*, 1 Anst. 79.

#### 2. *Service upon an agent.*

- 1. Service of a *subpoena* upon an agent under a letter of attorney, was ordered to be good service. *Carter v. De Brune*, Dick. 39.
- 2. So upon the agent or factor in England of another defendant who lived in Jamaica. *Hyde v. Foster*, Dick. 102.
- 3. Yet in this case, substitution of service upon one to whom defendant, residing out of the jurisdiction, had given a power of attorney to act for him in the management of his affairs, was refused. *Smith v. The Hibernian Mine Company*, 1 S. & L. 238. Vide infra 3.
- 4. But service by sending the writ to the defendant under cover to the person to whom he had directed his letters to be sent, will be ordered to be sufficient. *Hunt v. Lever*, 5 Ves. 147.

#### 3. *Service upon solicitor or clerk in court.*

- 1. Service of a *subpoena* for costs, the clerk in court being dead, and the suit abated, and no other proceeding to be had, but to recover the costs, on the solicitor for the surviving defendant, ordered to be good service. *Tysen v. Ward*, Dick. 166.
- 2. Where a party is avoiding service, and the clerk in court is dead, the proper course is to move first, that service of a *subpoena* to name a clerk in court on the solicitor may be good service; if none is named, then that service on the solicitor may be good service. *Francklyn v. Colhoun*, 12 Ves. 2.
- 3. Service of *subpoena* on the attorney of executors. *Hales v. Sutton*, Dick. 26.
- 4. Order, that service of *subpoena* to answer the amended bill upon the clerk in court or solicitor may be good service upon the special circumstances; that though he had not been served with a *subpoena*, he had appeared on two motions; that his answer would be very important; that he lived abroad out of the jurisdiction; and would not appear, to answer. *Gildenichi v. Charnock*, 6 Ves. 171.
- 5. In a cross cause, service upon the clerk in court in the original cause, good service. *Gardiner v. Mason*, 4 B. C. C. 478.
- 6. Application to serve the clerk in court for plaintiffs in the original cause, who were defendants in the cross cause, with a *subpoena* to appear, and to answer the cross bill, refused, as being contrary to all rule. *Anderson v. Lewis*, Dick. 776.
- 7. Where there are cause and cross cause, and the plaintiffs in the original cause are many, several of whom are out of the jurisdiction, and some peers,



motion that service on the clerk in court be good service, refused; but the plaintiffs shall not proceed in the original cause till they have answered in the cross cause. *Ibid.* 3 B. C. C. 429.

8. Where parties are beyond the jurisdiction of the court, service of *subpœna* on their clerk in court cannot be deemed good service, though they have filed a bill by that clerk in court. *Bond v. Duke of Newcastle*, 3 B. C. C. 386. *Vide supra*, 2.

9. A defendant having appeared, and answered the original bill, the plaintiff afterwards amended it, at which time the defendant was out of the jurisdiction. The court will not order service on the clerk in court in the original suit to be taken as good service on the defendant of the *subpœna* to appear and to answer the amended bill. *Roberts v. Worsley*, 2 Cox, 389.

10. Substitution of service of *subpœna* to appear and answer, refused, where one defendant resided out of the jurisdiction, and the other admitted by his answer that he had a power of attorney from him to receive the arrears (then due) of an annuity, which it was the object of the bill to set aside. *Rickcord v. Nedriff*, 2 Mer. 459.

11. Service of a *subpœna* to revive on the defendant's clerk in court in the original cause, refused. *Brown v. Lee*, Dick. 455. *Lee v. Warner*, *Ib.* 546.

#### 4. Service upon the father of an infant.

Service of *subpœna* upon the father-in-law of an infant, good service. *Thompson v. Jones*, 8 Ves. 141. *Vide* 1 Dick. 18. 77.

#### 5. Service upon an appointee in a mortgage deed.

Application to serve two persons named, by a mortgagor for that purpose in an indorsement on the mortgage, with a *subpœna* to appear to a bill filed, by the mortgagee against the mortgagor, to foreclose, the mortgagor having been out of the kingdom so long as not to come within the act of 5 Geo. 2., to render process effectual against persons who abscond, refused. *Wellins v. Lomans*, Dick. 579.

#### 6. Service upon a partner.

1. Service of *subpœna* by leaving the label at a counting-house of the defendant is not sufficient, unless it be given to a partner, or some acknowledged clerk there. *Menzies v. Rodrigues and others*, 1 Price, 92.

2. Bill filed against two partners, and one being abroad, the *subpœna* against him permitted to be served on the partner here. *Coles v. Gurney*, 1 Mad. 187.

#### 7. Service upon a servant.

A copy of *subpœna ad respond.* left with a servant of defendant's brother, (who was also his partner, and a co-defendant in the suit,) at whose house such servant acknowledged that he resided, will be good service, although the party be out of the kingdom at the time. *Birdwood v. Hart*, 3 Price, 176.

#### 8. Service upon defendant's wife.

Delivering the body of the *subpœna* to the defendant's wife, at his dwelling-house, which she threw down, and the solicitor afterwards thrust under the door, held to be good service of *subpœna*, to shew cause against a decree. *Lander v. Whitmore*, Dick. 596.

#### 9. Contempt upon the service of.

1. Ordered, that a defendant stand committed, unless cause, for ill-treating the person serving him with a *subpœna*, and that leaving the order at his house should be good service. *Williams v. Johns*, Dick. 477.

2. Defendant ordered to be committed for a contempt, unless cause or personal notice. *Van. v. Price*, Dick. 91.

3. It is a general rule, that parties must clear their contempt, before they can be heard. 9 Ves. 173.

#### 4. Touch-

4. Touching which, interrogatories will be exhibited. Mayor of London v. Saunders, Dick. 83.

5. But a copy of them will be refused. Welch Copper Company v. Moore, Dick. 335.

#### 10. To amended bill.

1. *Subpœna* not necessary to an amended bill. Skeffington v. ———, 4 Ves. 66.; Angerstein v. Clarke, 1 Ves. jun. 250.

2. And therefore where a bill is amended, and the plaintiff amends the defendant's copy of the bill, there is no occasion to serve the defendant with a *subpœna* to answer the amendment, to put the matter in issue. Hail v. Camp, Dick. 108.

3. Defendant in contempt under an order for a messenger, putting in an answer, to which exceptions were allowed, plaintiff, not having accepted costs, may immediately proceed upon the old process without *subpœna*, or notice for a better answer, but, if in custody, the process discharged pending the reference by tender of costs. Boehm v. De Tastet, 1 Ves. & Beam. 324.; Coulson v. Graham, Ibid. 331.; Bromfield v. Chichester, Dick. 379.

#### 3. Letter missive.

##### 1. What peers are entitled to.

The right to the letter missive by copy of the bill, is privilege of peerage, not of parliament; attaching therefore to all Scotch and Irish peers. Injunction, therefore, or other process, not so accompanied, is ineffectual. Lord Milningtoun v. Earl of Portmore, 1 Ves. & Beam. 419.

##### 2. As to the place of residence.

Question, whether a peer who lived in the country, and was there at the time of being served with a letter missive, and a *subpœna* to appear to the plaintiff's bill, both houses of parliament being at that time convened and assembled, should be considered to be in town. Lord chancellor was of opinion, that he should. Attorney-general v. Earl of Stamford, Dick. 744.

#### 4. Attachment.

##### 1. As to the affidavits.

1. Formerly affidavits might be filed before the return of an attachment. Read v. Ward, Dick. 76.

2. Yet, in future, this practice of issuing an attachment, without an affidavit previously filed, in opposition to orders of the court, will be corrected. Broomhead v. Smith, 8 Ves. 357.

##### 2. On the service of *subpœna* in Scotland.

1. Service of a *subpœna* to appear on the defendant in Scotland, being out of the jurisdiction of the court, the propriety of issuing an attachment doubted, though thought by the master of the rolls and most of the practitioners to be regular. Bourke v. Lord Macdonald, Dick. 587.

2. And so determined. Shaw v. Lindsay, 18 Ves. 496.

##### 3. On the service of *subpœna* abroad.

Attachment may issue on a *subpœna* served abroad. Scott v. Hough, 4 B. C. C. 213.

##### 4. Computation of time with respect to its return.

Attachment returnable within eight days after the purification. The eight days mean eight entire days. Mootham v. Waskett, 1 Mer. 243.

##### 5. Further process on the return of *cepi corpus*.

1. After *cepi corpus* returned, the plaintiff cannot move that the sheriff may bring in the body, but only for a messenger, and afterwards for a sergeant at arms. Wilkinson v. Belsher, 2 B. C. C. 181.

2. And therefore held, that where a defendant residing in the county palatine of Lancaster was attached for want of an answer, and *cepi corpus* was returned by the sheriff; the next proceeding is to move for a messenger upon the return of *cepi corpus*, and afterwards for a sequestration. *Holme v. Cardwell*, 3 Mad. 114.

3. So on a return, to an attachment for want of appearance, "*cepi corpus*," but from illness and infirmity she could not be removed; a messenger was ordered. *Miles v. Lingham*, 7 Ves. 230.

4. A defendant having filed an answer and demurrer after a *cepi corpus* returned, on an attachment for not answering, an order for a messenger obtained before the demurrer and answer (of which the plaintiffs had bespoken an office copy) had been taken off the file, discharged with costs. *Curzon v. De la Zouch*, Swanst. 189.

6. *Priority between attachment and answer.*

If an answer is put in the same day on which an attachment for want of an answer issues, the attachment has precedence. *Stephens v. Neale*, 1 Mad. 551.

7. *Discharge from custody on putting in answer.*

1. Defendant in court discharged on putting in answer, and depositing a sum for costs, subject to taxation. *Broughton v. Martyn*, 4 B. C. C. 296.

2. The defendant is in custody for contempt in not putting in a better answer; having put in an answer, he applied to be discharged; which was ordered, no exception having been taken to the second answer. *Dupont v. Ward*, Dick. 133.

3. So notwithstanding exceptions. *Wallop v. Brown*, 4 B. C. C. 212.

4. So without waiting for the report, that it is sufficient. 16 Ves. 478.

5. And prisoner cannot be detained till further answer, though exceptions allowed. *Wallop v. Brown*, 4 B. C. C. 323.

6. Defendant in custody under an attachment, and a messenger ordered, discharged on putting in his answer; but on exceptions allowed the plaintiff, not having accepted the costs, resumes the process where it stopped: if costs were accepted, he begins again. *Hill v. Turner*, 2 Ves. & Beam. 372.

8. *Discharge from custody on putting in examination.*

Defendant in custody for want of his examination, discharged immediately on putting it in; but if on reference it proves insufficient, the plaintiff, not having accepted the costs, may proceed from the last process. *Bonus v. Flack*, 18. Ves. jun. 287.

9. *Discharge of, by obtaining order for time.*

Attachment not discharged, though order for time had been obtained. Service of a copy of the order not being good service, unless the production of the original is dispensed with by the opposite party. *Wallis v. Glynn*, Cooper, 282.

10. *Discharge from custody under an insolvent act.*

Discharge by *habeas corpus* from commitment under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, as executor, committed before, though not ascertained by the report, or decreed to be paid, till after the time fixed by an insolvent act, of which the party had taken the benefit. *Wheldale v. Wheldale*, 16 Ves. 376.

11. *Officer's duty on a conditional order of discharge from custody.*

Upon an order that a defendant should be released from the Fleet, on paying the costs of his contempt, or a tender of the same, the warden of the Fleet must release him, on an affidavit of a tender of the costs. *Anon.* 1 Mad. 109.

12. *For want or insufficiency of answer.*

1. Defendant, until a fourth insufficient answer, is entitled to be discharged from

from custody for the contempt, immediately on putting in a further answer, without waiting the report upon the reference of the exceptions, though the costs have not been accepted. *Bailey v. Bailey*, 11 Ves. 151.

2. A defendant in contempt for not putting in his answer, may be brought up on any day in term. *Wilson v. Bott*, 1 Price, 62.

13. *For non-payment of money.*

1. After an order upon a party in the cause for payment of money, the proper course is an attachment; and upon the return to that, an order for commitment. *Bowes v. Lord Strathmore*, 12 Ves. 325.

2. Court refused to commit a prisoner for non-payment of the money, as a close prisoner, for a further contempt. *Call v. Mortimer*, 4 B. C. C. 89.

14. *For non-performance of award.*

Where there is a non-performance of an award, the proper motion is, that the party stand committed, and the service must be personal. *Knox v. Simmonds*, 3 B. C. C. 358.

5. Commission of rebellion.

1. *Bail thereon.*

Commissioners on a commission of rebellion, have it in their discretion to take bail of a person for not performing a decree. *Inglet v. Vaughan*, Dick. 7.; 1 Carey, 261.

2. *Out of the ordinary course.*

A defendant, against whom the serjeant at arms was ordered to go, for not producing deeds pursuant to a decree, being a lodger, and keeping himself locked up, except on a Sunday, so that the serjeant at arms could not execute his warrant, and the plaintiff being, as it was supposed, without remedy, applied by motion that a commission of rebellion might issue to commissioners, who can break locks, &c.; but it was denied, it being a writ, which if warranted, issues of course. *Edwards v. Pool*, Dick. 693.

6. Serjeant at arms.

1. *Revival of, after sequestration.*

Goods sequestered, being insufficient to answer a duty decreed, the serjeant at arms revived. *Barnesby v. Powel*, Dick. 130.; *Hopkins v. Adcocks*, Id. 443.

2. *Contempt in relation to.*

Commitment for a contempt in assaulting a deputy-messenger of the court in discharge of duty. *Eliot v. Halmarack*, 1 Mer. 302.

3. *For insufficient answer.*

1. Order for a messenger for want of an answer, defendant put in an answer which was reported insufficient. This being as no answer, the messenger was ordered to proceed to execute the former order. *East India Company v. Dacres*, 1 Cox, 343.

2. An order was made, that defendant should, within four days, put in an answer to interrogatories, or, in default, a serjeant at arms to go against him. He put in an insufficient answer, and, upon motion, the serjeant at arms was directed to take him. *Weston v. Jay*, 1 Mad. 527.

4. *For want of further answer.*

After process to a serjeant at arms issued, but not executed, answer and exceptions submitted to by a note between the clerks in court, but no further answer being put in, the serjeant at arms ordered to go. *Waters v. Taylor*, 16 Ves. 417.

5. *Under an order to bring in papers before the master.*

Serjeant at arms not granted under a four-day order to bring in books, &c.

before the master, until made absolute by a subsequent order upon the master's certificate, of the same date. *Carleton v. Smith*, 14 Ves. 180.

6. *Against one secreting himself from messenger.*

Serjeant at arms sent after a defendant, who secreted himself from the messenger. *Sambroke v. Ekins*, Dick. 68.

7. Sequestration.

1. *Grounds of.*

Defendant in contempt for not producing deeds; sequestration against him. *Trigg v. Trigg*, Dick. 326.

2. *Form of order for.*

Copy of order of sequestration. *Pope v. Ward*, 1 Cox, 194.

3. *Amendment of order for.*

Mistake, in title of order for sequestration by omission of the words "and others," allowed to be rectified by amendment, inserting the words omitted. *Lowten v. Colchester*, 2 Mer. 395.

4. *Amendment of.*

Sequestration made out following the title of the order for the serjeant at arms, and the commission of rebellion, the titles of which were mistaken; the mistake ordered to be rectified. *Bennet v. Button*, Dick. 135.

5. *After a single distringas.*

Order of sequestration made upon the return to a single *distringas*, issued under a decree for payment of costs. Such an order is only an order *nisi* in the first instance. *Lowten v. Mayor of Colchester*, 3 Mer. 543. Form of *distringas* regular; being to appear and answer contempt merely; (not *ad comparendum et solvendum*) but the cause for which it issued being specified by indorsement. *Ibid.* Return "issues, 40s." also regular. *Ibid.*

6. *Services relative to.*

1. An order *nisi*, for sequestration against a privileged person, may be served on the clerk in court of the defendant. *Smallbrook v. Lord Donegal*, 3 Anst. 647.

2. Service of an order of sequestration, *nisi*, upon the clerk in court, good; the plaintiff having tried in vain to serve it personally. *Marquis of Lothian v. Garforth*, 5 Ves. 113.

3. But in ordinary cases, service of a writ of execution upon the clerk in court, will not be good. *Ellison v. Pickering*, 8 Ves. 319.

4. An order having been made against the defendant for a sequestration for non-performance of the decree, an application was made to discharge the order for irregularity, the defendant by his affidavit positively denying that he had been served with the order *nisi*. The court would not discharge the order, but stayed the sequestration for a fortnight, to give the defendant an opportunity of complying with the directions of the decree, by executing certain deeds, &c. *Shuttleworth v. Lord Lonsdale*, 2 Cox, 47.

7. *Against choses in action.*

1. Once it was a *quære*, whether a court of equity will give any relief to a judgment-creditor as against the money of the debtor in the public funds. *Dundas v. Dutens*, 2 Cox, 235.

2. But it is now settled that it will not. *M'Carthy v. Goold*, 1 B. & B. 387. 390.

3. So dividends of bank stock, being choses in action, cannot be sequestered. *Ibid.* 387.

4. Hence the rule, that stock is not liable to the payment of debts during the life of the proprietor, in any way, except under a commission of bankruptcy. 15 Ves. 577.

5. Or

5. Or by his own specific charge.

6. Though standing in a trustee's name. *Grogan v. Cooke*, 2 Ball & Beatty, 233.

7. And debts are in the same predicament. *Ibid.*

8. Difference in the effect of a sequestration, between rents payable by tenants, and funded property. 1 B. & B. 390.

#### 8. *Against a pension or salary.*

1. Sequestration lies against a pension to A. and his assigns, payable at the treasury, when in the hands of the assignee. *McCarthy v. Goold*, 1 Ball & Beatty, 387.

2. But, a salary to an equerry to one of the royal family, is not a subject of sequestration. *Fenton v. Lowther*, 1 Cox, 315.

#### 9. *Against an equity of redemption.*

An equity of redemption cannot be taken in execution, under the statute of frauds. *Lyster v. Dolland*, 3 B. C. C. 478.; 1 Ves. jun. 431.

#### 10. *Against trust-money.*

Money in the hands of a trustee cannot be affected by legal execution, nor can equity interfere. *Cailland v. Estwick*, 2 Anst. 381.

#### 11. *Execution of, on mesne process, or on decree pro confesso.*

1. Goods sequestered on mesne process, cannot be sold. *Hales v. Shafto*, 3 B. C. C. 72.; 2 Cox, 224.; 1 Ves. jun. 86.; *Knight v. Young*, 2 V. & B. 184.

2. Otherwise than to pay the costs of the contempt to be taxed. *Hales v. Shafto*, Dick. 711.

3. Bill stating a sequestration for want of an answer, prayed a discovery and account of all money or other property of the defendant in the original cause in the hand of the defendants, who were bankers, at the time of service of the sequestration, or since. Upon demurrer as to the money, and answer as to the rest of the bill, the lord chancellor determined against the demurrer upon the form, considering it overruled by the answer, and would not in that stage of the cause decide the two points: 1st, whether a sequestration upon mesne process can be executed farther than to pay the expenses: 2dly, whether a chose in action is liable to sequestration. *Simmonds v. Lord Kinnaird*, 4 Ves. 735.

4. When it is for non-payment of money, the sequestrators may be ordered to sell. *Cavil v. Smith*, 3 B. C. C. 362.

5. And the court will sell perishable commodities, rents paid in kind, or the natural produce of a farm, under a sequestration. 3 Ves. 23.

6. Hence, generally speaking, the executing of a sequestration on mesne process is improper; and this, though the bill were decreed to be taken *pro confesso*, and the sequestrators decreed to account; costs were reserved generally. *Heather v. Waterman*, Dick. 335.; *Vaughan v. Williams*, Dick. 354.

7. Bill for an account taken *pro confesso* against surviving executor and devisee in trust; and leasehold estates taken under a sequestration for want of an answer: the court would not order the sequestrators to sell; but directed them to apply the profits. The court also ordered the dividends of money in the bank on the testator's account, to be paid under the will; but could not order the bank to transfer before the act 36 Geo. 3. c. 90. *Shaw v. Wright*, 3 Ves. 22.

#### 12. *Motion for sale under.*

Motion to sell furniture under a sequestration for not performing the decree, must be on notice. *Mitchell v. Draper*, 9 Ves. 208.

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#### 13. *Sale*

13. *Sale of leasehold under.*

Sequestrators ordered to sell a leasehold estate. *Sutton v. Stone*, Dick. 107.

14. *Authority of commissioners under, to break doors.*

It appears that commissioners under a writ of sequestration have authority to break open doors in discharge of their office, by comparison with the proceeding under a commission of rebellion. *Lowten v. Colchester*, 2 Mer. 395.

15. *Authority of commissioners under, to seize papers.*

*Quære*, as to the authority of commissioners, under a warrant of sequestration, to seize books and papers, &c. belonging to a corporation. *Ibid*.

16. *Attornment to sequestrators.*

1. Tenants ordered to attorn to sequestrators under a sequestration for a duty. *Wood v. Adams*, Dick. 576.

2. Tenants ordered to attorn to sequestrators in mesne process; but which his lordship afterwards would not enforce. *Rowley v. Ridley*, Dick. 622.

17. *Lease by sequestrators.*

Applications to empower sequestrators in mesne process to grant leases, refused. *Bray v. Hooker*, Dick. 638.

18. *Allowance to sequestrators.*

Exceptions taken by sequestrators; for that the master had not allowed them 6s. 8d. a day. They were allowed one shilling a day each. *Prentice v. Prentice*, Dick. 388.

19. *Contempt in relation to.*

Contempt to disturb sequestrators in possession. If the sequestration is executed, a judgment-creditor, though prior, can only claim to be examined *pro interesse suo*: if not executed, he may take execution. 9 Ves. 336.

20. *Discharge of, in part.*

Where sequestration as to real estate was discharged, but not as to personal estate. *Hyde v. Greenhill*, Dick. 106.

21. *Discharge of, by appointing a receiver.*

Appointment of a receiver in the place of the sequestrator's, discharges the sequestration. *Shaw v. Wright*, 3 Ves. 22.

22. *Abatement of, by plaintiff's death.*

Sequestration against a defendant on mesne process, abates on the death of the plaintiff, but is revived with the suit. *Hyde v. Forster*, Dick. 132.

23. *Against a stranger.*

A receiver having been appointed, with the usual directions for the tenants to attorn, and a tenant having been served with a writ of execution of the order, and arrested upon an attachment, and turned over to the Fleet, sequestration refused. *Attorney-general v. Tancred*, Dick. 798.

24. *Against a prisoner.*

1. Sequestration for not performing the decree upon the return to an attachment, that the defendant was in custody of the warden of the Fleet. *Errington v. Ward*, 8 Ves. 314.

2. But it only goes, where the defendant is in custody of the warden of the Fleet, not where of a sheriff. *Markham v. Wilkinson*, 2 Anst. 579.

25. *Against a peer or member.*

A sequestration *nisi* against a peer, or member of parliament, for want of his answer; if he answer, and the answer be reported insufficient, the plaintiff

plaintiff must move again for a sequestration *nisi*. *Rashleigh v. Buller*, Dick. 152.

26. *For want of an answer.*

Sequestration for want of answer to be obtained only upon an order *nisi*; not absolute in the first instance. *Bernal v. Marquis of Donegal*, 11 Ves. 49.

27. *Against an officer of the court.*

The reasons for suing out sequestration against a defendant, who is one of the sworn clerks of the court, for not putting in his answer, instead of applying first, as was formerly the practice, for an order to suspend him. *Corbyn v. Birch*, Dick. 635.

8. *Distringas.*

*Subpoena* to compel relators to pay a sum of money, on non-payment, a *distringas* issued. *Attorney-general v. Waters*, Dick. 79.

9. *Commitment for contempt.*

1. For the purpose of commitment under a short order to pay money, the person serving the order must have authority to receive the money. *Wilkins v. Stevens*, 19 Ves. 117.

2. The practice of personal service, as a foundation for process of contempt, dispensed with under circumstances; a party declaring, he would not execute an order, and absconding to avoid it. *De Manneville v. De Manneville*, 12 Ves. 203.

3. Motion to commit upon a fourth insufficient answer, refused; the plaintiff not having a report of the insufficiency of such fourth answer, though the defendant had filed a fifth answer. *Const v. Ebers, Cooper*, 262.

4. Master having made his report of what was due from tenant for rent, on affidavit of service of the report, and of demand, and non-payment of the rent; tenant ordered to stand committed. *Manly v. Eyton*, Dick. 189.

5. Defendant in contempt ordered to be committed; but not being to be found, a sequestration issued; the sequestrators having returned *nulla bona* liberty was given to execute the warrant of commitment. *Deardan v. Halsey*, Dick. 31.

6. Commitment for breach of franchise. *Ex parte Carpenter*, Dick. 334.

7. The court will commit a party guilty of an act of violence in the register's office, as a contempt. *Ex parte Burrows*, 8 Ves. 535.

10. *Habeas Corpus.*

1. *To found an attachment.*

Order that defendant, a prisoner in Newgate, under sentence for forgery, being brought up for want of answer, should be turned over to the Fleet, and then carried back to Newgate, with his cause. *Moss v. Brown*, 1 Ves. & Beam. 78.

2. *To found a sequestration.*

1. A party to a suit in contempt and in custody, must be turned over to the prison of the Fleet, before a sequestration can issue against him. *Kinsey v. Yardley*, Dick. 265.

2. A defendant, a prisoner in the king's bench prison, under a criminal prosecution, brought up by *habeas corpus*, and turned over to the prison of the Fleet, *pro forma*, (to ground an order for a sequestration), and from thence carried back to the king's bench, with his cause; and immediately a sequestration moved for and granted. *Bowes v. Countess of Strathmore*, Dick. 711.

3. *To charge a prisoner, in execution for a crime, with a contempt.*

1. A party being in Newgate, under a criminal sentence, cannot be brought up under a writ in *meane process* for the purpose of charging him; the leaving of such writ with the sheriff sufficiently charging him. *Johnson v. Aylet*, Dick. 659.

2. De-



2. Defendant in confinement under sentence for felony, cannot be brought up by *habeas corpus*, upon an attachment for want of an answer. *Rogers v. Kirkpatrick*, 3 Ves. 471. 573.

3. Defendant, in Newgate, under a criminal sentence, having been brought up by *habeas corpus*, for not putting in his answer, and remanded to Newgate; as to the farther proceeding, *quære*. *Lloyd v. Passingham*, 15 Ves. 179.

4. *For a party committed for marrying a ward of court.*

A prisoner in the Marshalsea for debt, being ordered to stand committed for marrying a ward of the court, an *habeas corpus cum causis* issued, directed to the marshal to bring him to the bar of the court. *Brandon v. Knight*, Dick. 160.

5. *Officer's duty on receiving the writ,*

*Habeas corpus* directed to high bailiff of West Riding of Yorkshire to bring defendant into court to answer his contempt; after receiving such writ, the high bailiff discharges defendant under an insolvent act. High bailiff guilty of a contempt. *Kendal v. Baron*, Dick. 89.

11. Taking bill *pro confesso*.

1. *Whether cause must be set down in order to.*

Where there is only one defendant, after all the process of contempt for want of an answer, the bill may be ordered to be taken *pro confesso* upon motion. *Seagrave v. Edwards*, 3 Ves. 372.

2. *Removal of defendant to the prison of the court.*

Defendant having been removed by *habeas corpus* from the King's Bench to the Fleet prison, for contempt in not putting in his answer, and having procured himself to be afterwards re-committed to the King's Bench, in order to prevent an *alias pluries*; ordered, that the bill should be taken *pro confesso*, against him, in default of his putting in his answer by the time at which an *alias pluries* might have issued. *Sturges v. Brown*, 2 Mer. 511; *Pendergrast v. Sauberque*, Dick. 535.

3. *Affidavit of defendant's having been in England.*

The master of the rolls refused to make an order under the statute of 5 Geo. 2. c. 2. for the purpose of having the bill taken *pro confesso*, without an affidavit, according to the eighth section, that defendant had been in England within two years before the *subpœna* issued. *Neale v. Norris*, 5 Ves. 1.; *Bishop of Winchester v. Beavor*, 5 Ves. 113.

4. *Affidavit of defendant's absconding.*

1. A bill cannot be taken *pro confesso* under stat. 5 Geo. 2. c. 15. without an affidavit of the defendant's absconding to avoid process. *Short v. Downer*, 2 Cox, 84.

2. The defendant had left the kingdom two years preceding the filing of the bill; upon an affidavit that the defendant continued abroad, as plaintiff believed, to elude justice, the defendant ordered to appear under 5 Geo. 2. *Mason v. Polier*, Dick. 401.

5. *In relation to stat. 5 Geo. 2.*

1. If the suit abates, and the defendant (though a defendant in the original cause) absconds to avoid being served, the stat. of 5 Geo. 2. c. 25. must be pursued as if he had been a new defendant. *James v. Dore*, Dick. 63.

2. Defendant served with a *subpœna* to appear; but not appearing, an attachment issued against him for his contempt, and on his absconding to avoid being attached, the court ordered him to appear by a certain day, under the act 5 Geo. 2. to render process effectual against persons who abscond, &c. *Goddard v. Pritchard*, Dick. 662.

3. Defendant being outlawed, motion, that he might appear within a limited

mitted time upon the equity of stat. 5 Geo. 2. c. 25. granted, though he had not been in the kingdom for two years before the *subpœna*. *Clarke v. Wright*, 2 Ves. 188.

4. The stat. 7 Geo. 2. c. 14. enabling plaintiff to proceed when defendant refuse to appear, does not apply to defendant labouring under incompetency, as idiocy, &c. 2 Sch. & Lef. 292.

#### 6. *After subpœna served.*

The process directed by the 5 Geo. 2. c. 25. in order to the bill, being taken *pro confesso*, shall issue, notwithstanding a *subpœna* has been served. 1 B. C. C. 388.

#### 7. *On avoiding the service of subsequent process.*

The stat. of 5 Geo. 2. for taking bills *pro confesso* against defendants, extends as well to cases where the party has been served with the former, but hath avoided the subsequent process, as to cases where it has been impossible to serve the party with any process at all. *Mawer v. Mawer*, 1 Cox, 104.

#### 8. *Bill of revivor.*

1. Statute of 5 Geo. 2. to render process effectual, &c. extends to bills of revivor. *Attorney-general v. Smith*, Dick. 135.

2. Hence, where the defendant has appeared to, and answered the original bill, if he cannot be found to be served with a *subpœna* to answer the bill of revivor, plaintiff must proceed under the act 5 Geo. 2. to have the bill taken *pro confesso*. *Henderson v. Meggs*, 2 B. C. C. 127.

#### 9. *Supplemental bill.*

Supplemental bill decreed to be taken *pro confesso*. *Rees v. Mansell*, Dick. 293.

#### 10. *Amended bill.*

1. Bill having been amended, cannot be taken *pro confesso*, as to the matter of the amendment. *Bacon v. Griffith*, Dick. 473.

2. Though may be taken *pro confesso* generally. *Bacon v. Griffith*, 4 Ves. 619.

3. Where the bill is amended after answer, if the amendment bill is not answered, the plaintiff is entitled to a decree that the bill be taken *pro confesso* generally. *Jopling v. Stuart*, 4 Ves. 619.

#### 11. *For want of a better answer.*

Bill decreed to be taken *pro confesso*, upon a sequestration, for want of a better answer, the first having, on exceptions to part of it, been reported insufficient. *Turner v. Turner*, Dick. 316.

#### 12. *Against one of several defendants.*

Bill taken *pro confesso* against one defendant, and complete decree against the others. *Earl of Litchfield v. Roberts*, Dick. 59.

#### 13. *Against a prisoner in custody for a crime.*

The process to obtain a decree *pro confesso*, not applied to a prisoner in Newgate under a criminal sentence; who, if brought up by *habeas corpus*, must be remanded immediately; and cannot, as in a civil case, be turned over to the Fleet *cum causâ*, subject to the further process by *alias habeas corpus*, &c. *Moss v. Brown*, 1 Ves. & Beam. 306.

#### 14. *Against a member of parliament.*

1. Member of parliament refusing to enter an appearance, the court appointed a clerk in court, to enter an appearance for him under stat. 45 Geo. 3. c. 24. s. 3. *Read v. Philips*, 16 Ves. 436.

2. The authority to take the bill *pro confesso*, against a defendant having privilege of parliament, standing out process of contempt, under statute 45 Geo.

45 Geo. 3. c. 124. s. 5., was held, in this case, to be confined to bills for discovery only. *Jones v. Davies*, 17 Ves. jun. 368.

3. But in this, the contrary was determined, and that a bill against a member of parliament, praying relief, may be taken *pro confesso*, the act not being confined to bills of discovery only. *Logan v. Grant*, 1 Mad. 626.

15. *Order for, how prevented.*

To prevent a decree, *pro confesso*, the defendant should have, not only an answer upon the file, but also a receipt for the costs. The answer being actually filed without payment or tender of the costs, the defendant was remanded, to give an opportunity of moving to take it off the file for irregularity; but, the plaintiff having taken an office copy of the answer, that course failed. *Sidgier v. Tyte*, 11 Ves. 202.

16. *Order for, how discharged.*

1. After an order that a bill be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order. *Williams v. Thompson*, 2 B. C. C. 279.

2. Bill having been taken *pro confesso*, under the act, the defendant allowed to put in his answer, and bring on the cause to be heard on terms. *Bishop of Rochester v. Knapp*, Dick. 70.

3. Upon a motion to discharge an order to take the bill *pro confesso* on payment of costs and an offer to put in an answer, the court required to see what answer they proposed to put in. Whether the application for leave to answer, *quære*. 11 Ves. 77.

4. An order having been obtained by plaintiffs, that the clerk in court might attend at the hearing of the cause, with the record of the bill. to have it taken *pro confesso* against one of the defendants (the others having put in their answers, which had been replied to), this defendant afterwards put in his answer, and thereupon moved to discharge this order. The court would not discharge the order on motion, but reserved the consideration of the matter to the hearing. *Williams v. Thompson*, 1 Cox, 413.

12. Taking information *pro confesso*.

*Upon insufficiency of answer.*

Information decreed to be taken *pro confesso* upon two insufficient answers. *Attorney-general v. Young*, 3 Ves. 209.

13. Course upon a writ being improvidently issued.

Writ improvidently issued, if within the control of the court (either as not having gone out of the custody of the officer, or as having been returned) shall be quashed; if beyond its control, it shall be superseded. *Lessee of Lawlor v. Murray*, 1 Sch. & Lef. 75.

### III. Proceedings by defendant previous to, and the mode of putting in, his defence.

1. Appearance.

1. *Who are bound to appear.*

Application for an order to direct the Attorney-general, as such, to appear to the bill, refused. *Barclay v. Russell*, Dick. 729.

2. *Time of appearance.*

Order for defendant to appear to bill under special circumstances, enlarged for three months. *Wilkinson v. Coker*, Dick. 74.

3. *Compulsory.*

Member of parliament refusing to enter an appearance; the court appointed

pointed a clerk in court to enter an appearance for him under statute 43 Geo. 3. c. 24. s. 3. *Reed v. Philips*, 16 Ves. 436. Vide *supra*, 2. 11.

## 2. Reference of bill for scandal and impertinence.

### 1. Who may refer.

A defendant to a bill, though not served with process, may appear *gratia*, and refer it for impertinence. *Fell v. Christ's College, Cambridge*, 2 B. C. C. 279.

### 2. Nature of the motion for.

Motion of course to refer a bill or answer for impertinence or scandal. 18 Ves. jun. 223.

### 3. After an order for time.

When a defendant has obtained an order for time to answer, he cannot refer the bill for impertinence; but scandal may be referred at any time. *Farrer v. Farrer*, Dick. 173.; *Anon.* 1 Ves. jun. 656.

## 3. Demurrer.

### 1. Time of putting in.

1. Demurrer may be filed any time before process for contempt. *East India Company v. Henschman*, 3 B. C. C. 372.

2. A demurrer may be put in after the time for answering it is out, provided a process of contempt has not issued against the defendant. *Sowerby v. Warder*, 2 Cox, 268.

3. Demurrer allowed after a sequestration. *Harvey v. Matthew*, Dick. 30.

### 2. After an order for time.

1. Defendant cannot demur, having obtained an order for time to answer only. *Penn v. Lord Baltimore*, Dick. 273.; *Kenrich v. Clayton*, Dick. 685.

2. And if he does, the demurrer may be taken off the file. *Dyson v. Benson*, Cooper, 110.

3. Though if coupled with an answer, it could not, it was considered, be taken off the file; but was ordered to be expunged or overruled. *Taylor v. Milner*, 10 Ves. 444.

4. Yet was a demurrer and answer filed by a defendant attached for want of an answer, after orders for time to plead, answer or demur, not demurring alone, ordered to be taken off the file. *Curzon v. Cecil Baron de la Zouch*, Swanst. 185.

5. After time obtained to answer, a motion will not be granted for leave to demur, unless under special circumstances, as surprise; merits only, not being a sufficient ground for the application. *Bruce v. Allen*, 1 Mad. 556.; *Taylor v. Milner*, 10 Ves. 444.

6. Order for time to plead, answer or demur, must be on condition of not demurring alone; and the mere denial of combination is not an answer within that condition. 10 Ves. 447.

### 3. After an attachment for want of an answer.

After an attachment for want of an answer, the defendant can only answer, not demur as well. *Broughton v. Jones*, 3 Mad. 42.

### 4. After an injunction upon a *dedimus*.

Defendant to an injunction bill, having suffered the injunction to go against him on a *dedimus*, the time for answering being expired, although not under an order for time, nor in contempt, *quære*, whether he may demur alone; and it seems that he cannot be allowed to do so. *Edmonds v. Savery*, 3 Mer. 304.

### 5. Allowance of, to save time.

It being agreed by both parties, that the hearing and determining the demurrer

demurrer in this cause would take the whole term; and each side being determined to carry it afterwards to the house of lords, the lords commissioners allowed the demurrer, without giving any opinion. *Whittington v. Attorney-general*, Dick. 616.

#### 6. *Reforming informality in.*

A demurrer overruled for informality, but good in substance, taken off the file, with liberty for the defendant to demur again as he shall be advised, on payment of costs. 2 Sch. & Lef. 499.

#### 7. *Withdrawing of.*

Order for defendants to be at liberty to withdraw a demurrer, set down to be argued on payment of costs to be taxed. *Downes v. the East India Company*, 6 Ves. 586.

#### 4. *Plea.*

##### 1. *After an order for time.*

1. Plea, filed under an order for time to answer, regular. *De Minckwitz v. Eldney*, 16 Ves. 355.

2. Defendant in contempt, and being arrested, gives his bail bond, and puts in a plea; the plea is discharged for irregularity. *Newton v. Dent*, Dick. 234.

##### 2. *To amended bill.*

1. Plea to the whole of an amended bill after answer to the first bill. *Gambier v. Leheup*, Dick. 44.

2. Motion to take off the file for irregularity, a plea to a bill amended under the usual order, after exceptions allowed, refused; as a case for a plea may arise either from the amendments themselves, or from their effect upon the original part of the bill. *Ritchie v. Aylwyn*, 15 Ves. 79.

3. Amended bill is out of court by allowance of plea posterior to the date of the bill; otherwise, if prior. 1 Ves. 448.

4. Original bill is to be first answered; but, if after a cross bill filed, the plaintiff in the original bill amend it in matters material, he loses his priority. *Long v. Burton*, Dick. 82.

5. Plaintiff in original bill loses his priority of suit, and his right to have an answer in the original bill, before he is called upon to answer the cross bill, by amending the original bill, although such amendment be after the order for time to answer cross bill, until after answer to original bill. *Johnson v. Freer*, 2 Cox, 371.

6. The plaintiff in an original bill, by amending the same after a cross bill filed, loses his right to an answer before he answers the cross bill; but, in order to stay proceedings in the original bill, until an answer is put into the cross bill, an order must be obtained to stay such proceedings. *Noel v. King*, 2 Mad. 392.

##### 3. *Entry of.*

Plea must be set down within eight days. *Jordon v. Sawkins*, 3 B. C.C. 372.

##### 4. *Setting down of, for argument.*

Every plea ought to be set down for argument by the defendant. *Chapman v. Lanadown*, 2 Anst. 554.

##### 5. *Defendant's default on its being called on.*

Where the defendant sets down a plea, and, upon its being called on, does not appear, the plea will, upon affidavit of the plaintiff having been served with an order to set down the plea, be overruled; and if no such affidavit is produced, the plea will be struck out of the paper. *Mazareddo v. Maitland*, 2 Mad. 38.

##### 6. *Allowance of.*

After plea set down, order obtained of course by plaintiff to amend the bill,

bill, and served on defendant: plaintiff not appearing when the plea came on to be argued, it was allowed of course, with costs. *Jennings v Pearce*, 1 Ves. 447.

7. *Found false.*

On a plea found false, the plaintiff is entitled to a decree; and if discovery is necessary, to examine defendant on interrogatories. 2 Ves. & Beam. 158.

8. *Restoration of, after being struck out.*

Plea struck out, refused to be restored to the paper, unless on an affidavit accounting for the party not being prepared. *Mazareddo v. Maitland*, 2 Mad. 38.

5. Answer.

1. *Defendant's oath and signature.*

1. Order, on plaintiff's motion, that defendant shall be at liberty to put in his answer without oath or signature, of course, if defendant is in this country; if abroad, his consent required. *Codner v. Hersey*, 18 Ves. jun. 468.

2. Answer of a mere trustee, without interest, in a state of incapacity, not to be taken without oath and signature. The proper course is to have a guardian appointed. *Wilson v. Grace*, 14 Ves. 172.

3. Under special circumstances, and by consent, the six clerk was directed to receive the answer to a bill of foreclosure, though not signed by the defendant. ——— v. Lake, 6 Ves. 171.

2. *By peeress upon honour.*

Peeress answering peers upon honour, in exactly the same situation as another defendant answering on oath. *Gilpin v. Lady Southampton*, 18 Ves. jun. 469.

3. *Counsel's signature.*

1. Answer (taken in town), not to be filed without the signature of counsel. 2 V. & B. 358.

2. Yet where the counsel's name to an answer has been forged, the court will not take the answer off the file, if an innocent plaintiff is likely to suffer by it. *Bull v. Griffin*, 2 Anst. 563.

4. *Supplemental.*

1. The court will not allow an answer to be taken off the file for the purpose of amending a clerical error; but will permit a supplemental answer to be put in. *Ridley v. Obee*, Wightw. 32.

2. Instances of permitting and refusing amendment by supplemental answer. 1 Ves. & Beam. 150.

3. Second answer may be put in pending exceptions to the first. *Knox v. Symmonds*, 1 Ves. 87.

4. And at any time before the order to amend, &c., even the moment exceptions are taken. 1 Ves. 88.

5. In the exchequer, however, pending exceptions to an answer, a further answer cannot be filed until those exceptions are argued and disposed of. Such tender of further answer is a submission to the exceptions, and the injunction may be moved for after such an offer, as of course. *Edwards v. Johnson and another*, 1 Price, 203.

5. *Re-swearing and re-attesting of, after amendment.*

An amendment in the title of an answer being necessary, viz. instead of "the farther answer to the original amended bill," intitling it "the farther answer to the original bill, and the answer to the amended bill;" the answer so amended, must in the case of a peer, be again attested upon honour; as in

in the case of a common defendant it must be re-sworn. *Peacock v. the Duke of Bedford*, 1 Ves. & Beam. 186.

#### 7. *To amended bill.*

1. Where a bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer. *Gill v. Mathews*, 3 Anst. 879.

2. The time allowed defendant to answer amendments in a bill, is eight days, or he must within that period apply for further time. But, on a special application, to be allowed to answer an amended bill, even after the plaintiff has replied and called on defendant to join in commission, the court will permit it, on condition of filing such further answer, and joining in commission immediately. *Church v. Legeyt*, 2 Price, 45.

3. Plea. The plaintiff amended the bill, paying costs. The amended bill not within the general order 23d January 1794; and the defendant therefore entitled to the same time to answer as upon an original bill. *Spencer v. Bryan*, 9 Ves. 231.

4. If an answer be reported insufficient, and the plaintiff obtain an order to amend, and that the defendant may answer the amendments and exceptions at the same time, unless he serve the order before the defendant answers, the defendant may answer the exceptions only. *Bethuen v. Bateman*, Dick. 296.

5. After motion to amend the bill, and that amendments and exceptions shall be answered together, if the exceptions are answered before the order is drawn up, it is regular. 11 Ves. 578.

6. Exceptions being allowed to an answer in an injunction cause, plaintiff obtained an order to be at liberty to amend, and that the defendant might answer the exceptions and amendments at the same time; if the answer to the exceptions be filed any time before the order to amend, &c. is served, the order must be discharged. *Paty v. Simpson*, 2 Cox, 392.

7. Order for the plaintiff to amend his bill, amending the defendant's copy, and requiring no farther answer from the defendant; which plaintiff did accordingly; the amendment is in issue. *Bagshaw v. Batson*, Dick. 113.

#### 7. *Commission for, by defendant in custody.*

A motion may be made, without consent, by a defendant in custody, upon an attachment for want of an answer, for a commission to take his answer, &c. *Mainwaring v. Wilding*, 3 Mad. 41.

#### 8. *Messenger's oath.*

Answer taken by commission abroad, ordered to be filed without the usual oath of the messenger, under the circumstances that it had been opened by the defendant's solicitor, and afterwards read in the presence of the plaintiff, upon affidavits of the messenger, &c. identifying it, and accounting for its being opened, as the effect of accident: the farther irregularity being cured by the consent. *Cox v. Newman*, 2 Ves. & Beam. 168.

#### 9. *Time of.*

In a bill against executors, the plaintiff having stated two promissory notes of the same date, one for 15,000*l.* sterling, the other for 15,000*l.* French louis, given by the testator for securing a sum of 15,900*l.* on an affidavit by one of the executors, that he had inspected the first note, and observed on the face of it circumstances tending to impeach its authenticity; that he was informed, and believed, that the second note had been produced by the plaintiff for payment in a foreign country; and that he was advised, and believed, that it was necessary in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note; it was ordered, that the defendants should not be compelled to answer, till a fortnight after

production of the second note. *The Princess of Wales v. the Earl of Liverpool*, Swanst. 114.

10. *Extension of time for, how obtained.*

1. Where more than the usual time for answering is necessary, the proper course is to apply on affidavit; not to put in a short evasive answer, for the purpose of gaining time. *Tomkins v. Lethbridge*, 9 Ves. 178.

2. Illness an exception to the rule, that an application for time to answer upon special grounds must be made, in the first instance, before the usual orders obtained. — *v. Riddle*, 19 Ves. 112.

11. *Special order for time in the first instance.*

1. Special order, upon circumstances, for time to answer without first obtaining the usual order. *Norris v. Kennedy*, 12 Ves. 66.

2. In a case of doubtful practice, farther time to answer allowed on terms, *Boehm v. De Tasset*, 1 Ves. & Beam. 324.

3. Where the plaintiff, by an amended bill, required the defendant to answer as to certain facts, upon the inspection of papers stated to be left by the plaintiff in the hands of his clerk in court, the defendant having obtained one order for time, was allowed, on affidavit, that the papers were not left for inspection till some time after that order obtained, as much time in addition, without prejudice to the usual order on a second application, after that additional time was expired. *Farnsworth v. Yeomans*, 2 Mer. 142.

12. *Service of the petition for time for.*

A copy of the petition, upon which time has been obtained, must be served upon the plaintiff to prevent an attachment. *Newcombe v. Rawlings*, 3 Mad. 246.

13. *Usual orders for time for.*

1. After a demurrer overruled, time to answer can be obtained only on a special application. *Curzon v. De la Zouch*, Swanst. 194.

2. After a motion for a month's time, after cross-bill answered, to answer original bill, and the cross-bill is answered, and a month expired, a motion cannot be made, as of course, for further time to answer the original bill. *Noel v. King*, 3 Mad. 183.

3. A defendant who instituted the suit as the plaintiff's solicitor, after several years, not having put in an answer, ordered to answer within a week, *Mootham v. Hale*, 3 Ves. & Beam. 92.

14. *Construction of the general order of 23d January 1794, relative to time for, in the case of a peer.*

1. Construction of the general order 23d January 1794, in the case of a peer, defendant; that in the cases specified, upon application for time to answer, the defendant shall enter his appearance, and undertake, that, if the answer is not put in, a sequestration shall go, *i. e.* a sequestration absolute. *Gregor v. Lord Arundel*, 3 Ves. 87.

2. Construction of the general order 23d January 1794. Defendant, after exceptions allowed, not having previously come under terms, is entitled of course to one order for time: the general order not attaching before the second application for time to answer an amended bill, or after exceptions allowed. *Wells v. Powell*, 17 Ves. jun. 113.

15. *Duration of an order for time for.*

1. The court condemned the practice of allowing as much time of course, after an insufficient answer as on the original answer; also as to the costs of attachments; and proposed a remedy by order. *Anon.* 2 Ves. 270.

2. At the rolls, after insufficient answer, an order for time is obtained on petition; and defendant never gets as much as for the original answer. 2 Ves. 270.



3. After two answers reported insufficient, the defendant is not entitled to six weeks' time to answer. *Gregor v. Lord Arundel*, 6 Ves. 144.

16. *Order for time for, when precluded from.*

Defendant submitting to exceptions, is not entitled to further time under the general order 23d January 1794; having previously had three orders for time, consenting to serjeant at arms, as required by that order. *Portier v. De la Cour*, 8 Ves. 601.

17. *Order for time for, after submitting to answer exceptions.*

As to the practice of giving time to put in a further answer, after a submission to answer exceptions. *Kinkley v. Tomkinson*, 1 Cox, 177.

18. *Order for time for, after exceptions allowed.*

1. As to orders for time to put in further answer, after exceptions allowed. *Gordon v. Pitt*, 4 B. C. C. 406.

2. After exceptions are allowed, the defendant has eight days to answer, and may then have an order for three weeks, to commence from the end of the eight days. *Cowan v. Philips*, 936.

19. *Order for time for, alteration of.*

Order for time to answer, not corrected by extending it to the usual order for time to plead, answer or demur, not demurring alone. *Philips v. Gibbons*, 1 Ves. & Beam. 184.

20. *Order for time for, what a compliance with.*

1. After time to answer, a plea put in, held good. *Roberts v. Harty*, Dick. 554.

2. Upon motion for time to answer, the defendant puts in a plea: it is a sufficient compliance with the order. *Roberts v. Hartley*, 1 B. C. C. 56.

3. The putting in of a plea is a sufficient compliance with an order for time to answer. *Ibid.*

4. But the plea appearing to be for delay, it was ordered to be argued the next day. *Ibid.*

5. And being of a sentence of the admiralty court, which was recited in the bill, and therefore bringing no new matter before the court, it was overruled. *Ibid.*

6. After a motion for time to answer, a demurrer to part (with an answer to part) was put in, and upon being referred to the master, he reported it regular; exception to the report allowed. *Kenrick v. Clayton*, 2 B. C. C. 214. *Secus*, of a plea, *ibid.*

7. Demurrer and answer, after a peremptory order for three weeks farther time to answer, following an order for a month to plead, answer or demur, not demurring alone, ordered to be taken of the file. *Mann v. King*, 18 Ves. jun. 297.

8. An answer only denying combination, is not a compliance with an order for time to plead, answer or demur, but not to demur alone. *Lee v. Pascoe*, 1 B. C. C. 78.

9. Upon an order to plead, answer, or demur, but not to demur alone, the defendant demurred, and answered only by denying combination; the demurrer was ordered to be taken off the file. *Ibid.*

10. Mere denial of combination not a compliance with the terms of the order for time, not demurring alone. 2 Ves. & Beam. 123.

21. *Priority between motion for time for, and an attachment.*

A motion for time to put in an answer, made on the same day that an attachment is sealed, is irregular; the attachment being considered as sealed the first moment of the day upon which it issues. *Stephens v. Neale*, 1 Mad. 550.

22. *After an order not to demur alone.*

As answer, though very insufficient, a satisfaction of the condition in the order not to demur alone. 9 Ves. 179.

IV. *Mode of proceeding in interlocutory matters.*1. *Motions and petitions.*1. *Distinction between.*

Distinction between motion and petition, as applied to carry into effect decrees and orders. 13 Ves. 393.

2. *Subjects of.*

Where the bill seeks relief as well as discovery, the court will not, upon motion, aid the plaintiff in proceeding at law without the authority and control of the court: any such proceeding must be under the authority and control of the court. Therefore in such a case the court would not on motion order, that an outstanding term should not be set up by the defendant against an ejectment brought by the plaintiff. *Hylton v. Morgan*, 6 Ves. 294.

3. *Which the appropriate course.*

Decree on default setting aside a lease of a charity estate with covenant for perpetual renewal, and directing an account of the actual rent. Rehearing permitted, on paying costs, not disturbing proceedings before the master, to the draft of a report of what was due; but the money not to be paid into court before the report made. Petition, not motion, the proper application. *Attorney-general v. Brooke*, 18 Ves. jun. 319.

4. *Motion whether the appropriate course.*

1. It is in equity very common to decide a question on motion, where all the facts appear upon the bill and answer, and there is nothing in dispute, but the law of the court. *Revell v. Hussey*, 2 B. & B. 286.

2. Motion to discharge an order for a commission to examine witnesses on a master's certificate, proper. *Chaffin v. Wills*, Dick. 377.

3. After a decree, merely directing inquiries, such an order as could be had on farther directions, may by consent be made on motion; as, in this instance, to dismiss the bill with costs. *Anon.* 11 Ves. 169.

4. Court will not, upon motion, make an order that will decide on the merits of the cause. *Like v. Beresford*, 4 B. C. C. 366.

5. The court will not order temporary bars to be waived on motion. *Byrne v. Byrne*, 2 Sch. & Lef. 537.

6. A special jurisdiction under an act of parliament must be strictly followed. Therefore, under the act preventing the necessity of a recovery by tenant in tail of land to be purchased, each party must petition. *Baynes v. Baynes*, 9 Ves. 462.

7. Reference whether two suits are for the same matter, is obtained by plea in chancery, as in the exchequer; not by motion. *Murray v. Shadwell*, 17 Ves. jun. 353.

8. Money not paid out of court on motion. 13 Ves. 394.

9. Irregular to confirm reports as to maintenance on motion. 5 Ves. 199.

10. One being in execution for costs, a demand of a higher nature, upon the plaintiff, arises to him as executor; the court will not discharge him on motion. *Holworthy v. Allen*, 2 B. C. C. 17.

11. After the death of a lunatic, a reference to ascertain his next of kin, in order that money in the hands of the committee might be distributed, will not be granted on motion, though made on behalf of the committee. *Ex parte Gilbert*, 1 B. & B. 297. — Such reference will only be granted on bill, against the committee, for an account of the lunatic's property. *Ibid.*

5. *Union of two subjects in one motion.*

An application for an injunction, and the appointment of a receiver should be made the subject of two successive motions. *Lawson v. Morgan*, 1 Price, 303.

6. *In relation to time.*

Notice of motion on Saturday must be given for Tuesday, not Monday. *Maxwell v. Phillips*, 6 Ves. 146.

7. *Postponement of motion.*

Motion not to be postponed, so as to affect the right to notice. *Coffin v. Cooper*, 11 Ves. 600.

8. *Form of motion to enforce payment of money.*

1. Where money has been ordered to be paid, the motion is, that the party shall pay it by a short day, or stand committed. *Vickery v. —*, 3 B. C. C. 372.

2. Sequestration for non-payment of money, the first motion is *nisi*. *Crawley v. Clarke*, 3 B. C. C. 373.

9. *To consolidate causes.*

1. Reference whether several tithe causes should be consolidated, not of course, before answer. *Keighley v. Brown*, 16 Ves. 344.

2. Where a master reported that two suits were for the same matter, and that one of them was most for the benefit of infant parties, to be prosecuted, the court would not stop the other suit, unless upon payment of costs, and by consent, there being no decree in either cause. *Mortimer v. West*, 1 W. C. C. 159.

10. *To examine a person pro interesse suo.*

1. Parties claiming a mortgage on estates sequestered, examined *pro interesse suo*. *Fawcett v. Fothergill*, Dick. 19; *Bowles v. Parsons*, Id. 142, (in the latter case a receiver having been appointed.)

2. Upon a sequestration, a mortgagee must come to be examined *pro interesse suo*. 6 Ves. 288.

3. Where the goods of a third person are seized by sequestrators, an order to examine *pro interesse suo* will be made. And if the goods taken are found to belong to the party so applying, a reference to ascertain his damages will be granted. *Copeland v. Mape*, 2 B. & B. 66.

4. A. claiming a mortgage prior to the plaintiff's right, examined *pro interesse suo*, and his claim allowed. *Cooper v. Thornton*, Dick. 72; *Hamlyn v. Lee*, Id. 94.

5. A person may be ordered to come in and be examined *pro interesse suo*, as well against a receiver as against sequestrators. *Gomme v. West*, Dick. 472.

6. It is not the practice, when tenants have been dispossessed by an injunction of lands, held by lease from the defendant prior to the institution of the suit, to which they were not parties, to permit them to be examined *pro interesse suo*. *Dunne v. Farrell*, 1 Ball & Beatty, 122.

7. An order directing such examination was set aside, and the plaintiff directed to proceed by ejectment to recover the lands. Ibid.

8. An order to examine *pro interesse suo*, is only made to ascertain priority of incumbrances; or when an interest is claimed in estates, in the possession of a receiver, or of sequestrators. Ibid. 124.

9. The mode of proceeding on examinations *pro interesse suo*. *Hunt v. Priest*, Dick. 540.

11. *Counsel's privilege as to number of motions.*

Counsel can only make two motions each successively. *Anon.* 4 Price, 345.

12. *Mo-*

12. *Motions before lord chief baron.*

Motions to be made in causes pending before the lord chief baron, in the exercise of his sole and exclusive jurisdiction, must be made before his lordship when sitting alone only. 4 Price, 309.

13. *Petition whether the appropriate course.*

1. The parties under commitment cannot be heard except on petition. *Nicholson v. Squire*, 16 Ves. 259.

2. Money to be paid to parties, under a private act of parliament, on petition; lord chancellor would not order it to be paid to persons deriving title under them without a bill. *King ex parte*, 2 B. C. C. 158.

3. Serjeant at arms directed to go against the defendant for want of his answer, on petition; he having consented that the serjeant at arms should go, in case he did not answer. *Countess of Londonderry v. Cornthwaite*, Dick. 285.

4. Objections to interrogatories settled by the master must be taken by exceptions, not by petition, as an objection to the appointment of a receiver. *Hughes v. Williams*, 6 Ves. 459.

5. No authority in bankruptcy on the petition of an equitable mortgagee by deposit of deeds, to order a sale of the estates, where there is a subsequent mortgagee of the equity of redemption who objects and has not proved under the commission; the proper remedy being by bill. *Ex parte Topham*, 1 Mad. 38.

14. *Service of petition upon an agent.*

Service of a petition to expunge a debt upon the agent of a foreign principal, who had exhibited the affidavit upon which it had been proved, allowed to be sufficient upon motion. *Ex parte Dunlop*, 3 Mad. 279.

15. *Dismissal of petition failing as to principal object.*

Petition failing as to the principal objects, dismissed generally. 17 Ves. jun. 376.

## 2. Affidavits.

1. *Where and before whom sworn.*

1. Affidavits before a master extraordinary in Ireland, read in this court. *Amesley v. Lord Anglesey*, Dick. 905.

2. Order that an affidavit should be sworn before a notary public at Amsterdam. *Chicot v. Lequesne*, Dick. 150.

2. *Time of filing.*

1. The rule of courts of law, that all affidavits shall be filed a certain time before the discussion: the practice of this court otherwise; and preferred notwithstanding the inconvenience. 6 Ves. 432.

2. No objection to a motion, that the affidavit was filed only the day before; if it is an affidavit that cannot be answered; as, that the plaintiff cannot go to trial with safety till the answer comes in. *Jones v. —*, 8 Ves. 46.

3. *Made in one cause, used in another.*

Affidavit in one cause that defendant could not be found, not sufficient for an order to serve the clerk in court in another cause, though between the same parties. *Lumbrozo v. White*, Dick. 150.

## 3. Notices.

1. A notice for a given hour is satisfied by an attendance before the next. *Knox v. Simmonds*, 4 B. C. C. 433.

2. Notice for Monday the 12th January, being the first seal before Hilary term, is good notice for the first seal, though held on Thursday the 15th January. *Smith v. —*, Swanst. 10.

N 3.

3. *Quære*,

3. *Quære*, whether affidavit of notice must state positively, that the person served acts as clerk in court; or whether upon information and belief is sufficient. *M'Caulcy v. Collier*, 1 Ves. 141.

#### 4. Interlocutory orders.

##### 1. *Subjects of.*

1. An order to acknowledge satisfaction on a statute. *Ex parte Duchess of Marlborough*, Dick. 340.

2. Order to acknowledge satisfaction on a statute staple. *Ex parte Munday*, Ibid. 373.

3. Where money is directed by an act of parliament to be paid to the accountant-general, he is bound by the act to receive it, and the court will not make an order for that purpose. *Anon.* 1 Ves. 56.

##### 2. *Conditional.*

In all cases where conditional orders are granted, if cause be not shewn on the motion-day next after the expiration of the time limited by such order, or a notice of shewing cause served (which is to be entered with the register,) the register shall give a certificate of no cause. Notices so entered to have precedence of all other motions save injunction-motions. 1 Sch. & Lef. 178.

##### 3. *Order in nature of a decree.*

To make an order in the nature of a decree on an interlocutory application, it must be made by consent. *Smith v. Lord Pomfret*, Dick. 437.

##### 4. *Drawing up order of, preceding lord chancellor, preparatory to re-hearing.*

Order of a preceding lord chancellor not to be re-heard upon minutes; but must first be drawn up. *Taylor v. Popham*, 15 Ves. 72.

##### 5. *Service of.*

Service of a writ of execution of the order to join in a conveyance of lands sold under a decree on the husband, ordered to be good service on the wife. *Clark v. Greenhill*, Dick. 91.

##### 6. *Loss of.*

Order lost, re-drawn, and entered *nunc pro tunc*. *Williamson v. Henshaw*, Dick. 129.

##### 7. *Mode of enforcing obedience to.*

A purchaser may be committed for disobeying an order to pay in his money. *Lansdown v. Elderton*, 14 Ves. 152.

##### 8. *Reference to master — preparatory to the institution of a suit.*

Institution of a suit on behalf of persons having a common interest, not directed on motion and affidavit, without a reference to the master whether it is for their benefit. *Musgrave v. Medex*, 3 Ves. & Beam. 167.

##### 9. *Reference to master — before decree.*

Reference before decree confined to the case of title. Where there was a farther subject of dispute, under a claim of compensation, it was refused with costs. — *v. Skelton*, 1 Ves. & Beam. 536.; (*Vide in Vendor and Purchaser*, I.)

##### 10. *Reference to master — to correct the generality of a bill.*

The date and general purport of wills, &c., under which the plaintiff claimed being only stated in the bill by way of reference, it was referred to the master to state a case of the rights claimed by the plaintiff under the several instruments. *Pauncefort v. Lord Lincoln*, Dick. 362.

##### 11. *Reference to master — touching the pendency of a former suit.*

1. Where the defendant pleads a former suit depending, it may be referred

ferred to the master to look into the two bills, &c., and to certify whether it is for the same matter. *Daniel v. Mitchell*, 3 B. C. C. 544.

2. Plea of another suit depending for the same cause, referred to the master of course, without being set down. *Anon.* 1 Ves. 484.

3. Plea of another suit for the same matter, referred to the master. 2 Ves. & Beam. 110.

4. Suggestion that the defendant is doubly vexed by suits in equity and at law for the same matter, ascertained by reference to the master. *Boyd v. Heinzelman*, Id. 381.

12. *Reference to master — touching a coming of age.*

Master to enquire if a party had attained the age of twenty-one. *Dinely v. Foot*, Dick. 401.

13. *Reference to master — touching a legitimacy.*

Reference to enquire whether the plaintiffs were natural children of the testator, refused; there having been sufficient in the bill to raise the question under a former reference. *Grave v. Salisbury*, 1 B. C. C. 425.

14. *Reference to master — touching scandal and impertinence in general.*

Any proceeding may be referred for scandal and impertinence; as a state of facts before the master, and affidavits in bankruptcy. *Erskine v. Garthshore*, 18 Ves. jun. 114.

15. *Reference to master — touching scandal or impertinence in affidavit.*

1. Affidavit referred for scandal. *Jobson v. Leighton*, Dick. 112.

2. Jurisdiction to expunge scandal from an affidavit in lunacy or bankruptcy, on reference to the master. *Ex parte Le Heup*, 18 Ves. jun. 221.

3. Affidavit referred for impertinence. *Philips v. Muilman*, Dick. 113.

16. *Reference to master — touching impertinence in a discharge.*

A discharge carried in before the master may be referred for impertinence. *Price v. Shaw*, 2 Cox, 184.

17. *Reference to master — touching a contempt.*

Reference to see if particular persons were guilty of a contempt. *Ex parte Rex*, Dick. 101.

V. *Interlocutory applications by plaintiff or defendant.*

1. *Dismissal of bill by plaintiff.*

1. *After issue directed.*

Although a cause be brought to a hearing and an issue directed, till the issue is tried, and there hath been a determination, let the cause be in what stage it may, the plaintiff may, upon motion, dismiss his bill, upon payment of costs. *Carrington v. Holly*, Dick. 280.

2. *By a co-plaintiff as to himself.*

Bill dismissed by one co-plaintiff as to himself with costs, without the consent of the other. *Langdale v. Langdale*, 13 Ves. 167.

3. *With or without costs.*

1. Motion by plaintiff to dismiss his own bill without costs, cannot be granted without the express consent of the defendants in court. *Fidelle v. Evans*, 1 Cox, 27.

2. See *infra*, tit. COSTS.

2. *To restore bill after dismissal.*

1. It is not the ordinary practice to restore a bill which has been regularly dismissed for want of prosecution; but this may be done under the circumstances of the case. *Hannam v. South London Water-works*, 2 Mer. 63.

2. The refusal of a motion to discharge an order to dismiss a bill, does not constitute

constitute a ground to prevent the party from applying to have the bill restored. *Ibid.*

3. On motion, after an order to dismiss bill, for want of prosecution, supported by affidavit as to merits, and accounting for the delay, the bill retained on the terms of paying costs, &c. *Wellingham v. Bruty*, 1 Mad. 265.

### 3. To revive after an abatement.

Order to dismiss for want of prosecution after an abatement, though irregular, not to be regarded as a nullity. Consequently, that order must be discharged before the plaintiff can obtain an order to revive the suit. *Boddy v. Kent*, 1 Mer. 361.

### 4. Reference of answer for insufficiency, scandal, and impertinence.

#### 1. *Principle of the practice.*

Principle of referring scandal to the master in the first instance. 6 Ves. 515.

#### 2. *Distinctions as to exceptions in chancery and in exchequer.*

Distinction as to exceptions in the courts of chancery and exchequer. 15 Ves. 377.

#### 3. *Preliminaries to exceptions.*

1. Where a bill is for a discovery and relief, and the defendant answers to the relief, and pleads to the discovery, it is not necessary that the plea should be argued before the plaintiff can except to the answer. *Pigot v. Stace*, Dick. 496.

2. If a defendant pleads to relief, and answers as to the discovery sought by the bill, it is regular to except to the answer before the plea is argued. *Sidney v. Perry*, Ib. 602.

#### 4. *Time of excepting.*

1. Plaintiff in a bill for discovery only is not entitled as of course to two terms to except to the answer filed in the vacation. *Hewart v. Semple*, 5 Ves. 86.

2. A reference of an answer to the master for impertinence, refused to be discharged, although not moved for till after notice of motion for dismissal of the plaintiff's bill for want of prosecution. *Kinworthy v. Allen*, 1 B. C. C. 400.

#### 5. *Filing exceptions nunc pro tunc.*

1. Exceptions *nunc pro tunc* may be filed to an answer to a bill of discovery. *Baring v. Prinsep*, 1 Mad. 526.

2. The time allowed for filing exceptions *nunc pro tunc* is two terms and the following vacation. *Thomas v. Lewellyn*, 6 Ves. 823.

3. And motion is of course to file exceptions *nunc pro tunc* within two terms and the following vacation from the date of the master's report of impertinence. *Dyer v. Dyer*, 1 Mer. 1.

#### 6. *Exceptions after amending bill.*

Amendment of the bill, merely adding a defendant, requiring no farther answer, does not prevent the plaintiff from excepting to the answer. *Taylor v. Wrench*, 9 Ves. 315.

#### 7. *New exceptions after amending bill.*

Plaintiff, having obtained the usual order to amend, and that the defendant shall answer amendments and exceptions together, cannot take a new exception as to any thing in the original bill; but must go before the master upon the old exceptions as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments; which however the master may consider with reference to such parts of the original bill as apply to them. *Partridge v. Haycraft*, 11 Ves. 570.

#### 8. *After*

8. *After an order nisi to dissolve an injunction.*

Practice as to reference of an answer for impertinence, after an order *nisi* to dissolve an injunction. *Jennings v. Walker*, 1 Cox, 178.

9. *Effect of excepting to answer pending demurrer to discovery.*

The effect of taking exceptions, pending a demurrer to discovery, is to admit the demurrer. Plaintiff permitted to withdraw the exceptions, paying the costs, without prejudice. *Boyd v. Mills*, 13 Ves. 85.

10. *Exceptions in case of separate answers.*

If defendants answer separately, exceptions must be taken to each answer. *Sydolph v. Monkstone*, Dick. 609.

11. *Exceptions to joint answer, and death of one defendant.*

Exceptions to a joint answer of two defendants, one of whom dies; exceptions referred as to the answer of the survivor only. *Lord Herbert v. Pusey*, Dick. 255.

12. *Amendment of exceptions.*

1. Amendment of exceptions after arguing them. *Northcote v. Northcote*, Dick. 22.

2. Amendment of exceptions permitted upon mistake. *Dolber v. Bank of England*, 10 Ves. 284.

13. *Subpœna for better answer after exceptions allowed.*

Defendant in contempt, and some exceptions allowed to his answer, and some overruled. If the plaintiff excepts to the master's report as to the exceptions overruled, as well as the defendant to those which the master has allowed, the defendant is entitled to a *subpœna* for a better answer, after the plaintiff's exceptions have been allowed by the court, and the defendant's disallowed. *Cooper*, 221.

14. *Joinder of exceptions, and subpœna for a better answer.*

Plaintiff cannot take exceptions to answer, and also serve defendant with a *subpœna* to make a better. *Strickland v. Mackenzie*, Dick. 49.

15. *Exceptions to an infant's answer.*

1. Exceptions will not lie to an infant's answer. *Copeland v. Wheeler*, 4 B. C. C. 256.

2. No exceptions to an infant's answer. In that case, therefore, cause against dissolving an injunction must be upon the merits; according to the answer: and though it was manifestly insufficient, the injunction was dissolved. *Lucas v. Lucas*, 13 Ves. 274.

16. *Scandal defined.*

What is material or relevant not to be considered scandal. 6 Ves. 514.

17. *To what master reference shall be.*

Exceptions to the answer to an amended bill, referred to the same master to whom the exceptions to the original bill had been referred. *Pratt v. Temier*, 1 B. C. C. 39.

18. *Jurisdiction of the master thereon.*

Upon exceptions taken to an answer for insufficiency, the master may look to the materiality of them, and overrule immaterial exceptions. *Agar v. the Regent's Canal Company*, *Cooper*, 212.

19. *Reference of insufficiency pending reference for impertinence.*

No reference for insufficiency until reference for impertinence determined. 2 Ves. & Beam. 293.

20. *Practice on establishing one or more exceptions only.*

1. The practice in the master's office to report an answer insufficient generally



rally upon establishing one exception, without entering into more, corrected. *Rowe v. Gudgeon*, 1 Ves. & Beam. 331.

2. When some exceptions to an answer are overruled, and others allowed, the master should report as to which exceptions are allowed, and which disallowed. *Agar v. Gurney*, 2 Mad. 389.

21. *Reference, by whom moved.*

1. Reference for scandal upon the application of any one, not a party, nor even without a motion. 6 Ves. 514.

2. Difference between plaintiff and defendant referring for impertinence; not applicable to scandal. *Ibid.* 515.

22. *Submission to exceptions.*

On exceptions to an answer, if the defendant means to submit to them, he must give notice thereof before he can file his amended answer. *Anon.* 1 Anst. 86.

23. *Waiver of reference, by setting down plea for argument.*

Plaintiff having referred a plea for impertinence, afterwards set the plea down for argument. This is a waiver of the reference for impertinence, notwithstanding the defendant had attended the master upon it. *Dixon v. Olmius*, 1 Cox, 412.

24. *Waiver of reference, by subsequent reference.*

A reference of an answer for impertinence is waived by subsequent reference for insufficiency. *Pellew v. —*, 6 Ves. 456.

25. *Miscellaneous.*

Motion to refer it to the master, to see whether the answers put in to three former amended bills were not sufficient answers to a fourth amended bill, refused. *Taylor v. Rhiddee*, Dick. 582.

5. Amendment of bill.

1. *Preliminaries to.*

1. Amendments moved ought properly to be stated. 1 Ves. 388.

2. A plaintiff cannot move to amend his bill on an affidavit of equitable facts, without previous notice to the defendant. But if the circumstances of the case require it, and it is late in the term, they will order the defendant to accept short notice of motion. *Harrison v. Delmont*, 1 Price 117.

3. A plaintiff cannot amend his bill, to enjoin further proceedings at law, after verdict, without first paying into court the sum recovered at law, although the original bill was filed before verdict obtained. But he will be permitted to amend by a stated time, on bringing the money then into court. *Ibid.* 118.

2. *New record, when necessary.*

1. Where amendment is permitted, if so considerable as to deface the record, it must be taken off the file, and a new record substituted. 13 Ves. 86.

2. Where much new matter is put in issue by an amended bill, it must be done by new engrossment; where but little, by interpolation. *Willis v. Evans*, 2 Ball & Beatty, 228.

3. *Subjects of.*

1. The court will exercise the right of rectifying a mere slip in any of its proceedings. *Cholmondeley v. Clinton*, 2 Mer. 81.

2. The name of a plaintiff cannot be struck out of the bill, in order that he may be examined as a witness. *Motteux v. Mackreth*, Dick. 735.

3. Evidence of a plaintiff being necessary, and defendant refusing to consent to his examination, the bill on motion amended by making him a defendant, and replication withdrawn, on terms of costs, amending defendant's copy, and requiring no farther answer. *Ibid.* 1 Ves. 142.

4. Order

4. Order to strike out the names of two of the plaintiffs on giving security for costs made without consent. *Lloyd v. Makean*, 6 Ves. 145.

5. Order that the name of an infant plaintiff may be struck out, that he may be made a defendant. *Tappen v. Norman*, 11 Ves. 563.

6. Co-plaintiff, as next friend, struck out, his evidence being necessary; but, as a general rule, upon giving security for the costs incurred. *Witts v. Campbell*, 12 Ves. 493.

7. Bill stated an agreement to make a lease to the plaintiff alone: defendant's answer stated the agreement to have been to let to the plaintiff and another person jointly; and so it appeared in evidence upon the hearing. Plaintiff not allowed to amend in order to make that other person a party: for that would be making a new lease. *Denniston v. Little*, 2 Sch. & Lef. 11.

8. No instance of a bill of discovery being amended by adding parties as plaintiffs. *Cholmondeley v. Clinton*, 2 Mer. 77.

9. Original bill prayed execution of an agreement; defendant denied the agreement as in bill, but admitted a different agreement. Plaintiff amended his bill, continuing to insist on the original agreement, but praying, in the alternative, if not entitled to that, to have execution of the admitted agreement. Bill dismissed, without prejudice to a bill for performance of the admitted agreement. *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

10. Plaintiff filing a bill stating an agreement, and defendant admitting a different agreement, plaintiff may amend his bill, abandoning the first agreement, and may have a decree for that admitted by defendant. *Ibid.* 9.

11. Plaintiff not entitled, upon paying the common costs of amendment, to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff, into a bill to foreclose a mortgage; after an issue against the plaintiff, finding him a mortgagee. *Ex parte Smith*, Cooper, 141.

12. Motion for leave to amend, after replication filed and *subpoena* served, specifying the nature of the intended amendments, and not requiring a further answer, refused; the case being that of a bill filed in 1814, to set aside a purchase made in 1799, for fraud, inferred from great undervalue, the defendant by his answer denying knowledge of the value at the time of making the purchase, and the amendments sought to be introduced tending to fix him with the fact of such knowledge. *Christchurch v. Symonds*, 2 Mer. 467.

13. An original bill was filed to redeem a mortgage, and an answer put in, showing that the plaintiff had no title to call for a redemption. Afterwards a right to redeem has purchased, and the bill amended. Demurrer to the amended bill allowed; and, on application, full costs given. *Pilkington v. Wignall*, 2 Mad. 240.

4. *Time of application to amend; conditions upon which it will be granted; with its effect.*

1. Bill amended after plea set down, and payment of 20*l.* costs, and 5*l.* for the plea. *Vernon v. Cue*, Dick. 358.

2. A demurrer being allowed, the bill is out of court, and the plaintiff cannot amend it. *Watkins v. Bush*, Dick. 701.

3. Bill cannot be amended, after demurrer to the whole bill has been allowed. *Smith v. Barnes*, Dick. 67.

4. After answer to bill of discovery, motion to amend the bill by adding a prayer for relief, refused with costs. *Butterworth v. Bailey*, 15 Ves. 358.

5. After answer, motion to amend the bill, by striking out the relief, refused. *Earl of Cholmondeley v. Lord Clinton*, 2 Ves. & Beam. 113.

6. Amendment permitted after answer, without prejudice to exceptions, by praying injunction, upon a *devastavit*, and a purpose of collusive sale by the executrix, a person of no property, to the trustee. The amendment confined to the prayer of the injunction. *Jacob v. Hall*, 12 Ves. 458.

7. After answer not excepted to, liberty to amend the bill without prejudice

dice to the injunction, staying proceedings at law, being the common injunction, not upon the merits, refused with costs. *Turner v. Bazeley*, 2 Ves. & Beam. 390.

8. After an undertaking to speed a cause, the plaintiff cannot, as of course, obtain an order to withdraw his replication and amend his bill. *Ryan v. Stewart*, 1 Cox, 397.

9. Liberty given after replication to amend bill, without withdrawing replication, by charging one of the defendants, as the administrator of J. S., which was in effect adding a party. *Andre v. —*, Dick. 768.

10. After a plaintiff has twice amended his bill, and filed a replication for a cause against a second order *nisi* to dismiss; as against a defendant who has not caused delay, the court will not permit the replication to be withdrawn for the purpose of further amending the bill, by striking out the name of such defendant, and in other respects; for they will not set bounds to dilatory proceedings. *Turner v. Calvert*, 3 Price, 161.

11. Order to dismiss a bill obtained, but not served till eight months after. Between the order and the service of it, the plaintiff obtained an order to amend. Held, that the order to amend was regular. *Young v. Smith*, 3 Mad. 196.

12. At the hearing, the cause went off for want of parties, with liberty for the plaintiff to amend; was ordered to do so by a given time, or the bill to be dismissed. *Yarroway v. Hand*, Dick. 498.

13. Order to amend upon petition at the rolls, after notice of motion to dismiss for want of prosecution for the seal, the day on which the order was obtained, and the motion could not be made, regular. *White v. Hall*, 14 Ves. 208.

14. The original bill was filed by three partners, who afterwards became bankrupts. The assignees under the commission being desirous of examining one of the bankrupts as a witness; it was ordered, that they should be at liberty to amend the bill by striking out the name of the bankrupt as a plaintiff, and then to examine him as a witness. *Ewer v. Atkinson*, 2 Cox, 393.

15. Re-amendment permitted without prejudice to an injunction, on affidavit that the facts, which must be stated, came to the plaintiff's knowledge since the bill filed, and on payment of costs. *Mair v. Thelluson*, 3 Ves. & Beam. 145.

16. On a plea to a bill of discovery, the vice-chancellor being of opinion that a *cestui que trust* could not file such a bill without the trustee, in whom the legal estate was vested, directed a case for the opinion of a court of law on the question where the legal estate was, and ordered the plea to stand over till the return of the judge's certificate. The parties not being able to agree on the case, a motion for leave to amend the bill by adding the trustee as a plaintiff, pending the vice-chancellor's order, refused. *Cholmondeley v. Clinton*, 2 Mer. 74.

17. Motion to amend a bill by striking out a party, and making him a defendant after bill dismissed; the court gave the plaintiff leave to amend, paying all costs. *Durand v. Hutchinson*, Dick. 456.

18. Bill amended after answer: cost must be paid for that; then it is considered as an original bill; plaintiff is not bound by offers in the original bill; nor defendant by submissions in his answer. 1 Ves. 210.

19. The court will not allow a plaintiff to amend his bill where he has been dilatory, without reason, in his former proceedings; and refusing such an application, they will do so with costs. *Milward v. Oldfield*, 4 Price, 325.

20. If after an injunction the plaintiff amend his bill, the amendments cannot be used in support of the injunction. *Vere v. Glynn*, Dick. 441.

21. Amending a bill after plea is not allowing the plea. *Ibid.*

22. Amendment of bill after exceptions to answer allowed, does not prejudice an injunction previously obtained. *Adney v. Flood*, 1 Mad. 449.

23. Amendment of bill, after exceptions allowed, and not answered, does not

not prejudice an injunction previously obtained. Therefore, a motion of course for leave to amend, and that defendant may answer amendments and exceptions together. *Dipper v. Durant*, 3 Mer. 465.

24. In general the amendment of a bill puts an end to all process of contempt for want of an answer, and the court will not allow a plaintiff to amend without prejudice to a sequestration, notwithstanding he undertakes not to require any answer to the amendments. *Symonds v. Duchess of Cumberland*, 2 Cox, 411.

25. Amended bill taken as a new bill for certain purposes. 1 Ves. 250.

#### 5. *Form of motion for.*

1. Motion, of course, after plea or demurrer to amend the bill on twenty shillings costs, must state that the plea of demurrer is not set down. 1 Ves. 448.

2. Where a party applies to withdraw a replication (filed to save a bill) and amend, he must state that the matter, sought to be introduced, came to his knowledge subsequent to the time of filing the replication. *Turner v. Chalkin*, Forrest, 13.

3. After an order *nisi* to dismiss for want of prosecution, the plaintiff filed a replication; and afterwards moved to withdraw the replication, and amend on affidavit of materiality; he must also shew why the facts introduced by the amendment could not have been stated before. *Longman v. Calliford*, 3 Anst. 807.

#### 6. *Drawing up and serving order for.*

1. Order to amend, not served or drawn up, does not prevent a motion to dismiss the bill for want of prosecution. Anon. 7 Ves. 222.

2. Order to amend the bill, not served or drawn up, cannot prevent the motion to dismiss for want of prosecution. *Morris v. Owen*, 1 Ves. & Beam. 523.

#### 7. *Effect of making it without leave.*

1. Although irregular to file an amended bill without leave, after an order to continue an injunction on the terms of speeding the cause; yet, amendment being material, and such as the court would have allowed, and the plaintiff offering terms which tend to prevent delay, the injunction was continued, plaintiff paying the costs of defendant's motion to dissolve it. *Welsh v. Hannam*, 2 Sch. & Lef. 516.

2. Plaintiff, after filing his bill, filed an amended bill without an order; defendant appeared to both bills; liberty given to the plaintiff to amend his bill on terms. *Parry v. Morgan*, Dick. 234.

#### 8. *Acceptance of copy of amended bill, its effect.*

Acceptance of an office-copy of an amended bill is a waiver of all preceding irregularity. *Sirr v. Benyon*, 3 Anst. 22.

#### 9. *Practice where no answer is required.*

The plaintiff having an order to amend without costs, not requiring any further answer, and amending the defendant's office-copy, the practice is, that the defendant must bring his office-copy to the plaintiff's clerk in court to be amended; and is at liberty to put in a further answer within eight days after service of the order, before which time the plaintiff cannot file a replication. *Lloyd v. Lloyd*, 2 Cox, 431.

#### 6. Amendment of answer.

##### 1. *Subjects of.*

1. The court never permits an answer to be amended. *Harris v. Daubeney*, 3 Anst. 717.

2. The court will not allow an answer to be amended in any case; nor a  
supple-

supplemental answer, unless on new matter arising, or a sufficient reason appearing for its not having been inserted originally. *Tennant v. Wilmore*, 2 *Anst.* 362.

3. Leave to amend an answer, refused. 2 *Ves. & Beam.* 256.

4. Answer allowed to be amended, by adding facts. *Bedford v. Wharton*, *Dick.* 84.

5. Liberty given to amend an answer, so as to explain an admission therein of assets. *Dagly v. Crump*, *Dick.* 35.; *sed vide In.* 573.

6. Liberty given to the defendant to amend his answer, by striking out the admission of the plaintiff's pedigree after publication. *Kingscote v. Bainsly*, *Dick.* 485.

7. Answer amended, defendant having discovered his title after it was put in. *Patterson v. Houghter*, *Dick.* 285.

8. Motion by defendant to take answer, defective in the title, off the file, and to amend and re-swear it, allowed on payment of costs. *White v. Goldbold*, 1 *Mad.* 269.

9. If the signature of counsel to an answer do not appear upon the record, the defendant must apply for leave to amend by inserting it. *Harrison v. Delmont*, 1 *Price*, 108.

#### 2. *Pending exceptions in injunction cause.*

In an injunction cause, where exceptions are taken to the answer, it is irregular to obtain an order to amend until the exceptions are disposed of. *Dixon v. Redmond*, 2 *Sch. & Lef.* 516.

#### 3. *To avoid a prosecution.*

An answer shall not be amended after an indictment for perjury preferred or threatened, in order to avoid the indictment. *Verney v. Macnamara*, 4 *B. C. C.* 419.

#### 7. Amendment of plea.

##### 1. *Subjects of.*

1. A plea may be amended, where there is a slip, if the material ground of defence appears sufficient, but not otherwise. 2 *B. C. C.* 143.

2. Plea to a bill, as revived upon the marriage of female plaintiff, alleging facts, requiring a supplemental bill; viz. a settlement. Objection of form; the plea not concluding either in bar or abatement; not stating the necessary parties. Leave given to amend. *Merrewether v. Mellish*, 13 *Ves.* 435.

##### 2. *Conditions of.*

Not usual to refuse leave to amend a plea; but defendant must be tied down to a very short time; and where it seemed incapable of amendment, he had leave to withdraw and plead *de novo* in a fortnight. *Nobkissen v. Hastings*, 2 *Ves.* 85.

##### 3. *Form of motion for.*

Leave to amend a plea, not of course; and the amendments to be stated. *Wood v. Stickland*, 2 *Ves. & Beam.* 150.

#### 8. Production of deeds and writings.

1. *General rules.* — A plaintiff is entitled to a production of such papers only in which he has a common interest with defendant. *Burton v. Neville*, 2 *Cox*, 242.

2. Whenever a plaintiff has established an interest in any instrument in the hands of the defendant, he is in general entitled to a production of it. And in this case the court thought that the plaintiff had established a sufficient interest in the documents required, and ordered a production of them. *Smith v. Duke of Northumberland*, 1 *Cox*, 363.

3. The statement of a defendant, by his answer, of the contents of an instru-

instrument, is not a sufficient ground for the production without an express admission of the instrument being in the defendant's custody or power. *Erskine v. Bize*, 2 Cox, 226.

4. Reason of the practice requiring proof (beyond mere reference) of possession by the defendant of a document previous to an order for production. *The Princess of Wales v. the Earl of Liverpool*, Swanst. 123.

5. Motion for production of deeds and papers, referred to as in defendant's possession, but not described by the answer or schedule, and without an offer to produce them, as the court shall direct, refused. *Atkins v. Wright*, 14 Ves. 211.

6. Answer admitting the execution of an instrument, and craving leave to refer to it, when produced, is not a ground to move for the production; not admitting, that it is in the possession or power of the defendant. *Darwin v. Clarke*, 8 Ves. 158.

7. In ordering the production of documents, the court proceeds on the principle, that they are by reference incorporated into the answer, and become a part of it. *Evans v. Richard*, Swanst. 3.

8. The plaintiff is entitled to the production of documents referred to in the answer, and admitted to be in the custody of the defendant, although an injunction obtained by the plaintiff, has been dissolved, on the ground, that the contract which he seeks to enforce is illegal. *Ex parte Smith*, Swanst. 7.

9. Qualified submission, to produce a deed if the court shall require it, does not fix the defendant: and deprive him of the discretion of the court as to the propriety of the production. 14 Ves. 213.

10. Order for production of papers in a trial at law limited to those referred to by the answer of the particular defendant; and not extended to any other answer except upon a trial, directed by the court; when the production is more general. *Marsh v. Sibbald*, 2 Ves. & Beam. 375.

11. Bill filed against a steward for an account of monies received in that capacity, and of the interest made by him of it. By his answer he admitted that he had received this money, and had mixed it with his own, and used it accordingly. This admission will induce the court to direct a production of his banker's books, though they may contain many other private matters. *Salisbury v. Cecil*, 1 Cox, 277.

12. A party might be compelled to produce papers connected with the relief. 6 Ves. 281.

13. To warrant an application to produce, on the trial of a civil action, a record of the court, sufficient grounds may be required, as the office-copy might be evidence. *Ball & Beatty*, 296.

14. In a suit by a principal against his agent, the latter was ordered, upon motion, to produce books of account in his possession, relating to the plaintiff's affairs, sealing up such parts as did not concern the plaintiff, and pledging himself by affidavit to seal up those parts alone. *Gerard v. Penswick*, 1 W. C. C. 222.

15. *Bill of Exchange*. — Plaintiff prayed a discovery, injunction, and delivery of a bill of exchange; upon the answers and evidence the right being clear, the court refused an opportunity of trying it at law, and decreed an immediate delivery. *Newman v. Milner*, 2 Ves. 483.

16. *Corporation*. — Upon a disputed title to a lease granted by a corporation, a trust being set up against the lessee, a motion being made to compel the corporation to produce surrendered leases, counterparts of renewed leases, &c.; no order was made. *Cock v. St. Bartholomew's Hospital*, Chatham, 8 Ves. 138.

17. *Court rolls*. — Court rolls, &c. ordered to be delivered to persons appointed to hold the courts of manors. *Brown v. Brown*, Dick, 62.

18. The court refused to order court rolls, &c. to be delivered by the steward appointed by the trustees, to the steward of the testamentary guardian;

dian: there being no suggestion of improper conduct or advantage from the change. *Mott v. Buxton*, 7 Ves. 201.

19. *Executor*. — General rule as to the deposit of papers and writings is, that an executor must deposit them for the benefit of the parties interested, unless there are purposes which require that he should retain them. *Freeman v. Fairlie*, 3 Mer. 30.

20. *Letters*. — Motion by defendant for inspection of letters, referred to by the plaintiff's depositions, as exhibits, refused, with costs. *Wiley v. Pistor*, 7 Ves. 411.

21. *Sales*. — Part of estate being sold under a decree, and the encumbrances discharged, deeds and writings in the master's office ordered to be delivered to the tenant for life, on affidavit of notice. *Webb v. Webb*, Dick. 298.

22. In an abstract of a vendor's title, a will which formed part of it was represented as having been proved in the spiritual court, which afterwards appeared not to have been done. The purchaser filed his bill, praying that the defendants might either be decreed to prove the will, or that it might be deposited in the hands of the master for safe custody. It appeared that two other persons were interested under the will, and they were added as parties; and they not objecting, the will was directed to be deposited with the master for safe custody. The vendors having, by their misrepresentations, occasioned the suit, were ordered to pay all the costs. *Harrison v. Coppard*, 2 Cox, 319.

23. Motion, on the part of a plaintiff, for the production of a deed alleged to be in possession of the defendant, as tenant in common with the plaintiff, refused, it appearing by the answer, that the defendant had sold his share, and was in possession of the deed in question only as mortgagee to the purchaser. 2 Mer. 459.

24. *Scmble*, bill does not lie by a purchaser from a contingent remainderman, for an inspection of title deeds in the hands of the tenant for life. *Noel v. Ward*, 1 Mad. 322.

25. If there be a settlement of a rent-charge upon an adult female before marriage in lieu of dower, a purchaser of other lands than those charged, is not entitled to look into the husband's title deeds to see whether he had a good title to the lands out of which the rent-charge was granted. *Simpson v. Gutteridge*, 1 Mad. 609.

26. *Settlement*. — Bill for discovery and delivery of a settlement, under which plaintiff claimed, and other title deeds, and possession of the estate: demurrer to all the relief, and all the discovery, except of the settlement, for want of equity; and answer admitting the settlement and offering to produce it, and denying that defendant had any other relative to the plaintiff's title; the title being legal, the court would only order the settlement to be produced at the trial; the demurrer therefore going to all the relief, the defendant had leave to amend. *Renison v. Ashley*, 2 Ves. 459.

27. *Will — devisee — heir*. — Though the court orders an original will to be delivered out for a special purpose, as to the jurisdiction, *Quære*. 7 Ves. 292.

28. Register of ecclesiastical court ordered to deliver original will to be produced at the hearing, on giving security. *Pierce v. Watkin*, Dick. 485.

29. The court will order the officer of the ecclesiastical court to deliver up a will, to be produced here on security given to return it. *Lake v. Causfield*, 3 B. C. C. 263.

30. An original will ordered to be delivered out of the ecclesiastical court to the solicitor, to be produced, by giving security to return it undefaced. *Forder v. Wade*, 4 B. C. C. 476.

31. Order upon the register of the consistory court, that an original will may be produced for the hearing, upon giving security. *Hodson v. —*, 6 Ves. 135.

32. Order upon the register of the consistory court, to deliver original wills, for the purpose of being produced at the hearing, on security. *Ford v. —*, 6 Ves. 135.
33. The court of exchequer will not direct the officers of the ecclesiastical court to deliver out the original will to be produced here, merely to save the expence of a copy. *Wells v. Corbyn*, 3 Anst. 648.
34. Will ordered to be delivered to devisee to be produced on the commission, on his giving security to return the will. *Morse v. Roach*, Dick. 65.
35. Bill by heir in tail against devisees: on motion, an inspection was ordered of all deeds of settlement, admitted to be in the possession of the defendant, creating estates in tail general; but no farther. *Lady Shaftesbury v. Arrowsmith*, 4 Ves.
36. Deeds not delivered out of court to a devisee, unless heir is before the court. *Anon.* 1 Ves. 29.
37. An heir at law has no equity except to remove encumbrances in the way of his legal right: he cannot call for an inspection of deeds in the possession of the devisees. *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66.
38. *Miscellaneous.* — To a bill of discovery, praying (amongst other things) a discovery of the correspondence between the parties, defendants in the schedules to their answer set forth a list of all letters, &c. in their possession, and also extracts from the correspondence, stating in the body of the answer, that such extracts were the only parts which related to the matters in question, and that many such letters related also to other matters. On a motion for the production of such letters, the court refused the application, the defendants undertaking, that on the trial the plaintiffs might read the extracts from the schedules, without reference to the body of the answer. *Campbell v. French*, 2 Cox, 286.
39. The court refused to permit depositions in the French language to be delivered out for the purpose of being translated. *Fauquier v. Tynte*, 7 Ves. 292.
40. Bill for discovery of glebe mixed with defendant's lands, by his ancestors, who occupied both. Answer, describing the glebe lands from certain papers in the defendant's possession. Motion to produce them. Ordered. *Potts v. Adair*, 1 Anst. 259.
41. A defendant ordered to deposit books in the hands of the deputy remembrancer, for the inspection of the other part, and afterwards ordered to account, in doing which he must refer to these books, is not obliged to pay the fees of the office in taking copies. *Gabbit v. Cavendish*, 2 Anst. 547.
42. The court will not make an order on a defendant who has answered; in whose hands another of the defendants, who has not answered, has deposited boxes, in which certain specific articles, claimed by the plaintiff, are said to be believed to be, that he shall be restrained from parting with the subject-matter of such deposit; unless the bill be supported by a positive affidavit, that the contents of the boxes are actually in danger, however strong the inference may be, from the facts stated in the affidavit, that there exists ground for apprehension that it is intended to make an improper use of them to the injury of the plaintiff. *Attorney-general v. Elliot*, 2 Price, 48.
43. On a bill to set aside a partition on the ground of inequality, and for a new partition, stating a valuation and estimate, the gross result of which, without the particulars, were contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the defendant was unable to set forth in what particulars it was inaccurate, by reason of such omission; a motion by the defendant for production of the valuation, and papers, &c. relative thereto, refused with costs. *Micklethwaite v. Moore*, 3 Mer. 292.
44. *Mode of obtaining.* — The court will not order a plaintiff to produce a deed, though stated in his bill, at the instance of a defendant, before hearing; he must file a cross-bill for the purpose. *Anon.* Dick. 778.



45. Where a defendant seeks the production of deeds; stated to be in the plaintiff's possession, the usual course is by filing a cross-bill. *Micklethwaite v. Moore*, 3 Mer. 292.

46. Deeds not delivered up upon petition. *Ex parte Poole*, 1 Ves. 160.

47. Where the bill seeks relief as well as discovery, the court will not, upon motion, aid the plaintiff in proceeding at law without the authority and control of the court; any such proceeding must be under a decree. Therefore in such a case a motion, that the defendant should produce deeds, &c. at the trial of an ejectment, was refused. *Aston v. Lord Exeter*, 6 Ves. 288.

48. Bill by a widow, devisee in fee, impeaching a mortgage by her, while covert for want of a fine. Answer admitting possession of the will, and the title under it; alleging the loss of the settlement; stating it differently from the bill, by the addition of a power of revocation and appointment of new uses, by the exercise of which a fine was not necessary. Production of the will, not being offered by the answer, ordered on motion. *Bird v. Harrison*, 15 Ves. 408.

49. The object of the bill being to set aside deeds, the court will not, on motion, go beyond the usual liberty to inspect, &c. and for production at the hearing, by an order to deposit them with the master for safe custody, without a special case, establishing danger, that they may not be produced. Therefore, where most of the circumstances relied upon, viz. variations in two deeds, appeared upon the answer, the order was limited to production at the hearing. *Beckford v. Wildman*, 16 Ves. 438.

50. Plaintiff, appealing from a decree, dismissing the bill, entitled to the usual order for the production and inspection of deeds. *Church v. Barclay*, *Ibid.* 435.

51. *Master's certificate*. — The master not ordered to certify, whether he was satisfied with the production of papers by a party. *Cotton v. Harvey*, 12 Ves. 391.

#### 9. Appointment of receiver.

##### 1. *Control over master's appointment of.*

The court will not interfere with the master's appointment of a consignee, unless upon special grounds and a strong case. *Bowersbark v. Calasseau*, 3 Ves. 164.

##### 2. *Recognizance of.*

Inrolment of recognizance entered *nunc pro tunc*. *Vaughan v. Vaughan*, *Dick.* 90.

#### 10. Injunction.

##### 1. *Origin of the jurisdiction.*

The origin of the jurisdiction of the court of chancery in regard to injunctions, and to what extent. *Goodeson v. Gallatin*, *Dick.* 455.

##### 2. *Distinction between the several classes of.*

Distinctions in practice between injunctions to stay waste, on the sale of an estate, and against an action. 18 Ves. jun. 488.

##### 3. *Implied.*

A decree of dismissal of a bill for a specific performance of an agreement, does not carry with it an implied injunction against proceeding at law. *M'Namara v. Arthur*, 2 B. & B. 353.

##### 4. *Whether grantable without bill, and by original motion.*

1. Injunction in pressing cases upon petition and affidavit. In this instance, converting old houses in London to a purpose that made them dangerous to the public, the lord chancellor granted the injunction, but said, the lord mayor by his general jurisdiction could apply a much more proper  
and

and effectual remedy. *The Mayor, Commonalty, and Citizens of London v. Bolt*, 5 Ves. 129.

2. Order, in nature of an injunction to stay waste, granted on petition at the lord chancellor's house. *Nichols v. Kearsly*, Dick. 645.

3. Where a tenant defending an ejectment brought by his landlord, makes default at the trial, and makes use of the interval to do all the mischief he can by breaches of covenant and wilful waste, an injunction will be granted on motion, or in the vacation on petition; but it was refused where no ejectment had been brought. *Lathropp v. Marsh*, 5 Ves. 259.

4. Where a purchaser has been long (four years), in treaty under contract for the purchase of an estate, and has paid part of the purchase-money, but in so short a time as a fortnight after the last act of negotiation, suddenly declares off, and commences an action to recover back the money paid on account, an injunction will be granted to restrain the action *on motion*, almost as of course; and *semble*, even on a hearing under such circumstances. *Ward v. Jeffery*, 4 Price, 294.

5. After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding on the agreement at law, granted upon motion; the defendant undertaking forthwith to file a bill. *M'Namara v. Arthur*, 2 Ball & Beatty, 349.

6. After a decree for a specific performance of an agreement for a lease, and the lease had been executed in pursuance of such decree, the plaintiff brought an action at law to recover from defendant damages for the delay in the performance of that agreement. Although the defendant would have been clearly entitled to an injunction in a new suit, yet the decree having been wholly executed, the court cannot make such an order in the original cause. *Ford v. Compton*, 1 Cox, 296.

7. After a decree pronounced, injunctions are frequently granted without a bill. 1 Ball & Beatty, 320.

#### 5. *Preliminaries to obtaining.*

1. Where there has been a length of exclusive enjoyment under a patent, the court will grant an injunction in the first instance, without previously putting the party to establish his right by an action at law; otherwise, where the patent is recent. *Hill v. Thompson*, 3 Mer. 622.

2. Bill for an injunction to stay the infringement of a patent right; demurrer, that the plaintiff had not established his right at law, overruled. *Hicks v. Raincock*, Dick. 647.

3. The court will not, by injunction, restrain the working of mines, permitted during eight years, without directing an action. *Field v. Beaumont*, Swanst. 208.

4. In an interpleading bill, *Quære*, whether the money shall not be brought into court before the motion for an injunction; though the practice seems to have been that it has been held time enough, if brought in upon showing cause against the motion to dissolve the injunction. *Dungey v. Angove*, 3 B. C. C. 36.

#### 6. *An interlocutory application is necessary to obtain.*

Injunction is granted only on an interlocutory application. *Kettle v. Corbin*, Dick. 314.

#### 7. *And anciently a motion in open court was necessary.*

Ancient order, that an injunction shall not be obtained, except by motion in open court. 10 Ves. 452.

#### 8. *Notice of motion for.*

1. The court will discharge an order for an injunction obtained on a motion of course, if it ought to have been moved for on notice. *Reed v. Bowyer*, 1 Price, 101.

2. A. sued at law on a policy of insurance which he had made as agent for B. On a motion for an injunction on affidavit of B.'s residing abroad, A. must have notice, *comme semble*. *Beachcroft v. Gordon*, 3 Anst. 686.

3. An injunction to stay proceedings at law dissolved for irregularity; plaintiffs having obtained the injunction as of course, for want of the answer of two defendants who resided abroad, without notice to the other defendant, who was sole plaintiff at law, and had put in his answer in time. *Cooper v. Flindt*, Wightw. 409.

4. Injunction against obstructing ancient lights granted on affidavit, before appearance, and without notice; the plaintiff having also commenced an action previous to filing the bill. *Attorney-general v. Nichol*, 3 Mer. 687.

#### 9. *Nature and form of the motion for.*

1. Where the injunction is to do a thing, the course is to move, that he shall do it by a particular day or stand committed. *Angerstein v. Hunt*, 6 Ves. 488.

2. Injunction to stay proceedings in the spiritual court, or the admiralty, must be moved specially. *Macnamara v. Macquire*, Dick. 223.

3. Plaintiff, entitled to move for the common injunction to stay execution for want of an answer, cannot, in the first instance, move for the special injunction to stay trial. *Garlick v. Pearson*, 10 Ves. 450. *Vide infra*.

4. Injunction to stay execution, and also to stay trial, not granted as one motion. *Wright v. Braine*, 3 B. C. C. 87.

5. Upon motion for injunction to stay waste, a particular title must be shown. *Whitelegg v. Whitelegg*, 1 B. C. C. 57.

6. Although in cases in the nature of waste, an injunction will sometimes be granted *ex parte* even after appearance; yet if in such a case, an injunction has been obtained for default of appearance, and it turns out that an appearance had, in fact, been entered at the time when the injunction was moved for, the order will be discharged. *Harrison v. Cockerell*, 3 Mer. 1.

7. Injunction granted until a party abroad should put in his answer. *Wright v. Nutt*, Dick. 691.

#### 10. *Affidavits.*

1. Affidavits of plaintiff's right not necessary to obtain an injunction, since defendant, in stating his own rights, must show the plaintiff's. *Packington v. Packington*, Dick. 101.

2. Affidavit of the equity of an injunction bill, must accompany the motion for a *subpoena*. *Delancy v. Wallis*, 3 B. C. C. 12.

3. Injunction granted on statement of *belief of the facts*, constituting the plaintiff's equity, where they must necessarily be in the knowledge of the defendant, if true, and are not denied by him in his answer. *Scott v. Becher*, 4 Price, 346.

4. To obtain an injunction against a tenant, to stay waste in cutting turf, the affidavit must state, that the turf was cut for the purpose of sale; the tenant being entitled to fire-bote. *De Salis v. Crossan*, 1 Ball & Beatty, 188.

5. In order to obtain an injunction against violation of a patent, the party must, at the time of applying, swear, as to his belief, that he is the original inventor. *Hill v. Thompson*, 3 Mer. 622.

6. Affidavit of the merits must accompany motion for injunction to stay proceedings, when the plaintiff at law is abroad; but need not accompany the application, that the service of the *subpoena* on the attorney, may be good service. *Burke v. Vickers*, 3 B. C. C. 24.

7. Where the defendant (who has brought ejectments at law), is abroad, motion for an injunction to stay trial, must be on special ground. *Revett v. Braham*, 2 B. C. C. 640.

8. Letters set out in the bill, and not admitted by the answer, allowed to be verified by affidavit in support of injunction. *Taggart v. Hewlett*, 1 Mer. 499.

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9. Affidavit in support of injunction admitted, after answer, to prove an allegation in the bill as to acts of the parties, neither admitted nor denied by the answer. But such affidavit not to be allowed in contradiction to the answer. *Morgan v. Goode*, 3 Mer. 10.

10. On a motion after the answer for an injunction to stay waste, affidavits filed subsequently to the answer cannot be read. *Smythe v. Smythe*, Swanst. 252.

11. Injunction until answer or further order, to restrain the publication of a work as the plaintiff's, upon affidavit by his agent (he himself being abroad) of circumstances making it highly probable that it was not the plaintiff's work, and defendant refusing to swear as to his belief that it was. *Lord Byron v. Johnston*, 2 Mer. 29.

12. The court will, upon application by a defendant, order an affidavit, made in support of a bill for an injunction, to be filed, for the purpose of giving him an opportunity of answering its contents, although it is not otherwise the usual course of practice to file it. *Scott v. Becher*, 4 Price, 346.

#### 11. *On falsification of answer.*

Where to a bill filed for an injunction, an answer is put in, swearing in such a manner that an injunction cannot be maintained on it; if the answer be afterwards falsified, the court will put the plaintiff in the same situation as if the answer had been originally fair. 1 Sch. & Lef. 308.

#### 12. *Affidavits contradicting answer.*

1. In what case affidavits shall be read against the answer, on motion for injunction. *Isaacs v. Humpage*, 3 B. C. C. 463.

2. Affidavits read in support of injunction. *Gibbs v. Cole*, Dick. 64.

3. Affidavit read in support of an injunction to stay waste. *Countess of Strathmore v. Bowes*, Ibid. 673.

4. Ground of reading affidavit in support of an injunction against waste. 9 Ves. 356.

5. In support of motion for injunction on interpleading bill, affidavits of the facts may be read; for it is exactly on the footing of waste. *Langston v. Boylston*, 2 Ves. 102.

6. Affidavits admitted on motion, after answer, for an injunction and receiver in the case of partnership, by analogy to waste. *Peacock v. Peacock*, 16 Ves. 49.

7. Injunction bill, charging fraud in obtaining verdict: affidavits contradicting the answer read in support of the injunction on the merits. *Isaac v. Humpage*, 1 Ves. 427.

8. In a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. *Somerville v. Buckler*, 3 Anst. 658.

9. Affidavits cannot be read in support of an injunction to restrain the negotiation of a bill of exchange. *Berkeley v. Brymer*, 9 Ves. 355.

#### 13. *Reading answer in support of injunction.*

Plaintiff may read the answer to shew his right to an injunction, and also affidavits of the waste. *Packington v. Packington*, Dick. 102.

#### 14. *What proceedings are stayed thereby.*

1. Injunction in the court of chancery stays all proceedings, if before declaration; if after, it stays execution only. 10 Ves. 452.; 18 Ves. 488.

2. Injunction in chancery stays execution only: not, as in the court of exchequer, trial also; but may afterwards be extended to stay trial upon a slight affidavit. *Nelthorpe v. Law*, 13 Ves. 323.; 2 Ves. & Beam. 41.; 18 Ves. 488.

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condition to do so; or if not, to do only what is necessary to enable him to do so; restraining execution. Therefore, after bail excepted to, ruling the sheriff to bring in the body, a breach of the injunction. *Buller v. Ovey*, 16 Ves. 141.

4. An injunction extends to prevent a suit against the sheriff, for not paying over money levied by him in the original action before the injunction issued. *Bolt v. Stanway*, 2 Anst. 556.

5. But, in order to bring himself within the protection of the order, the sheriff must comply with the terms of it, by bringing the money into court. *Ibid.* 569.

15. *Available and obligatory for parties only.*

1. Injunction not binding upon a person not a party in the cause. 7 Ves. 456.; *Dawson v. Princeps*, 2 Anst. 521.

2. Nor can it be extended to protect one who is not a party in the suit in equity. *Gadd v. Worral*, 2 Anst. 555.

16. *General grounds for.*

Party applying for an injunction must shew a specific right in the property, and that it is in danger. *Ximenes v. Franco*, Dick. 149.

17. *From subsequent discovery of facts.*

If a defendant fail in proving a material fact at law, of which he afterwards obtains a discovery from the adverse party in equity, it is a ground for granting an injunction, though he would not be permitted to prove the fact by any other witnesses whom he could have examined at law. *Hankey v. Vernon*, 2 Cox, 12.

18. *Threats, a ground for.*

1. Threats a sufficient ground for an injunction. *Packington v. Packington*, Dick. 101.; 6 Ves. 706.

2. Hence, sending a surveyor to mark out trees is a sufficient ground for an injunction. *Jackson v. Cator*, 5 Ves. 688.

19. *Time of obtaining.*

1. Injunction in chancery in the vacation; the court being always open. 6 Ves. 771.

2. Injunction under special circumstance to stay the working of coal mines, after the seals subsequent to trinity term were over. *Smith v. Clarke*, Dick. 455.

3. Order *nisi* to stay proceedings at law, obtained on motion after the last seal in the vacation, the brief not having been delivered to counsel on the seal-day, discharged with costs for irregularity. *Sharpe v. Ashton*, 2 Ves. & Beam. 412.

4. No injunction until appearance or default. *White v. Klevers*, 18 Ves. jun. 471.; *James v. Downes*, *Ibid.* 522.

5. A plaintiff is entitled to the common injunction immediately on an attachment being issued. *Bruce v. Webb*, 2 Mer. 474.

6. Injunction to prevent transfer of stock, not granted till after the defendant's appearance, or being in contempt, and upon notice. *Doolittle v. Walton*, Dick. 442.

7. A special injunction, to restrain a defendant from distraining, will be granted before answer, if the defendant be in contempt for not having answered. *Heming v. Emuss*, 1 Price, 386.

8. Motion refused for an injunction on filing an interpleading bill and affidavit. *Croggson v. Synlons*, 3 Mad. 130.

9. The defendant before he had prayed time to answer, or was in contempt, was restrained from selling diamonds, to which the plaintiff by his bill claimed a title. *Tonnins v. Prout*, Dick. 387.

10. Injunction to restrain defendant from negotiating a bill of exchange, given

given for goods not delivered, issued on certificate of bill filed, and to be served with a *subpœna*. *Patrick v. Harrison*, 3 B. C. C. 476.

11. Injunction granted on filing the bill, to prevent the defendant from being inducted to a living. *Potter v. Chapman*, Dick. 146.

12. In ordinary cases no injunction till hearing, unless a ground for it in the answer; but in cases of waste, patents, and irreparable mischief, it will be granted on affidavit before answer. 1 Ves. 430.

13. Injunction before answer to prevent irreparable mischief, defendant having previously established his right at law. *Chalk v. Wyatt*, 3 Mer. 688.

14. The court will grant an injunction to stay proceedings at law, before answer, even where the defendant having obtained time for the return of a commission sent abroad to take the answer, is not in contempt for not putting it in, if it is shewn that, in consequence of the necessary intermediate delay, the action at law would be tried before the expiration of the time allowed for its return. *Parnell v. Nesbitt*, 2 Price, 144.

15. Injunction to stay proceedings in the spiritual court granted in the first instance. *Chandler v. Gascoyne*, Dick. 281.

16. Motion under special circumstances upon affidavit before answer to restrain proceeding under a judgment, refused. *Lane v. Williams*, 6 Ves. 798.

17. Undertaking, upon sale of the good-will of a trade, not to carry on the same business, and to use the best endeavours to assist the purchaser, &c. The remedy for a breach is an action, or issue, *quantum damnificatus*; and an injunction against proceeding under a judgment for the consideration, upon affidavits before answer, was refused. *Shackle v. Baker*, 14 Ves. 468.

18. An injunction to stay trial cannot be obtained until after the common injunction; and therefore where the time for the defendant's appearance was the day for which notice of trial was given, the trial cannot be stayed. *Wright v. Brains*, 2 Cox, 232.

19. Motion for special injunction to restrain defendant (plaintiff at law) from suing out execution on a judgment obtained by him in his action previous to the common injunction being obtained, refused, as contrary to practice; the court only granting such special injunction in cases where the plaintiff has had no opportunity of obtaining the common injunction. *Franklyn v. Thomas*, 3 Mer. 225. The defendant (plaintiff at law) subsequently, on the day when the common injunction might otherwise have been obtained, puts in a demurrer which is overruled; and in the mean time, pending the demurrer, the plaintiff is taken in execution; after which, and immediately on the overruling of the demurrer, the common injunction is obtained upon an application to discharge the plaintiff out of custody, on the ground that the demurrer being overruled, the parties are entitled to be placed in the situation they would have been in if no demurrer had been filed, and by analogy to the case of goods taken in execution; the application being opposed on the ground that the parties would not by granting it be placed in the situation in which they would otherwise have stood, since the judgment had been satisfied by the taking in execution, and if now discharged, the debt would be gone. Ordered, that the plaintiff be discharged on undertaking again to confess judgment, so that he might not afterwards say the existing judgment and debt had been satisfied, by the execution from which he was so discharged. *Franklyn v. Thomas*, 3 Mer. 225.

20. Injunction to stay trial just at the time of the assizes, refused. *Blacoe v. Wilkinson*, 13 Ves. 454.

21. Where a verdict at law has been obtained against a defendant, who neglects to apply for a new trial within the time appointed by the rules of the court of law, this court will not entertain a bill for an injunction on the ground that the plaintiff's demand was unconscientious, or that it was subject-matter for an account; provided it was competent to the party to lay those



those grounds before the jury on the trial, or before the court of law on motion for a new trial. *Bateman v. Willoe*, 1 Sch. & Lef. 201.

22. The court will set aside an injunction granted (after trial and verdict obtained) upon the ground that one of the defendants, plaintiffs at law, in whom the interest was averred to be, was in contempt for not having answered, and that his answer was most material to the defence at law of the plaintiffs (in equity) to the action, as it might shew that the property was not in truth in him; and that although the affidavit of merits, on which it was obtained, contain allegations of strong facts in support of the plaintiff's equity; and although the court of law have since, on the same facts having been brought before them upon motion for a new trial, granted a rule *nisi*, against which cause has not yet been shewn. Such an order can only be obtained before verdict, and if obtained after will be discharged upon motion. *Whitmore v. Thornton*, 3 Price, 241.

23. Injunction pending a demurrer irregular. *Cousins v. Smith*, 13 Ves. 164.

#### 20. *After reference of bill for impertinence.*

Where a bill is referred for impertinence, before the time for answering is out, the plaintiff cannot have an injunction of course for want of an answer; but must move it on notice and affidavit. *Neale v. Wadeson*, 1 B. C. C. 574.

#### 21. *From want of an answer.*

1. Injunction for want of an answer. *Exchange Assurance v. Barker*, Dick. 72.

2. Injunction of course for want of answer to an amended bill; an answer having been put in to the original bill; and no injunction obtained upon that. *Nelthorpe v. Law*, 13 Ves. 923.

3. Motion to discharge order for an injunction, and an attachment on which the injunction had issued, refused; the answer having been sworn the evening before, but not filed until after the injunction issued. *Bruce v. Webb*, 2 Mer. 474.

4. The bill being referred for impertinence, the plaintiff cannot move (as of course) for an injunction for want of an answer, but is in the same situation as if the time for answering were not out, until the master has reported on the reference. *Neale v. Wadeson*, 1 Cox, 104.

5. Exceptions filed, which may be *nunc pro tunc* of course upon application within two months after answer, and afterwards upon special cause, will sustain an injunction. 14 Ves. 536.

6. Where exceptions have been filed, *nunc pro tunc*, the court will not grant an injunction on opening a material exception, unless the plaintiff, on obtaining his order, give a four-day rule for arguing the exceptions. *Edwards v. Hogarth*, 1 Price, 147.

7. To constitute what is called a material exception to the answer, or one upon the opening of which an injunction will be granted, it is not only necessary that the charge is not fully answered, but the charge itself must be of such import that the answer will be of use to the plaintiff in his defence at law, and if that is not manifest the want of answer will not entitle the plaintiff to an injunction. *Hirst v. Peirse*, 4 Price, 339.

#### 22. *From insufficiency of answer.*

In a valued policy, unless there is a particular charge in the bill for an injunction, that the value of the cargo is below the amount insured, it is sufficient if the defendant swears to the value as stated in the invoice. *Aubert v. Jacobs*, Wightw. 118.

#### 23. *From implied admissions in answer.*

Defendant's denying that he had committed waste "since the filing of the bill,"

bill," is no reason for refusing an injunction. *Attorney-general v. Burrows*, Dick. 128.

24. *From demurrer to bill being overruled.*

Injunction of course, demurrer to the bill being overruled. *Rashleigh v. Buller*, Dick. 153.

25. *On amended bill.*

1. Injunction granted on amended bill, on special motion, without affidavit, after injunction dissolved on the original bill. *Edwards v. Jenkins*, 3 B. C. C. 425.

2. After an injunction dissolved on the merits, the plaintiff cannot, on an amended bill, have another injunction, without a special affidavit of merits, though the defendant be in contempt for not answering. *Longham v. Toe*, 1 Anst. 188.

3. After an injunction on the original bill, dissolved on the coming in of the answer, the plaintiff cannot have an injunction on an amended bill, though supported by affidavits, unless the defendant is in contempt. *Gadd v. Worral*, 2 Anst. 553.

4. Injunction refused upon merits in the answer, not obtained of course upon amended bill. *Bliss v. Boscawen*, 2 Ves. & Beam. 101.

26. *Services relative to.*

1. Service of *subpoena* necessary in the case of special injunction; but, the practice having been unsettled, the defendant was put to dissolve upon the merits; and the plaintiff permitted to shew cause. *Attorney-general v. Nichol*, 16 Ves. 338.

2. Copy of an injunction served, and the original shown, sufficient service. *Woodward v. King*, Dick. 797.

3. A plaintiff who has obtained an order for an injunction, is not entitled in point of practice to serve it with the writ of execution, before it be passed and entered, although it is usual to do so; and if he should so serve it, and there should be an error in drawing up the order, to the prejudice of the defendant, it will be considered a contempt, and so treated by the court on an application to them to punish the plaintiff for so doing; nor will the plaintiff be suffered to avail himself of the excuse of its being a mistake; and all the costs incurred by the defendant, arising from such an irregularity, will be ordered to be paid by the plaintiff. *Scott v. Becher*, 4 Price, 346.

4. Service of *subpoena* issued on an injunction-bill, though effected at eleven o'clock on the night of the return-day, and at so great a distance from town as to render it impracticable for the defendant to appear in time to prevent an injunction for want of appearance, was held to be sufficient service. *Nightingale v. Merryweather*, 1 Price, 287.

5. Service on defendant's clerk in court, ordered to be good service, with notice of motion for breach of an injunction. *Rugg v. Floyer*, Dick. 478.

6. Service upon the attorney, the defendant being abroad, only to compel appearance, not for the purpose of a special injunction in the first instance. *Anderson v. Darcy*, 18 Ves. jun. 447.

7. The court will order the attorney of a plaintiff residing abroad, who has been employed to commence an action at law, to accept a *subpoena* on an injunction-bill, supported by an affidavit of the facts, and of the subsistence of an account between the parties. *Wattleworth v. Pitcher*, 2 Price, 5.

8. It is not necessary that the affidavit for an order, that service of the *subpoena*, upon an injunction bill, on the attorney at law, shall be good service, should state a previous application to the attorney, and refusal to accept service. *French v. Roe*, 13 Ves. 593.

9. Service on the defendant's wife ordered, to be deemed personal service on the defendant; and upon that service ordered, that he stand committed

for breach of the injunction. *Sir William Pulteney v. Shelton*, 5 Ves. 147. 260, note.

27. *Commencement of its operation.*

An injunction when sealed at the next seal, operates from the order, not from the sealing. *Ratray v. Bishop*, 3 Mad. 220.

28. *Its effect on motion to dismiss for want of prosecution.*

Motion to dismiss the bill for want of prosecution since the answer, not prevented by an injunction. *Day v. Snee*, 3 Ves. & Beam. 170.

29. *Its effect upon an inchoate execution.*

If an injunction is obtained on bill filed after execution executed, the goods not yet being out of the hands of the sheriff, and the sheriff proceeds to sell without process, he will be ordered to pay the money into court. Formerly the practice in such case was, to make the sheriff a party, but since disused. *Franklyn v. Thomas*, 3 Mer. 234.

30. *Discharge from custody on obtaining.*

1. On an injunction obtained, the court will not discharge the plaintiff out of custody, if taken on legal process. *Willis v. Daniel*, 1 Anst. 36.
2. See *Franklyn v. Thomas*, 3 Mer. 225.

31. *Continuation of—preliminaries to.*

On injunction to stay the printing of a book, reference to see if the books published by the plaintiff and defendant were the same or not. *Jeffrey v. Bowles*, Dick. 429.

32. *Continuation of—notwithstanding the doubtfulness of legal title.*

1. Injunction granted or continued to the hearing, though the legal title doubtful; as upon patent rights. 6 Ves. 707.
2. Injunction that the validity of a patent might be tried at law; verdict for the patentee, subject to the opinion of the court upon a case: the court equally divided: the patentee must bring another action: but the court will not impose any terms upon him, nor dissolve the injunction in the mean time. *Bolton v. Bull*, 3 Ves. 140.

33. *Continuation of—conditions of—payment of money into court.*

1. Where there is a suit for money received, and the defendant files a bill for an injunction, admitting to have received the money, he shall pay it into court, or the injunction shall be dissolved. *Sherwood v. White*, 1 B. C. C. 452.
2. Bill filed for injunction (after verdict at law) which is obtained for want of an answer, the plaintiff shall bring the money recovered against him into court, upon application of the defendant on oath, denying the equity of the bill, or the injunction shall be dissolved. *Acton v. Market*, 2 B. C. C. 14.; *Culley v. Hinckling*, 2 B. C. C. 182.
3. The court will not order a plaintiff, who has obtained an injunction, to stay proceedings at law, on a bill filed for a discovery, by which he seeks to establish a case of the goods being charged at a much greater price than the one agreed on—to pay even the price acknowledged to be just, into court, to abide the result of the action. *Parnell v. Nesbitt*, 2 Price, 149.
4. A plaintiff, having obtained an injunction to restrain proceedings at law, cannot be called on to pay into court the sum demanded at law, on an affidavit of equitable grounds by one of the defendants, the answer of the others not having come in; nor will the court alternately dissolve the injunction. *Menzies v. Rodrigues*, 1 Price, 133.
5. Where an injunction is obtained till the coming in of the answer of one defendant who resides abroad, the plaintiff is not compellable to bring the

the money into court, unless on special circumstances. *Shoulbred v. M'Master*, 2 Anst. 366.

34. *Continuation of—to stay trial.*

1. Injunction extended to stay trial, on affidavit that the plaintiff is advised and believes, that he cannot safely proceed to trial until the answer. *Partington v. Hobson*, 16 Ves. 220.

2. On an application to extend the usual injunction to stay trial, an affidavit that the plaintiff "had been advised by his counsel, and verily believed that he could not safely proceed at law without a discovery from the defendant of the several matters contained in the bill," is sufficient. *Hartley v. Hobson*, 2 Cox, 117.

3. Injunction extended to stay trial, on affidavit that plaintiff cannot safely go to trial without the answer, and believes it will produce discovery material to his defence. 18 Ves. jun. 488.

4. To extend an injunction to stay trial the affidavit must state belief, not merely that the defendant cannot go to trial, but that the answer will furnish discovery material to the defence in the action. *Appleyard v. Seton*, 16 Ves. 223.

5. An answer filed is a sufficient objection to a motion to extend an injunction to stay trial, but as the defendant submitted to exceptions, the order was made; an insufficient answer being no answer. *Bishton v. Birch*, 1 Ves. & Beam. 366.

6. An action was commenced in July 1816, and tried at York assizes in July 1817. On 21st January 1818, a new trial was granted, whereupon plaintiff filed his bill for a discovery, and obtained the common injunction. The new trial at York was fixed for the 7th March. On a motion to extend the injunction to stay trial, the same was refused with costs. *Field v. Beaumont*, 3 Mad. 102.; *Swanst.* 204.

35. *Continuation of—from replying to answer.*

The replying to an answer, the serving a *subpoena* to rejoin, and giving rules to produce witnesses, will not prevent a defendant from moving upon his answer to dissolve an injunction, unless cause. *Molineaux v. Luard*, Dick. 684.

36. *Continuation of—from reference of answer for scandal or impertinence.*

1. An answer referred for scandal and impertinence not cause for continuing an injunction. *Milner v. Golding*, Dick. 672.

2. A reference of the answer for impertinence is good cause against dissolving an injunction. *Fisher v. Bayley*, 12 Ves. 18.

37. *Breach of—from proceeding after injunction, but before notice.*

Where a party is taken on legal process, after he has obtained an injunction, but before notice given of it, it is no contempt. *Willis v. Daniel*, 1 Anst. 36.

38. *Breach of—from proceeding after notice.*

1. Party or his attorney, knowing of an injunction though it be not sealed, is guilty of a contempt, if he proceed at law. *Powel v. Follett*, Dick. 116.

2. Breach of injunction after notice of the order, without personal service of the injunction or order. *Kimpton v. Eve*, 2 Ves. & Beam. 349.

3. A defendant being in court, when the order for an injunction is made, is bound by it from that time, although it be not formally served till some time afterwards; and *semble*, that an injunction, restraining an administrator from transferring the intestate's stock into his own name, will by equitable construction operate to prevent his parting with any stock so transferred. *Scott v. Becher*, 4 Price, 346.

4. Exception to the rule, requiring personal service of an order of injunction, where the party was present when the order was made, established by Lord

45. Where a defendant seeks the production of deeds; stated to be in the plaintiff's possession, the usual course is by filing a cross-bill. *Micklethwaite v. Moore*, 3 Mer. 292.

46. Deeds not delivered up upon petition. *Ex parte Poole*, 1 Ves. 160.

47. Where the bill seeks relief as well as discovery, the court will not, upon motion, aid the plaintiff in proceeding at law without the authority and control of the court; any such proceeding must be under a decree. Therefore in such a case a motion, that the defendant should produce deeds, &c. at the trial of an ejectment, was refused. *Aston v. Lord Exeter*, 6 Ves. 288.

48. Bill by a widow, devisee in fee, impeaching a mortgage by her, while covert for want of a fine. Answer admitting possession of the will, and the title under it; alleging the loss of the settlement; stating it differently from the bill, by the addition of a power of revocation and appointment of new uses, by the exercise of which a fine was not necessary. Production of the will, not being offered by the answer, ordered on motion. *Bird v. Harrison*, 15 Ves. 408.

49. The object of the bill being to set aside deeds, the court will not, on motion, go beyond the usual liberty to inspect, &c. and for production at the hearing, by an order to deposit them with the master for safe custody, without a special case, establishing danger, that they may not be produced. Therefore, where most of the circumstances relied upon, viz. variations in two deeds, appeared upon the answer, the order was limited to production at the hearing. *Beckford v. Wildman*, 16 Ves. 438.

50. Plaintiff, appealing from a decree, dismissing the bill, entitled to the usual order for the production and inspection of deeds. *Church v. Barclay*, *Ibid.* 435.

51. *Master's certificate*. — The master not ordered to certify, whether he was satisfied with the production of papers by a party. *Cotton v. Harvey*, 12 Ves. 391.

#### 9. Appointment of receiver.

##### 1. *Control over master's appointment of.*

The court will not interfere with the master's appointment of a consignee, unless upon special grounds and a strong case. *Bowersbark v. Calasseau*, 3 Ves. 164.

##### 2. *Recognizance of.*

Inrolment of recognizance entered *nunc pro tunc*. *Vaughan v. Vaughan*, Dick. 90.

#### 10. Injunction.

##### 1. *Origin of the jurisdiction.*

The origin of the jurisdiction of the court of chancery in regard to injunctions, and to what extent. *Goodeson v. Gallatin*, Dick. 455.

##### 2. *Distinction between the several classes of.*

Distinctions in practice between injunctions to stay waste, on the sale of an estate, and against an action. 18 Ves. jun. 488.

##### 3. *Implied.*

A decree of dismissal of a bill for a specific performance of an agreement, does not carry with it an implied injunction against proceeding at law. *M'Namara v. Arthur*, 2 B. & B. 353.

##### 4. *Whether grantable without bill, and by original motion.*

1. Injunction in pressing cases upon petition and affidavit. In this instance, converting old houses in London to a purpose that made them dangerous to the public, the lord chancellor granted the injunction, but said, the lord mayor by his general jurisdiction could apply a much more proper  
and

and effectual remedy. The Mayor, Commonalty, and Citizens of London v. Bolt, 5 Ves. 129.

2. Order, in nature of an injunction to stay waste, granted on petition at the lord chancellor's house. Nichols v. Kearsly, Dick. 645.

3. Where a tenant defending an ejectment brought by his landlord, makes default at the trial, and makes use of the interval to do all the mischief he can by breaches of covenant and wilful waste, an injunction will be granted on motion, or in the vacation on petition; but it was refused where no ejectment had been brought. Lathropp v. Marsh, 5 Ves. 259.

4. Where a purchaser has been long (four years), in treaty under contract for the purchase of an estate, and has paid part of the purchase-money, but in so short a time as a fortnight after the last act of negotiation, suddenly declares off, and commences an action to recover back the money paid on account, an injunction will be granted to restrain the action *on motion*, almost as of course; and *semble*, even on a hearing under such circumstances. Ward v. Jeffery, 4 Price, 294.

5. After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding on the agreement at law, granted upon motion; the defendant undertaking forthwith to file a bill. M'Namara v. Arthur, 2 Ball & Beatty, 349.

6. After a decree for a specific performance of an agreement for a lease, and the lease had been executed in pursuance of such decree, the plaintiff brought an action at law to recover from defendant damages for the delay in the performance of that agreement. Although the defendant would have been clearly entitled to an injunction in a new suit, yet the decree having been wholly executed, the court cannot make such an order in the original cause. Ford v. Compton, 1 Cox, 296.

7. After a decree pronounced, injunctions are frequently granted without a bill. 1 Ball & Beatty, 320.

#### 5. *Preliminaries to obtaining.*

1. Where there has been a length of exclusive enjoyment under a patent, the court will grant an injunction in the first instance, without previously putting the party to establish his right by an action at law; otherwise, where the patent is recent. Hill v. Thompson, 3 Mer. 622.

2. Bill for an injunction to stay the infringement of a patent right; demurrer, that the plaintiff had not established his right at law, overruled. Hicks v. Raincock, Dick. 647.

3. The court will not, by injunction, restrain the working of mines, permitted during eight years, without directing an action. Field v. Beaumont, Swanst. 208.

4. In an interpleading bill, *Quære*, whether the money shall not be brought into court before the motion for an injunction; though the practice seems to have been that it has been held time enough, if brought in upon showing cause against the motion to dissolve the injunction. Dungey v. Angove, 3 B. C. C. 36.

#### 6. *An interlocutory application is necessary to obtain.*

Injunction is granted only on an interlocutory application. Kettle v. Corbin, Dick. 314.

#### 7. *And anciently a motion in open court was necessary.*

Ancient order, that an injunction shall not be obtained, except by motion in open court. 10 Ves. 452.

#### 8. *Notice of motion for.*

1. The court will discharge an order for an injunction obtained on a motion of course, if it ought to have been moved for on notice. Reed v. Bowyer, 1 Price, 101.

2. A. sued at law on a policy of insurance which he had made as agent for B. On a motion for an injunction on affidavit of B.'s residing abroad, A. must have notice, *comme semble*. *Beachcroft v. Gordon*, 3 Anst. 686.

3. An injunction to stay proceedings at law dissolved for irregularity; plaintiffs having obtained the injunction as of course, for want of the answer of two defendants who resided abroad, without notice to the other defendant, who was sole plaintiff at law, and had put in his answer in time. *Cooper v. Flindt*, Wightw. 409.

4. Injunction against obstructing ancient lights granted on affidavit, before appearance, and without notice; the plaintiff having also commenced an action previous to filing the bill. *Attorney-general v. Nichol*, 3 Mer. 687.

#### 9. *Nature and form of the motion for.*

1. Where the injunction is to do a thing, the course is to move, that he shall do it by a particular day or stand committed. *Angerstein v. Hunt*, 6 Ves. 488.

2. Injunction to stay proceedings in the spiritual court, or the admiralty, must be moved specially. *Macnamara v. Macquire*, Dick. 223.

3. Plaintiff, entitled to move for the common injunction to stay execution for want of an answer, cannot, in the first instance, move for the special injunction to stay trial. *Garlick v. Pearson*, 10 Ves. 450. *Vide infra*.

4. Injunction to stay execution, and also to stay trial, not granted as one motion. *Wright v. Braine*, 3 B. C. C. 87.

5. Upon motion for injunction to stay waste, a particular title must be shown. *Whitelegg v. Whitelegg*, 1 B. C. C. 57.

6. Although in cases in the nature of waste, an injunction will sometimes be granted *ex parte* even after appearance; yet if in such a case, an injunction has been obtained for default of appearance, and it turns out that an appearance had, in fact, been entered at the time when the injunction was moved for, the order will be discharged. *Harrison v. Cockerell*, 3 Mer. 1.

7. Injunction granted until a party abroad should put in his answer. *Wright v. Nutt*, Dick. 691.

#### 10. *Affidavits.*

1. Affidavits of plaintiff's right not necessary to obtain an injunction, since defendant, in stating his own rights, must show the plaintiff's. *Packington v. Packington*, Dick. 101.

2. Affidavit of the equity of an injunction bill, must accompany the motion for a *subpœna*. *Delancy v. Wallis*, 3 B. C. C. 12.

3. Injunction granted on statement of *belief of the facts*, constituting the plaintiff's equity, where they must necessarily be in the knowledge of the defendant, if true, and are not denied by him in his answer. *Scott v. Becher*, 4 Price, 346.

4. To obtain an injunction against a tenant, to stay waste in cutting turf, the affidavit must state, that the turf was cut for the purpose of sale; the tenant being entitled to fire-bote. *De Salis v. Crossan*, 1 Ball & Beatty, 188.

5. In order to obtain an injunction against violation of a patent, the party must, at the time of applying, swear, as to his belief, that he is the original inventor. *Hill v. Thompson*, 3 Mer. 622.

6. Affidavit of the merits must accompany motion for injunction to stay proceedings, when the plaintiff at law is abroad; but need not accompany the application, that the service of the *subpœna* on the attorney, may be good service. *Burke v. Vickers*, 3 B. C. C. 24.

7. Where the defendant (who has brought ejectments at law), is abroad, motion for an injunction to stay trial, must be on special ground. *Revett v. Braham*, 2 B. C. C. 640.

8. Letters set out in the bill, and not admitted by the answer, allowed to be verified by affidavit in support of injunction. *Taggart v. Hewlett*, 1 Mer. 499.

9. Af-

9. Affidavit in support of injunction admitted, after answer, to prove an allegation in the bill as to acts of the parties, neither admitted nor denied by the answer. But such affidavit not to be allowed in contradiction to the answer. *Morgan v. Goode*, 3 Mer. 10.

10. On a motion after the answer for an injunction to stay waste, affidavits filed subsequently to the answer cannot be read. *Smythe v. Smythe*, Swanst. 252.

11. Injunction until answer or further order, to restrain the publication of a work as the plaintiff's, upon affidavit by his agent (he himself being abroad) of circumstances making it highly probable that it was not the plaintiff's work, and defendant refusing to swear as to his belief that it was. *Lord Byron v. Johnston*, 2 Mer. 29.

12. The court will, upon application by a defendant, order an affidavit, made in support of a bill for an injunction, to be filed, for the purpose of giving him an opportunity of answering its contents, although it is not otherwise the usual course of practice to file it. *Scott v. Becher*, 4 Price, 346.

11. *On falsification of answer.*

Where to a bill filed for an injunction, an answer is put in, swearing in such a manner that an injunction cannot be maintained on it; if the answer be afterwards falsified, the court will put the plaintiff in the same situation as if the answer had been originally fair. 1 Sch. & Lef. 308.

12. *Affidavits contradicting answer.*

1. In what case affidavits shall be read against the answer, on motion for injunction. *Isaacs v. Humpage*, 3 B. C. C. 463.

2. Affidavits read in support of injunction. *Gibbs v. Cole*, Dick. 64.

3. Affidavit read in support of an injunction to stay waste. *Countess of Strathmore v. Bowes*, Ibid. 673.

4. Ground of reading affidavit in support of an injunction against waste. 9 Ves. 356.

5. In support of motion for injunction on interpleading bill, affidavits of the facts may be read; for it is exactly on the footing of waste. *Langston v. Boylston*, 2 Ves. 102.

6. Affidavits admitted on motion, after answer, for an injunction and receiver in the case of partnership, by analogy to waste. *Peacock v. Peacock*, 16 Ves. 49.

7. Injunction bill, charging fraud in obtaining verdict: affidavits contradicting the answer read in support of the injunction on the merits. *Isaac v. Humpage*, 1 Ves. 427.

8. In a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. *Somerville v. Buckler*, 3 Anst. 658.

9. Affidavits cannot be read in support of an injunction to restrain the negotiation of a bill of exchange. *Berkeley v. Brymer*, 9 Ves. 355.

13. *Reading answer in support of injunction.*

Plaintiff may read the answer to shew his right to an injunction, and also affidavits of the waste. *Packington v. Packington*, Dick. 102.

14. *What proceedings are stayed thereby.*

1. Injunction in the court of chancery stays all proceedings, if before declaration; if after, it stays execution only. 10 Ves. 452.; 18 Ves. 488.

2. Injunction in chancery stays execution only: not, as in the court of exchequer, trial also; but may afterwards be extended to stay trial upon a slight affidavit. *Nelthorpe v. Law*, 19 Ves. 323.; 2 Ves. & Beam. 41.; 18 Ves. 488.

3. Effect of an injunction in the court of chancery: before action commenced, staying all proceedings at law: after action commenced, permitting the defendant to call for a plea, and proceed to judgment at law, if in a



answer, the plaintiff shewed exceptions for cause, with the usual undertaking to procure the master's report in four days. The master reported the answer to be sufficient, to which report the plaintiff excepted. The injunction is dissolved, notwithstanding the plaintiff's exceptions. *Botham v. Clark*, 2 Cox, 428.

65. *Dissolution of—from allowance of plea.*

When a plea is allowed, on application, an injunction will be dissolved absolutely, because it is to be considered as a full answer. *Phipps v. Langhorn*, Dick. 148.

66. *Dissolution of—from allowance of demurrer to prayer of injunction.*

After injunction obtained a demurrer to the prayer of injunction is allowed; yet the injunction cannot be dissolved without the previous order. *Hurst v. Thomas*, 2 Anst. 585.

67. *Dissolution of—to secure money in danger.*

1. On affidavit of the danger of losing a sum of money recovered on a verdict against the plaintiff in equity, who had obtained an injunction; he was ordered to pay the money into court, by a day fixed, or the injunction to be dissolved. *Cotes v. Lindsay*, Dick. 352.

2. Where a verdict has been obtained at law, and an injunction bill is filed while the plaintiff at law is out of the kingdom; and an injunction obtained against him for want of his answer, the court will direct the plaintiff in equity to pay into court the money recovered, and in default thereof will dissolve the injunction. *Potts v. Butler*, 1 Cox, 330.

68. *Dissolution of—from fear of losing evidence.*

On a bill for discovery and injunction, the defendant, plaintiff at law, admitted himself to be a mere agent for the other defendant, and ignorant of the transaction: an injunction was moved for as of course, till the coming in of the answers of the other defendants, who lived abroad; but there appearing a probable danger of losing other material evidence by the delay, it was refused. *Vandam v. Munro*, 2 Anst. 502.

69. *Dissolution of—on affidavit of waste.*

Injunction-cause stood over at hearing for want of parties: injunction not dissolved, nor receiver appointed on motion, without special case of waste; but plaintiff compelled to speed the cause. *Price v. Williams*, 1 Ves. 401.

70. *Dissolution of—from answer showing their consent, and contradicting affidavits.*

The injunction, obtained upon a breach of covenant, in nature of a specific performance, dissolved upon the answer, contradicting the affidavits, and showing the consent for several years. *Barrat v. Blagrove*, 6 Ves. 104.

71. *Dissolution of—from waiver.*

A conditional consent to proceed at law waives an injunction. *Grant v. Priddell*, 1 Anst. 62.

72. *Dissolution of—miscellaneous.*

Lease from dean and chapter, with covenant not to make sale of or take any timber trees growing or to grow on a certain part of the premises, save for the necessary building or repairing, &c. of their cathedral church, or of the church buildings thereto belonging. Bill by lessee to restrain the dean and chapter from selling or cutting, except for the purposes aforesaid. Injunction obtained on filing the bill dissolved on the coming in of the answer, stating that the whole of the timber was wanted for the purpose of repairs; the covenant not extending to deprive them of the right which they might have exercised independent of it; and deans and chapters, like other ecclesiastical persons, not being liable to be restrained in cases of waste, either by

by prohibition or injunction, except in the ecclesiastical court, or at the suit of the crown. *Wither v. Dean, &c. of Winchester*, 3 Mer. 421.

73. *Dissolution of — cause against — reference of answer for impertinence.*

The answer being referred for impertinence, is a good ground for continuing an injunction. *Hurst v. Thomas*, 2 Anst. 591.

74. *Dissolution of — cause against — exceptions to answer for impertinence.*

In injunction cases, the master's report on the question of impertinence must, at least without reference to the inquiry whether there is further impertinence, have the same weight as his report on the question of insufficiency. *Raphael v. Birdwood*, Swanst. 232.

75. *Dissolution of — cause against — exceptions to answer for impertinence.*

1. Exceptions to the master's report, as to impertinence, is not cause against dissolving an injunction. *Corson v. Stirling, Cooper*, 93.

2. On a motion to dissolve a special injunction staying the trial of an action till further order, the master, on a reference for impertinence, having reported the answer impertinent in a small part only, and the plaintiffs having excepted to the report, and insisting on their right, after the question of impertinence was decided, to except to the answer for insufficiency, the lord chancellor examined the bill and answer, and dissolved the injunction, so far as it extended to stay trial. *Raphael v. Birdwood*, Swanst. 228.

76. *Dissolution of — cause against — miscellaneous.*

An injunction, though not to be continued, with a view to specific performance of an agreement to grant a lease, if under a clause for re-entry, the lease, when granted, would be at an end by the tenant's acts, was maintained upon undertaking to give possession when required by the court, and paying the rent due by waiver of the forfeiture, if incurred: viz. *distraining* for subsequent rent. *Gourlay v. Duke of Somerset*, 1 Ves. & Beam. 68.

77. *Dissolution of — time for shewing cause against.*

1. On motion to dissolve an injunction *nisi* at the last seal after trinity term, the plaintiff cannot have time till the next day of motions upon the usual undertaking to shew cause on the merits; but was permitted to shew cause during the petitions. *Robinson v. Wardell*, 5 Ves. 552.

2. Motion on answer to dissolve injunction *nisi*: plaintiff shewing exceptions for cause, must procure the report in four days: but the time is extended by courtesy. 2 Ves. & Beam. 42.

78. *Revival of — preliminaries to.*

Injunction not revived, pending a re-hearing of an order, allowing an exception to a report, that the answer was insufficient. *Scott v. Mackintosh*, 1 Ves. & Beam. 503.

79. *Revival of — on amending bill.*

1. Injunction dissolved on the answer, not revived of course without special motion on amendments, verified by affidavits. *James v. Downes*, 13 Ves. jun. 522.

2. The common injunction having been dissolved upon the coming in of the answer, and the bill being subsequently amended, the injunction was revived upon special application, supported by affidavit of the facts stated by way of amendment, the defendant being in default (though not in contempt) for not answering the amended bill. *Vipan v. Mortlock*, 2 Mer. 476.

3. After injunction dissolved upon the merits, motion to stay trial of ejectment till full answer to the amended bill, refused with costs. *Lady Markham v. Dickinson*, 1 Ves. 30.; 42 Geo. 3. c. 76.; 8 East, 569.; 44 Geo. 3. c. 161.; 8 East, 41.

80. *Revival of—on prayer of dedimus to answer amended bill.*

1. Injunction revived on the defendant's praying a *dedimus* to answer an amended bill. *Bagster v. Walker*, Dick. 109.

2. If after an injunction is dissolved, the plaintiff amends the bill, and requires a further answer, and the defendant prays a *dedimus* to take his answer, the court will consider it as dilatory, and will revise the injunction; but it must be upon notice, and a special application. *Edwards v. Edwards*, Dick. 755.

81. *Revival of—from indictment for perjury having been found against defendant.*

That an indictment for perjury, upon the answer, has been found by the grand jury, is not a ground for reviving an injunction. *Clapham v. White*, 8 Ves. 35.

82. *Revival of—election of, compulsory.*

1. When an injunction has been obtained in a cause, which afterwards abates by the death of the defendant, the practice is to move, on the part of the defendant's representatives, that the plaintiff may revive within a reasonable time, (a week generally), or the injunction may be dissolved. *Stuart v. Ancell*, 1 Cox, 411.

2. Where a defendant dies pending an injunction against him to restrain proceedings in ejectment, the heir at law may move that the plaintiff in equity may revive within a week, or the injunction be dissolved. *Hill v. Hoare*, 2 Cox, 50.

83. *Revival of—miscellaneous.*

1. Order to refer exceptions to answer, and to procure report in four days, or the injunction to be dissolved; the report not being obtained, the injunction was dissolved; afterwards, the exceptions being referred, and the answer reported insufficient, the injunction was held to be revived of course. *Philips v. Johnson*, Dick. 292.

2. An injunction against violation of a patent, having been dissolved, with liberty to the plaintiff to bring an action to establish his patent-right, and the defendant to keep an account in the mean while; a verdict having been obtained for the plaintiffs on the trial of the action, on application being made to revive the injunction, it was objected that the defendants intended to move for a new trial; and the matter was ordered to stand over till the result of that application should be known, the parties continuing to keep the account in the interim. *Hill v. Thompson*, 3 Mer. 631.

84. *Perpetual.*

1. A right is not considered to be determined so as to be a ground for a perpetual injunction, by any one trial at law, unless upon an issue sent out of this court for the purpose. *Robinson v. Lord Byron*, 2 Cox, 4.

2. An issue *devisavit vel non* directed to be tried at bar; verdict, by a special jury, in favour of the will. Upon hearing the cause on the equity reserved, the will was decreed to be established, and the trusts to be executed, and which were executed accordingly. Afterwards the testator's heir at law died, having by his will devised the residue of his real estate to one of the defendants, his second son, he having brought an ejectment, a perpetual injunction was decreed. *Lowe v. Jolliffe*, Dick. 388.

85. *Continuation of perpetual injunction on an abatement.*

A perpetual injunction having been decreed, it is not necessary, upon an abatement, to file a bill of revivor merely to keep on foot the injunction. *Yeomans v. Kilvington*, Dick. 351.; *Askew v. Townsend*, Dick. 471.

86. *Form of affidavit to stay trial.*

1. All that is necessary on the affidavit to ground an application that a  
injunction

injunction may extend to stay trial is, that the party cannot safely proceed to trial, until the defendant hath put in his answer. *Hartly v. Hobson*, Dick. 728.

2. Affidavit for an injunction to stay trial need not be particular as to the discovery expected. *Farrar v. Lewis*, -Dick. 729.

87. *To stay indictment pending bills for the same subject.*

Injunction to stay proceedings on an indictment for a trespass, two bills having been filed to determine the right. *Pilkington v. City of York*, Dick. 84.

88. *To stay suit at law pending bill in equity.*

1. Injunction to stay a party from proceeding at law for land; where a bill brought by him merely to recover the same land, was depending in chancery. *Bull v. Bodie*, Dick. 1.

2. Injunction against an action commenced by the plaintiff while proceeding under a decree to account for the same matter, it being a contempt to proceed at law after the subject of the suit had been attached in court. *Mocher v. Reed*, 1 Ball & Beatty, 318.

3. After decree to account, injunction, on application of the defendant, to restrain the plaintiff from proceeding at law in an action commenced pending the suit in equity. *Wilson v. Wetherhead*, 2 Mer. 406.

89. *To stay suit at law, after refusal of court of law to stay proceedings.*

Injunction granted in this court, though the court of law in which the action has been brought have, upon application made to it to stay proceedings, on a release of one of the plaintiffs, and affidavits of the circumstances of the case, refused to stay proceedings. *Whitfield v. Ralfe*, Cowper, 89.

90. *To stay suit in spiritual court for legacy.*

1. Injunction to the spiritual court to stay proceedings for payment of a legacy. *Stonehouse v. Stonehouse*, Dick. 98.

2. Injunction granted to stay a legatee from proceeding in the spiritual court for a legacy, until the hearing of the cause. *Smith v. Kempson*, 769.

91. *To stay suit in spiritual court for wife's legacy.*

Injunction to restrain a husband from proceeding in the spiritual court for the wife's legacy, the husband having made no settlement upon her. *Meals v. Meals*, Dick. 373.

92. *To stay suit in spiritual court to invalidate will.*

Injunction to stay proceedings in the spiritual court to invalidate a will and call in probate. *Sheffield v. Duke of Bucks*, Dick. 74.

93. *To stay suit at law barred by bankruptcy and certificate.*

Equity will not restrain by injunction further proceedings at law, upon a verdict obtained through the defendant's (a bankrupt) neglect to produce his certificate in evidence. *Lingard v. Hibberton*, 1 Rose, 459.

94. *To stay suit at law after executory satisfaction of demand.*

The court will continue an injunction granted to restrain a defendant from proceeding at law to enforce payment of a promissory note, given to the defendant's testator, on the ground that testator had agreed to accept an annuity in satisfaction of it, and had received a sum of money as part of that annuity on account; although nothing more conclusive had been done by the parties, and no bond or other security given to the grantee, and the whole remained executory. But they will impose on the party enjoining the action the terms of bringing the money into court. *Dally v. Catchlowe*, 4 Price, 147.

95. *To stay suit at law for mortgage-money after foreclosure.*

Injunction to stay the representative of a mortgagee (after foreclosure and sale of the premises) for going on at law for unsatisfied mortgage money, refused. *Tooke v. Hartley*, 2 B. C. C. 125.

96. *To stay suit at law on the ground of set-off.*

1. It is sufficient for the purpose of obtaining an injunction to restrain a plaintiff at law from proceeding in the action, that the defendant state in his bill and affidavit, that an unsettled account subsists between the parties, and that plaintiff would be found indebted to him on such account, in a greater sum than he is proceeding for; nor is such a bill demurrable on the ground that the plaintiff, in equity, stating a balance to have been acknowledged to be in his favour, might have pleaded it, at law, on notice of set-off. *Wattleworth v. Pitcher*, 2 Price, 46.

2. Injunction refused, on the alleged equity, that since the settlement of accounts, for the balance of which the action sought to be stayed, had been brought, the defendant (in equity) had become indebted to the plaintiff (in equity) considerably beyond the amount of such balance for business done as his agent. *Hirst v. Peirse*, 4 Price, 339.

3. A. and B., partners, gave a joint and several bond to C., who afterwards becomes indebted to A. B. becomes bankrupt; C. proves the bond under the commission, and then brings a joint action against A. and B., to which B. pleads his certificate. A. being by this form of action precluded from setting off his separate debt, applies for and obtains injunction against C.'s proceeding in the joint action. *Bradley v. Millar*, 1 Rose, 273.

97. *To stay suit at law, founded in duress.*

Injunction against securities obtained by one French emigrant against another by arresting him, when about to sail on the expedition against France, and under an obligation entered into in France as surety; which, according to the laws of France could not affect the person. *Talleyrand v. Boulanger*, 3 Ves. 447.

98. *To stay suit at law, founded in undue influence.*

Injunction against an ejectment under a deed of appointment, as obtained by a husband from his wife by undue influence, oppression, &c., and an issue directed. *Peele v. —*, 16 Ves. 157.

99. *To stay suit at law on suspicion of fraud.*

Where four of many actions against the various underwriters upon several policies (individually) had been tried, and verdicts passed for the plaintiffs at law, the court granted an injunction to restrain them (the plaintiffs at law) from proceeding farther, in a case where there was strong suspicion of fraud in the assured, on the money being paid into court, on the ground of the answer of one of the defendants not having come in. — (And the court of C. B. enlarged their rule, which had been obtained for a new trial, until the same time). The court, however, will dissolve the injunction if the amount of the losses claimed be not paid into court; and they will not permit money so paid in to be taken out upon the ground of great lapse of time between the filing of the bill and the putting in the answer, unless it clearly appears that the delay was gross and wilful on the part of the defendant, and that he was plainly not disposed to answer at all. A commission to examine witnesses abroad will be granted under such circumstances, on the coming in of the defendant's answer, although not prayed by the original bill, and the injunction will be in the meantime continued. *Kensington v. White*, 3 Price, 167.

100. *To stay suit at law, founded on a misrepresentation.*

Injunction granted to restrain defendant from recovering a demand against

against one of the plaintiffs, he having represented to the agent of the other plaintiff (on a treaty of marriage with his daughter), that there was no such demand existing. *Neville v. Wilkinson*, 1 B. C. C. 543.

101. *To stay suit at law for a rent-charge granted as a parliamentary qualification.*

Injunction granted to restrain the defendant from suing for a rent-charge granted to qualify him to set in parliament, the purpose never having been answered. *Platamone v. Staple, Cooper*, 250.

102. *To stay vexatious suit at law.*

Jurisdiction by injunction upon the ground of vexation by repeated actions of covenant. 2 Ves. & Beam. 302.

103. *To stay foreign attachment.*

Injunction to stay proceedings on a foreign attachment. *Mildred v. Neate*, Dick. 279.

104. *To stay suit at law for penalty of bond.*

1. Where a bond is given for the enjoyment of a collateral matter, the court will grant an injunction against an action at law for the penalty, and award an issue *quantum damnificatus*. *Lloman v. Walter*, 1 B. C. C. 418.

2. Injunction granted to restrain an action on a bond for performance of covenants to build a bridge, and an issue *quantum damnificatus* ordered, the sum mentioned in the bond being a penalty. *Errington v. Aynesty*, 2 B. C. C. 341.

105. *To stay execution beyond the bond-debt actually due.*

The practice of a court of law, compelling a plaintiff on bond not to take execution beyond his real debt, does not oust the jurisdiction of this court in awarding injunction; demurrer, on that ground, overruled. *Codd v. Woden*, 3 B. C. C. 73.

106. *To stay suit at law on illegal bond.*

1. Injunctions to stay proceedings at law on bonds, the consideration being a place procured about the person of the king. *Harrington v. Chastel*, Dick. 581.

2. Action at law on a bond, only reciting that the obligor was (on resignation of the obligee's *cestui trust*) appointed to an office, not restrained by injunction; but may be pleaded at law, in order to try whether consideration was corrupt. *Thrale v. Ross*, 3 B. C. C. 57.

107. *To stay suit at law on bail-bond.*

Where an action at law has been brought upon a bail-bond given to the sheriff upon an attachment from the equity side of the exchequer, for not answering according to the condition, and a verdict has been recovered; if the defendant instead of pleading the answer put in, pleads *non est factum*, and refuses to settle with the plaintiff by paying the cost pending the action, when he had an opportunity, before the judge upon a summons, the exchequer will not restrain the plaintiff from taking out execution (although the defendant has answered since the action brought) but on the terms of all the costs at law being paid, notwithstanding the plaintiff has not (as he ought to have done) refused to accept the answer when it came in, till the contempt was cleared, but has actually waived them, by excepting to the answer and amending his bill. But they will not order the defendant (at law) to pay the cost in equity also, because they are waived by the plaintiff accepting the answer. *Heard v. Partington*, 3 Price, 222.

108. *To stay suit at law on replevin-bond after agreement to refer.*

The court will grant an injunction to restrain a landlord from proceeding at law on an assignment of a replevin-bond against the sureties, if there have

have been an agreement to refer, and a reference between the landlord and a tenant (without the concurrence of the surety) of the matters in difference, whereby the performance of the condition of the bond (to proceed with effect) has been suspended. On such an agreement having been entered into, the bond became *finitus officio*. *Bowmaker v. Moore*, 3 Price, 214.

109. *To stay suit at law on post obit bonds under circumstances.*

Injunction granted on the merits to restrain proceeding on *post obit* bonds, under the circumstances of the case, until the hearing of the cause. *Darley v. Singleton*, Wightw. 25.

110. *To stay suit at law on gambling securities.*

Action on bills of exchange; a bill was filed for an injunction, and to have them delivered up as being given on a gaming transaction; a demurrer was overruled. *Newman v. Franco*, 2 Anst.

111. *To stay execution for securities arising out of gambling transactions.*

An injunction will not be granted to restrain a defendant from taking out execution on a judgment being suffered by default on a case made by bill, and answer that the bill of exchange on which the action had been brought, was given in consideration of defendants delivering up a former bill, which had been indorsed in consideration of a gaming debt. *Graves v. Houlditch*, 2 Price, 147.

112. *To stay judgment-creditors' execution upon lands imperfectly conveyed before judgment.*

1. The court will grant an injunction to restrain a judgment-creditor from taking out execution on his judgment against lands, which had been the property of his debtor, but were sold by him to a purchaser before the creditor obtained his judgment, but which from the invalidity of the conveyance, had since descended to the vendor's heir at law. *Prior v. Penpraze*, 4 Price, 99.

2. Demurrer by a judgment-creditor to a bill for an injunction to restrain him from taking out execution on his judgment, against an estate sold before he obtained judgment, and ineffectually conveyed to the purchaser (the plaintiff), whereby the legal estate descended since the date of his judgment to the heir at law, overruled. *Ibid.*

113. *Against turning out of possession for breach of covenant.*

1. Distinction as to injunction between landlord and tenant upon an actual lease and a mere agreement. In the latter case no relief, if the covenant would have been violated: in the former some ground necessary, either by the conduct of the lessor or under the statute 4 Geo. 2. c. 28. 3 Ves. & Beam. 29.

2. Covenant against using premises as a shop or warehouse for any trade without licence in writing, or permitting any thing which may grow to the annoyance or damage of the lessors, or any of their other tenants. Breach, though not a nuisance in law, public or private, being an annoyance, not protected by injunction; there being no licence; and permission of one trade, not to be construed a general licence for any trade; nor will the court enter into a comparison which are more or less offensive. *Macher v. Foundling Hospital*, 1 Ves. & Beam. 188.

3. Injunction refused against a verdict in ejectment upon a breach of covenant by lessee for years as to the mode of cultivation: if admitting relief, the defendant having been prevented from proving other breaches, against which no relief could be had; as by assigning without licence. *Lovet v. Lord Ranelagh*, 3 Ves. & Beam. 24.

114. *To stay execution against property leased to plaintiff himself.*

Injunction to restrain a sheriff from executing a *fiery facias* against the furniture

furniture and effects of the defendant at law, which, with a house and land, had been let by him to the plaintiff, who was in possession, refused. *Garstin v. Asplin*, 1 Mad. 150.

115. *To stay execution in ejectment arising out of confusion of boundaries.*

1. Where the principal dispute is as to the locality of the lands of each, equity will not allow the defendant, after recovering in ejectment, to take out execution where he chooses. *Hardcastle v. Shafto*, 1 Anst. 184.

2. When lands are confused, and the plaintiff at law recovers on an instrument which states the whole to be twenty-five acres, and that eighteen belong to him, whereas, in fact, the whole is only twenty-one acres, equity will not permit him to take out execution for eighteen. He must abate proportionably. *Ibid.*

116. *To stay suit at law for not repairing.*

Remedy by injunction to restrain an action on breach of covenant to repair, on the peculiar circumstances of the case, not amounting to neglect or surprise, and there having been no waiver or abandonment on the part of the defendant. *Hannam v. South London Water-works*, 2 Mer. 65.

117. *To stay suit at law for rent of premises destroyed by fire.*

No equity in favour of a lessee of a house, liable to repair, with the exception of damage by fire, for an injunction against an action under the contract for payment of rent upon the destruction of the house by fire. *Hollzapffel v. Baker*, 18 Ves. jun. 115.

118. *To stay ejectment for not insuring.*

1. Injunction against an ejectment for breach of covenant to insure against fire, refused. *Reynolds v. Pitt*, 19 Ves. 134.

2. No relief by injunction against a forfeiture for breach of covenant to keep insured. *White v. Warner*, 2 Mer. 459.

119. *On affidavit of insolvency and absconding of defendant in replevin.*

Where one distrained, and on replevin, made three comasances as bailiff to different persons, an affidavit stating the only claim to be under one of the persons, and that he had absconded insolvent, will not entitle the plaintiff to an injunction. *Nichols v. Philips*, 3 Anst. 636.

120. *To stay suit at law against auctioneer for deposit.*

1. Injunction to restrain an action against the auctioneer for the deposit, refused, where there had been great delay on the part of the vendor. *Lloyd v. Collett*, 4 B. C. C. 470.

2. Vendor and vendee proceeding in treaty beyond the time for completing the contract, the vendor having brought an action, and withdrawn his record, not having got in a judgment amounting to half the purchase money, refused an injunction. *Wood v. Bernal*, 19 Ves. 220.

3. Injunction to stay proceedings in an action brought by a purchaser to recover the amount of his deposit, refused; the description in the printed particular of sale being calculated grossly to deceive as to the real nature and value of the estate sold. *Stewart v. Alliston*, 1 Mer. 206.

4. Injunction to restrain an action against the auctioneer for the deposit, although the estate sold was represented as freehold, with leasehold adjoining, and turned out to be almost all leasehold; and although there had been great delay in making the plaintiff's title. *Fordyce v. Ford*, 4 B. C. C. 494.

5. Motion for an injunction to restrain proceeding in an action for recovery of the deposit, opposed upon that ground, and upon the ground of other objections to the title, which could not be disposed of except at the hearing, was therefore granted. *Levy v. Lindo*, 3 Mer. 81.



121. *To stay suit against executor after decree for creditors to come in.*

1. Where there is a bill filed against executor, and a decree *quod computat*, and for creditors to come in, if a creditor brings an action, an injunction shall issue to stay trial as well as execution; but if the action be brought before the bill, and he chuses to discontinue, he shall be allowed to prove his costs at law, in addition to his debt. *Goate v. Fryer*, 3 B. C.C. 23.

2. After a general decree against an executor to account, &c., a creditor shall be restrained by injunction from proceeding at law, not only staying execution, but from going to trial. *Ibid.* 23 Cox, 201.

3. Injunction after a decree to account, to restrain a creditor from proceeding at law upon a verdict which would entitle him to a judgment *de bonis propriis* against an executor, refused. In cases where the injunction is granted, it may be obtained on the application of the plaintiff in equity, as well as of the executor. *Terrewest v. Featherby*, 2 Mer. 480.

122. *To ground writ of assistance.*

Injunction, on motion of course to deliver possession of land decreed, as a ground for the writ of assistance, the only mode of obtaining immediate possession; a court of equity properly acting only *in personam*. *Huguenin v. Baseley*, 15 Ves. 180.

123. *In relation to the forfeiting act in America.*

Under the forfeiting act in America, the estates of royalists were to be sold for payment of debts; this is no ground for an injunction to restrain an action here on a bond. *Kemp v. Antill*, 2 B. C. C. 2. Vide *in tit.* CHANCERY.

124. *To restrain arbitration.*

Injunction granted upon bill filed and affidavit, to restrain proceedings in an arbitration, under the circumstances. *Mylne v. Dickinson*, Cooper, 195.

125. *To protect enjoyment of specific chattel.*

Injunction upon the jurisdiction to protect the enjoyment of a specific chattel, not properly the subject of compensation by damages. *Lady Arundell v. Phipps*, 10 Ves. 139.

126. *To restrain breach of contract.*

1. The court will not interfere by injunction (in the nature of an order to stay waste), to prevent a breach of contract, where no trespass is committed. *Longman v. Calliford*, 3 Anst. 645.

2. Distinction between express covenant and implied agreement, as to be enforced by injunction: granted in the former instance, not in the latter, against tenant removing articles, contrary to the custom of the country. *Kimpton v. Eve*, 2 Ves. & Beam. 349.

3. Injunction granted to restrain a breach of covenant, secured by forfeiture of the lease and a penalty. *Barrett v. Blagrave*, 5 Ves. 555.

4. Injunction on affidavit to restrain the tenant of a farm breaking up meadow, contrary to express covenant, for the purpose of building. Whether, if no express covenant, it would do upon the ground of waste, *quære*. *Lord Grey de Wilton v. Saxon*, 6 Ves. 106.

5. The court will not interfere by injunction to prevent a tenant's selling manure off the farm, contrary to the covenants of a lease. *Johnson v. Goldswaine*, 3 Anst. 749.; *sed vide contra*, *Geast v. Lord Belfast*, *Ibid.* n.

6. Injunction restraining the sale of an estate until answer to a bill alleging a parol agreement to exchange, partly performed by the plaintiff having purchased an estate for the purpose. *Curtis v. Marquis of Buckingham*, 3 Ves. & Beam. 168.

7. The court will not interfere by injunction to prevent the violation of  
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an agreement, of which, from the nature of the subject, there could be no decree for a specific performance, as for instance, to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired. *Newbery v. James*, 2 Mer. 446.

8. *Quære*, whether a court of equity, in the exercise of its jurisdiction to decree the specific performance of an agreement, can interfere by injunction to restrain a party from divulging a secret in medicine, which is unprotected by patent. In this case, an injunction, which had been granted for that and other purposes, was dissolved upon the affidavit of the defendant (an infant), denying the facts of the case, as represented by the plaintiff's affidavit in support of the injunction, and upon the ground, that there was no secret in the alleged invention. *Williams v. Williams*, 3 Mer. 157.

127. *For creditor to restrain payment of money to heir.*

An injunction (on behalf of a creditor), granted to restrain payment of purchase-money to the heir. *Green v. Lowes*, 3 B. C. C. 217.

128. *To restrain executor from receiving assets.*

1. Application on behalf of an infant plaintiff to restrain executor from receiving the assets, refused, and the *prochein amy* ordered to pay the costs. *Buckly v. Buckeridge*, Dick. 395.

2. Injunction to restrain defendant from receiving a testator's effects, and to stay trial of actions granted before answer under the circumstances. *Mansfield v. Shaw*, 3 Mad. 100.

129. *To restrain sales by executors.*

1. Motion to restrain the defendant's widow, and administratrix of the intestate, from disposing of his property in the funds, on the ground of having squandered the real estate, of which she was in possession for the plaintiff's, the children, granted as to two-thirds, the share of the plaintiff's. *Rogers v. Rogers*, 1 Anst. 174.

2. Injunction restraining an executor, claiming under the will, and also by a gift from the testatrix in her life, from selling, upon affidavit of undue influence. *Edmunds v. Bird*, 1 Ves. & Beam. 542.

130. *Against building by Foundling-hospital.*

Injunction to restrain the Foundling-hospital from building, &c. on the grounds belonging to the hospital, refused. *Attorney-general v. the Foundling-hospital*, 4 B. C. C. 165.

131. *Against commissioners under an inclosure act.*

An inclosure act empowered commissioners to sell by private contract any part of the commonable lands fronting or adjoining the houses or gardens of the purchasers, and also empowered the commissioners to sell by auction such parts at the greatest distance from the houses of the respective proprietors, as the commissioners should think fit, for defraying the expences of the act, and the surplus of the produce of such sales was directed to be divided amongst the proprietors. Upon a bill by one proprietor upon behalf of himself and the others, the commissioners were restrained by injunction from proceeding in an agreement made by them for the sale of a pond by private contract, to a person who was not the owner of any property adjoining or fronting the pond, it appearing that the pond was of much public utility, and was sold at an undervalue. *Hawkes v. James*, 1 W. C. C. 2.

132. *To restrain nuisance—prejudicing a canal.*

Injunction against draining, preparatory to opening a coal-mine, with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure. *Birmingham Canal Company v. Lloyd*, 18 Ves. jun. 515.

133. *To restrain nuisance — digging a ditch.*

Injunction from farther digging a ditch; but court will not order it to be filled up till after answer. *Anon.* 1 Ves. 140.

134. *To restrain nuisance — injuring fish-ponds.*

An injunction shall go to restrain the defendant from injuring fish-ponds. *Earl Bathurst v. Burden*, 2 B. C. C. 64.

135. *To restrain nuisance — obstructing lights.*

1. Application for an injunction to restrain building, so as to stop up lights, not being ancient lights, refused. *Fishmongers' Company v. East India Company*, Dick. 163.

2. Injunction against darkening ancient windows, not in every case affecting the value of premises, that would support an action. The effect must be, that material injury, amounting to nuisance, which should not only be redressed by damages, but upon equitable principles prevented. *Attorney-general v. Nichol*, 16 Ves. 338.

136. *To restrain nuisance — obstructing stream.*

1. Injunction to restrain defendant from preventing water flowing in regular quantities to a mill, granted. *Robinson v. Byron*, 1 B. C. C. 588.

2. Order specifically to repair the banks of a canal, and stop-gates and other works, refused. But the effect was obtained by an order to restrain impeding the plaintiff from navigating, using, and enjoying, by continuing to keep the canals, banks, or works, out of repair, by diverting the water, or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop-gate. *Lane v. Newdigate*, 10 Ves. 192.

3. Injunction against using water injuriously to a mill, putting the plaintiff to go to trial forthwith. 18 Ves. jun. 516.

137. *To restrain nuisance — offensive process in trade.*

Jurisdiction by injunction on information by the attorney-general, or the relation of individuals, against a nuisance by an offensive and unwholesome process in trade, not exercised without a trial at law; regulating according to justice the time of trial of an indictment depending, and removed by *certiorari* into the king's bench, from the assizes, as against the relators; whether as against the defendants, *quære*. *Attorney-general v. Cleaver*, 18 Ves. jun. 211.

138. *To restrain partners from recovering partnership funds.*

Injunction to restrain a partner from recovering partnership funds, the defendant being in contempt. *Read v. Bowers*, 4 B. C. C. 441.

139. *To restrain surviving partner from disposing of joint stock.*

Injunction to restrain a surviving partner from disposing of the joint stock, and receiving the outstanding debts. *Hartz v. Schrader*, 8 Ves. 317.

140. *Against publishing judicial proceedings.*

Injunction until the hearing, under an order of the house of lords, for publishing Lord Melville's trial, and prohibiting any other publication of it. *Gurney v. Longman*, 13 Ves. 493.

141. *Against publishing letters.*

1. Injunction granted on the application of the executor, to restrain the defendant from publishing letters, the property of the testator. *Earl of Granard v. Dunkin*, 1 B. & B. 207.

2. Whether the publication of private letters can be restrained upon breach of confidence, independent of contract and property, *quære*. 2 Ves. & Beam. 28.

142. *To stay executor's suit for the transfer of stock.*

Demurrer allowed to a bill by the bank of England for an injunction against

against the action of an executor claiming a transfer of stock. Considering the stock as specifically bequeathed (which was doubtful) to trustees in France upon special trusts, if the executor cannot maintain the action, upon the nature of the bequest, or as having assented, the injunction is unnecessary: if he can, upon his title to the stock, to be applied as the other property, there is no equity. *Bank of England v. Lunn*, 15 Ves. 569.

143. *To stay the transfer of stock pending litigation of will.*

Injunction restraining a transfer, and a receiver appointed, to preserve the property during a litigation in the ecclesiastical court upon the will. *King v. King*, 6 Ves. 172.

144. *To stay the transfer of stock standing in an agent's name.*

Injunction till answer, restraining a transfer of stock, standing in the name of a steward; on strong evidence by affidavit, that it was the produce of his master's property, rents, &c. received for many years without account. Refused as to money at his banker's in his name. *Lord Chedworth v. Edwards*, 8 Ves. 46.

145. *To stay sales by trustees.*

On a trust to sell, a suggestion in the bill, verified by affidavit, of improper conduct of the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale. *Pechel v. Fowler*, 2 Anst. 549.

146. *To restrain vendor from conveying.*

Injunction restraining vendor, defendant to a bill for specific performance, from conveying the legal estate. *Echliff v. Baldwin*, 16 Ves. 267.

147. *To restrain a vessel from sailing.*

1. The court of admiralty is open all the year round to applications by part-owners to restrain the sailing of ships without their consent, until security given to the amount of the respective shares. But where the shares are not ascertained, that court has no jurisdiction; and in such case the court of chancery will exercise a concurrent jurisdiction, by injunction, to restrain the sailing of a ship until the share of the party complaining shall be ascertained, and security given to the amount of it. In this case it was referred to the master to make the inquiry, and settle the security. *Haly v. Goodson*, 2 Mer. 77.

2. Injunction to restrain the sailing of a ship, upon the application of a part-owner, refused; where the ship was intended to sail the next day, and it did not appear, by the affidavit in support of the motion, that there were any circumstances to account for the delay in making the application. *Christie v. Craig*, 2 Mer. 137.

148. *To stay waste — in general.*

Injunction against waste by tenant. *Kimpton v. Eve*, 2 Ves. & Beam. 349.

149. *To stay waste — proof of title essential to.*

Injunction to restrain waste not granted without positive evidence of title. *Devis v. Leo*, 6 Ves. 784.

150. *To stay waste — on doubtful title.*

1. Injunction for waste denied because plaintiff's right doubtful. *Field v. Jackson*, Dick. 599.

2. Injunction against cutting timber refused, where the title was disputed; as between devisee and heir-at-law. *Smith v. Collyer*, 8 Ves. 89.

151. *To stay waste — against one not party.*

Injunction against tenant in possession not a party from committing waste. *Attorney-general v. Duke of Ancaster*, Dick. 68.

152. *To*

152. *To stay waste — on belief of intention.*

No injunction upon belief of an intention to cut timber. 7 Ves. 417.

153. *To stay waste — permissive waste.*

Injunction against permissive waste. Caldwell v. Bayless, 2 Mer. 408.

154. *To stay waste — notwithstanding covenant.*

Covenant to repair, and at the end of the term surrender buildings in good condition, does not preclude an injunction against pulling them down, and carrying away the materials just before the end of the term. Corporation of London v. Hedger, 18 Ves. jun. 355.

155. *To stay waste — a mere trespass.*

1. Formerly, before injunction was applied to the case of trespass, upon the death of the party an account was given; the trespass dying with the person. 18 Ves. jun. 186.

2. Injunction granted in cases of trespass. Field v. Beaumont, Swanst. 208.

3. Injunction in the case of trespass to prevent irreparable mischief. 7 Ves. 308.

4. Injunction against trespass upon irremediable mischief in nature of waste, on a bill by the lord of a manor and his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor. Earl Cowper v. Baker, 17 Ves. jun. 128.

5. Injunction in the case of trespass to prevent the multiplicity of suits. 7 Ves. 310.

6. Injunction in trespass, where the title was disputed. Kinder v. Jones, 17 Ves. jun. 110.

7. The court will not interfere by way of injunction to stay waste, where the defendant is a stranger in estate. Mortimer v. Cottrell, 2 Cox, 205.

8. Whether after a verdict at law, in an action of trespass, the court will grant an injunction against future trespasses, in favour of parties who refused at the trial to produce documents necessary to a fair decision, *quære*. Field v. Beaumont, Swanst. 210.

9. A defendant not having, or claiming any right, cuts down timber on the estate, being a mere trespasser, and having committed an act for which an action would lie against him, the court would not grant an injunction to stay waste. Mogg v. Mogg, Dick. 670.

10. Injunction to stay waste granted against the widow of a late rector, at the suit of the patroness, during vacancy. Hoskins v. Featherstone, 2 B. C. C. 552.

11. Where the defendant having begun to take coal in his own land had worked into that of the plaintiff. Mitchell v. Dors, 6 Ves. 147.

12. Lessee committed waste by opening a mine, and continued the work into other land of the lessor, not comprised in his lease. Injunction as to both. 7 Ves. 308.

13. Injunction against cutting timber in the case of trespass: viz. by a person having got possession under articles to purchase. Distinction between waste and trespass, or destruction, where there is no privy. Crockford v. Alexander, 15 Ves. 138.

14. Injunction in the case of trespass by the lord of a manor digging for coal on the premises of a copyhold tenant. From the nature of the subject and the consequences, such an injunction not to be continued without securing the means of a speedy trial. Grey v. the Duke of Northumberland, 17 Ves. jun. 281.

15. The jurisdiction against waste by injunction and account, applied to trespass, by exceeding a limited right to enter and take stone from a quarry; being a destruction of the inheritance; as in case of timber, coal, &c.; and the

the distinction between waste and trespass therefore disregarded. *Thomas v. Oakley*, 18 Ves. jun. 184.

156. *To stay waste — defendant being in possession under plaintiff's tenant.*

Injunction against waste; defendant insisting on his own title, but admitting possession received from plaintiff's tenant without his knowledge. *Norway v. Rowe*, 19 Ves. 154.

157. *To stay waste — in tenant from year to year.*

Injunction to restrain a tenant from year to year, under notice to quit, as in the case of a lessee for a longer term, from doing damage, and from removing the crops, manure, &c., except according to the custom of the country. *Onslow v. —*, 16 Ves. 173.

158. *To stay waste — by one tenant in common.*

1. One tenant in common not entitled to injunction to restrain another tenant in common from cutting down timber. *Goodwyn v. Spray*, Dick. 667.

2. Injunction to stay waste refused, where the plaintiff and defendant in possession were tenants in common: but granted an affidavit of the defendant's insolvency. *Smallman v. Onions*, 3 B. C. C. 621.

3. Injunction between tenants in common against destruction: not against pure equitable waste. *Hole v. Thomas*, 7 Ves. 589.

159. *To stay waste — by copyholder.*

Lord of a manor is entitled to injunction and account in respect of waste by a copyholder. *Richards v. Noble*, 3 Mer. 673.

160. *To stay waste — mortgagor from felling timber.*

Mortgagor restrained by injunction from cutting down timber on the mortgaged premises. *Usborne v. Usborne*, Dick. 75.

161. *To stay waste — felling young or ornamental trees.*

1. Injunction granted to stay cutting down saplings, wavers, and fruit-trees. *Kaye v. Banks*, Dick. 431.

2. Injunction against cutting down trees planted for ornament, or any timber, except at seasonable times, and in an husband-like manner. *Chamberlain v. Dummer*, Dick. 600.

3. Injunction to stay waste will go to prevent tenant for life, without impeachment of waste, from improper waste; but the answer denying any intention of cutting young or ornamental trees, the order dissolved, though the original affidavits were read against the answer. *Countess of Strathmore v. Bowes*, 2 B. C. C. 88.

4. Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct; amounting to a consent to the plaintiff's plan of improvement, laying out the lawn, &c. *Jackson v. Cator*, 5 Ves. 688.

5. Injunction restraining tenant for life without impeachment of waste from cutting timber growing for ornament or shelter, extended to clumps of firs on a common two miles from the house, having been planted for ornament. *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107.

6. Injunction against cutting ornamental timber, confined to timber standing for ornament or shelter: the court refusing to extend it by inserting the words "contribute to ornament." *Williams v. M'Namara*, 8 Ves. 70.

162. *To stay waste — in cutting turf.*

Tenant restrained from cutting turf for sale, (his lease giving a right of estovers only,) notwithstanding an uninterrupted practice for eighty years. *Lord Courtown v. Ward*, 1 Sch. & Lef. 8.

163. *To*

163. *To stay waste — alterations in a house, changing the nature of the subject.*

Injunction against proceeding with alterations in a house, under an agreement for a lease, upon circumstances that would probably prevent a specific performance; viz. surprise, the effect of fraudulent misrepresentation and concealment, and the particular nature of the alterations, for the conversion of a private house to the purpose of a coach-maker's business, wholly changing the nature of the subject. *Bonnett v. Sadler*, 14 Ves. 526.

164. *To stay waste — by sowing pernicious crop.*

Injunction granted to stay waste, and from sowing land with mustard-seed, or any other pernicious crop. *Pratt v. Brett*, 2 Mad. 62.

165. *Miscellaneous causes for, arising out of the relation of landlord and tenant.*

The court will not grant an injunction to a lessee to restrain a party proceeding against him in ejectment, or to restrain his landlord from distraining for rent, which he has received notice from the plaintiff in ejectment not to pay to the landlord; because it is, either way, a proceeding which would have the effect of bringing his landlord's title into dispute, which he is not to be permitted to be the means of doing. *Homan v. Moore*, 4 Price, 5.

166. *Refused in a miscellaneous case, arising out of a partnership.*

Under a bill by some partners in a joint concern on behalf of themselves and the others, three hundred in number, for a dissolution, receiver, &c. and an account, alleging mismanagement by the managers; the court refused to interfere by injunction, and the appointment of a receiver, in the first instance, until they had tried the means of redress provided by the articles. *Carten v. Drury*, 1 Ves. & Beam. 154.

11. Writ of *ne exeat regno*.

1. *Original object of the writ.*

Original object of the writ of *ne exeat regno* to prevent a subject going to the king's enemies. 11 Ves. 46.

2. *Its general nature and application.*

1. *Ne exeat regno* a high prerogative writ. 7 Ves. 417.
2. Applied to cases of private right with great caution and jealousy. 8 Ves. 33.
3. It is applied to the purpose of equitable bail. 1 Ves. & Beam. 373.
4. Prerogative by writ of *ne exeat regno* to restrain a subject from leaving the kingdom; and by the great or privy seal to recall a subject abroad; and if not obeyed, to take his property. 10 Ves. 63.

3. *Whether grantable by the exchequer.*

The court of exchequer grant orders in nature of the writ of *ne exeat regno*; applying them only to cases to which this court would apply the writ. 11 Ves. 46.

4. *Analogy between the writ, and an application to hold to bail.*

Analogy between the applications for the writ of *ne exeat regno* and to a judge to hold to special bail. 5 Ves. 97.; 7 Ibid. 174.

5. *A foreign country defined.*

1. A writ of *ne exeat regno* to prevent the defendant going to Scotland. *Wilson v. Boswell*, Dick. 535.; 11 Ves. 46.
2. The defendant, a creditor of the bankrupt, having arrested and received part of bankrupt's effects in Scotland, a writ of *ne exeat regno* granted against him. *Mackintosh v. Ogilvie*, Dick. 119.

3. Writ

3. Writ of *ne exeat regno* to restrain a member of parliament going to Ireland, refused. *Bernal v. Marquis of Donegal*, 11 Ves. 43.

6. *On threatening to go abroad.*

Writ of *ne exeat regno* granted on a party's threatening to go abroad. *Taylor v. Leitch*, Dick. 380.; *Goodwin v. Clarke*, Id. 497.

7. *On belief.*

Belief, without circumstances or declarations shewing the ground of it, will not sustain a writ of *ne exeat regno*. 8 Ves. 597.

8. *From demand being in danger.*

That the debt will be endangered is sufficient for a writ of *ne exeat regno*, without stating that the object is to avoid the jurisdiction. *Stewart v. Graham*, 19 Ves. 313.

9. *Against one leaving England in the course of duty.*

To obtain a writ of *ne exeat regno*, an affidavit to information, and belief of an intention to quit the kingdom, or circumstances, making it necessary, as an order for military officers to join their regiments abroad, not sufficient. *Hannay v. M'Entire*, 11 Ves. 54.

10. *Against a foreigner,\* or foreign resident.*

1. A writ of *ne exeat regno*, issued against the defendant, whose place of residence was at Port Mahon, with whom the plaintiff's testator was in partnership, and to be in 2,000*l.*, the amount of what he believed the defendant to be indebted on a balance of accounts. *Robertson v. Wilkie*, Dick. 786.

2. Writ of *ne exeat regno* granted against a person generally resident in Ireland; and in this country only for a temporary purpose; under the circumstances that a balance was sworn to, for which bail might have been had; that the plaintiffs had filed a bill in Ireland, where transactions arose, for an account; and a proposal of reference. *Howden v. Rogers*, 1 Ves. & Beam. 129.

3. *Ne exeat regno* granted; the defendant's general residence being in the West Indies, &c. 1 Ves. & Beam. 133.

11. *Against a feme covert.*

1. A writ of *ne exeat regno* against a feme covert executrix. *Jernegan v. Glass*, Dick. 107.

2. A writ of *ne exeat regno* against a feme covert, the administratrix of her late husband, who had come to England to get in his property. *Moore v. Meynell*, Dick. 30.

12. *Against a co-debtor, the other remaining here.*

Writ of *ne exeat regno* refused on a judgment against two persons, one threatening to go abroad. *Crossley v. Marriot*, Dick. 609.

13. *After a previous holding to bail.*

1. Writ of *ne exeat*, obtained on bill being filed, discharged on the ground that the defendant had been previously arrested at the suit of the plaintiff for the same debt, and discharged. *Raynes v. Wise*, 2 Mer. 472.

2. Plaintiff having twice held the defendant to bail, obtained a bill of *ne exeat regno*; discontinuing the action. The writ discharged. *Amsinck v. Barklay*, 8 Ves. 594.

14. *Grantable for equitable demands only.*

1. *Ne exeat regno* must be upon an equitable demand. *Atkinson v. Leonard*, 3 B. C. C. 218.; *King v. Smith*, Dick. 82.; *Brocker v. Hamilton*, Ibid. 154.



2. For where the demand is legal, chancery will not grant a writ of *ne exeat regno*. *Ex-parte* Duncombe, Dick. 503.

3. Writ of *ne exeat regno*, however, upon a legal demand against an attorney, on the ground of his privilege, by analogy to the case of equitable demands, refused. *Gardner v. ———*, 15 Ves. 444.

4. So in account the writ *ne exeat regno* granted; though bail might be had at law. 11 Ves. 55.

5. Hence writ of *ne exeat regno* for a demand, upon which bail might be had; viz. the admitted balance of an account; on the ground, that if bail was given, the plaintiff disputing the balance would be entitled to an account, and the defendant could not put him to his election to sue at law or in equity except upon terms. *Jones v. Sampson*, 8 Ves. 593.

6. So writ of *ne exeat regno* upon the concurrent jurisdiction, in account; though bail might be had at law. Against a positive affidavit, the defendant's affidavit, or evidence of the plaintiff's admission, that no debt is due, will not avail. The affidavit of a threat or intention to go abroad must be positive; not upon information and belief. *Jones v. Alephsin*, 16 Ves. 470.

#### 15. For demands arising under agreements.

1. Writ of *ne exeat regno* granted where the plaintiff's demand arose under an agreement. *Goodwin v. Clarke*, Dick. 497.

2. *Quære* if the writ could be supported on affidavit of a sum alleged to be due under an agreement, the specific performance of which is resisted by the defendant. *Raynes v. Wise*, 2 Mer. 472.

#### 16. To compel payment of alimony.

1. Writ of *ne exeat regno* against husband going abroad, to avoid paying alimony. *Ex-parte* Whitmore, Dick. 143.

2. Upon a suit in ecclesiastical court by wife for alimony, *Quære*, whether before the decree court will grant writ of *ne exeat regno* against husband. *Coglar v. Coglar*, 1 Ves. 94.

3. Writ of *ne exeat regno* issues in the case of alimony, but only for sums actually due, and costs. *Shaftoe v. Shaftoe*, 7 Ves. 171.; *Dawson v. Dawson*, Ibid. 173.; *Oldham v. Oldham*, Ibid. 410.

4. The writ of *ne exeat regno* is in the nature of equitable bail: therefore, in the case of alimony, marked only for the arrears actually due; and not carried farther by analogy to the case of a judge holding to bail for uncertain damages upon a personal tort. *Haffey v. Haffey*, 14 Ves. 261.

#### 17. For assignee of bond.

*Ne exeat regno* refused at the suit of assignee of a bond, the original obligee being dead without representatives. *Ray v. Fenwick*, 3 B. C. C. 25.

#### 18. To compel payment of costs.

A writ of *ne exeat regno* granted, on the application of a defendant against a plaintiff, whose bill was dismissed with costs. When from the declarations of the plaintiff, it was apprehended, that he would leave the country before the service of the process to pay costs could be made effectual. *Stewart v. Stewart*, 1 B. & B. 73.

19. Against the agent of an executor possessed of bond securing plaintiff's residue.

*Ne exeat regno* refused against an agent of a surviving executor, having in his possession a bond which was the security for a residue to which plaintiff was entitled. *Storey v. Higgins*, 3 B. C. C. 476.

#### 20. Upon an undertaking for indemnity.

A writ of *ne exeat regno* refused upon an undertaking for an indemnity. To obtain it there must be an equitable demand in the nature of a debt actually due. *Cock v. Ravie*, 6 Ves. 283.

21. *Re-*

21. *Refused under circumstances.*

The writ of *ne exeat regno* refused: the circumstances not affording a sufficient ground. *Gardiner v. Edwards*, 5 Ves. 591.

22. *Mode of obtaining.*

1. Prayer for the writ of *ne exeat regno* in the bill not essential; nor affidavit of the debt, established by the master's report, absolutely confirmed. *Collinson v. —*, 18 Ves. jun. 353.

2. No notice of motion for the writ of *ne exeat regno*. 18 Ves. jun. 355.

23. *On affidavit of committee of lunatic.*

Writ of *ne exeat regno* obtained on behalf of a lunatic by his committee on a note, as given for the balance of an account, restraining the captain of an East India ship from proceeding on his voyage. *Stewart v. Graham*, 19 Ves. 313.

24. *Affidavit for — by whom sworn.*

*Ne exeat regno* not issued against the husband on the affidavit of the wife, administratrix of her former husband. *Sedgwick v. Watkins*, 3 B. C. C. 2.; 1 Ves. jun. 49.

25. *Affidavit for — must be positive.*

1. Affidavit to support a writ of *ne exeat regno* must be positive. *Roddam v. Hetherington*, 5 Ves. 91.

2. And as positive as an affidavit to hold to bail; information and belief admitted only upon matter of pure account, as between partners and executors. The application ought to be as prompt as possible. *Jackson v. Petrie*, 10 Ves. 164.

3. To obtain a writ of *ne exeat regno*, an affidavit to information and belief of an intention to quit the kingdom, or circumstances making it necessary, as an order for military officers to join their regiments abroad, not sufficient. *Hansay v. M'Entire*, 11 Ves. 54.

4. Writ of *ne exeat regno*, on affidavit, not by the plaintiff, to information and belief of intention to quit the kingdom, according to the nature of the information; as, where received from persons of the defendant's family, that they were about to go to the Isle of Man. *Collinson v. —*, 18 Ves. jun. 353.

26. *Affidavit for — statement of evidence.*

The writ of *ne exeat regno* issued properly: the subject being matter of account. A general affidavit of the belief of defendant's intention to quit the kingdom is sufficient, without the circumstances upon which that belief was founded. *Russel v. Asby*, 5 Ves. 96.

27. *Affidavit for — certainty as to debt.*

1. To obtain a *ne exeat regno*, a sum certain must be sworn to be due, and there must be ground for the suggestion that the party is going abroad. *Shearman v. Shearman*, 3 B. C. C. 370.

2. The court will grant an order in the nature of a *ne exeat regno*, against an accountant of the crown, sworn to be about to leave the kingdom without having rendered his accounts; although no precise sum be sworn to by the affidavit made to support the motion, as being the account in value of the moneys unaccounted for. But they will exercise a discretion as to the amount for which they will exact sureties, and will require notice of the order to be given before the attachment shall issue. *Attorney-general v. Mucklow*, 1 Price, 289.

28. *Affidavit for — statement of intention to go abroad.*

1. Affidavit for a writ of *ne exeat regno* must state an intention to go abroad: that the defendant will hide himself is not sufficient. It must be  
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positive that he is going abroad, or to some declaration, that he is, by himself, not a third person. *Oldham v. Oldham*, 7 Ves. 410.

2. It is sufficient that the debt will be endangered, without stating that it is to avoid the jurisdiction. *Etches v. Lance*, 7 Ves. 417.

29. *Affidavit for — statement of danger of losing debt.*

1. It is not necessary in an affidavit on which to ground a writ of *ne exeat regno*, to swear that the plaintiff is in danger of losing his demand by the defendant's leaving the kingdom; it being a strong implication, he doth it with a view to avoid the demand on which a suit has been commenced. *Baker v. Haily*, Dick. 632.

2. It is sufficient that the affidavit states that the debt will be endangered; without alleging that the purpose of going abroad is to avoid the demand. *Tomlinson v. Harrison*, 8 Ves. 32.

30. *Affidavit for — before whom sworn.*

Affidavit sworn in Ireland before a master, to ground a writ of *ne exeat regno*, admitted. *Johnson v. Smith*, Dick. 592.; *vid. Ibid.* 90.

31. *Amount for which the writ shall be marked.*

Where plaintiff has two demands on defendant, the one liquidated the other not, the writ of *ne exeat regno* shall be marked for the former only. *Parker v. Appleton*, 3 B. C. C. 427.

32. *Service of the writ.*

Upon an application for the writ of *ne exeat regno* no *subpœna* is served; but upon personal service of the writ the party is bound to appear and put in his answer; and then he may apply to supersede the writ; but not upon his affidavit. *Russel v. Asby*, 5 Ves. 96.

33. *Bail thereon.*

On motion on behalf of the defendant, that his bail might justify, after being sworn and examined, his lordship allowed of one, and disapproved the other. *Mitford v. Lark*, Dick. 484.

34. *Enforcement of bail-bond, and recognizance given thereon.*

1. If the sheriff takes a bail-bond on a writ of *ne exeat regno*, the court hath nothing to do with prosecuting the bond. *Collinridge v. Mount*, Dick. 688.

2. Order on sureties to pay money into court, on forfeiture of recognizance, entered into, a writ of *ne exeat*. *Musgrave v. Medex*, 1 Mer. 49.; *Utten v. Utten*, 1 *Ibid.* 51.

35. *Discharge of recognizance.*

1. The writ discharged on giving security. *Howden v. Rogers*, 1 Ves. & Beam. 129.

2. After answer, writ of *ne exeat regno*, discharged, on defendant's giving security to abide the event of the cause. *Boon v. Collingwood*, Dick. 115.

3. *Ne exeat regno*, obtained by one inhabitant of Antigua against another, on a lost bond, discharged on giving security to abide by the decree. *Atkinson v. Leonard*, 3 B. C. C. 218.

4. Writ of *ne exeat regno* discharged on paying into court the sum for which it was marked. *Evans v. Evans*, 1 Ves. 96.

5. Recognizance of defendant and two sureties for 2000*l.* discharged as to all on payment of that sum, although in the mean time a larger sum appeared to be due. *Baker v. Jefferies*, 2 Cox, 226.

6. Writ *ne exeat regno* shall not be discharged on the putting in of the answer, where there appear things which the defendant will be decreed to do at the hearing. *Atkinson v. Bedel*, Dick. 98.

7. After decree against defendant, for the same matter as the writ *ne exeat regno*

*regno* issued; the sureties were ordered to be discharged, and the bond as to them cancelled. *Debazin v. Debazin*, Dick. 95.

8. Writ of *ne exeat regno*, obtained by one French emigrant against another, discharged, upon the circumstances appearing upon the affidavits in support of the will, and upon the answer; which may be read, the application not being in the nature of an affidavit to hold to bail, but to the discretion of the court, applying a remedy, not in its origin distinctly applicable to private transactions between subject and subject. It is very delicate to apply it as against foreigners, and it would be a necessary term, that it shall be simply a case of equity. *De Carriere v. De Caillonne*, 4 Ves. 577.

9. Writ of *ne exeat regno*, obtained by a resident here against a resident in the West Indies, upon a demand arising there, when the answer came in, was discharged under the circumstances, with costs, against the *prochein amy* of the infant plaintiff; but upon the admissions in the answer, the defendant was ordered to give security to abide the decree. *Roddam v. Hetherington*, 5 Ibid. 91.

10. Writ of *ne exeat regno*, upon declarations, or facts, as evidence of the intention to go abroad, not discharged upon affidavit, denying the intention. *Aminck v. Barklay*, 8 Ibid. 594.

## 12. Payment of money into court.

### 1. *General rule respecting.*

General rule as to payment of money into court is, that the plaintiffs must be solely entitled, or have such an interest jointly with others, as to entitle them, on behalf of themselves and those others, to have the fund secured. *Freeman v. Fairlie*, 3 Mer. 29.

### 2. *Preliminaries to motion for — defendant's answer.*

Defendant ordered to pay money into court before answer, in a case of gross fraud, appearing upon affidavit by the plaintiff, and by the defendant in answer. *Jervis v. White*, 6 Ves. 738.

### 3. *Preliminaries to motion for — account before master.*

Money belonging to wards of the court cannot be transferred to the accountant-general, to the credit of the cause, until the account is taken before the master. *Bencraft v. Rich*, 1 B. C. C. 56.

### 4. *Preliminaries to motion for — master's report.*

1. The court will not order a balance upon charge and discharge, to be brought in, before the master has made his report. *Fox v. Macreth*, 3 B. C. C. 45. But see the same point, *contra*. *Thompson v. Pyefinch*, 3. B. C. C. 647.

2. Before report court refused to order balance of charges allowed against defendant upon account, and the whole alleged in his discharge to be paid into court, upon certificate by the master and defendant's examination before him: but also refused to take the certificate off the file. *Fox v. Macreth*, 1 Ves. 69.

3. Motion to pay money into court upon the affidavit of an account, that from the schedules to the answer, the examination and the books of account, such a balance was due, refused. *Mills v. Hanson*, 8 Ves. 68.

### 5. *Balance ascertained by report.*

Defendant on motion ordered to pay in a balance ascertained by the report. *Gordon v. Rothley*, 3 Ves. 572.

### 6. *Interest.*

Order on motion to pay into court a principal sum, with interest, admitted by the answer to have been made to a greater amount. 1 Ves. & Beam. 50.

7. *A trust-fund in danger.*

Trust-fund, which, under a power in marriage settlement, had been lent, decreed to be paid into court, the trustees representing it to be in danger. *Payne v. Collier*, 1 Ves. 170.

8. *Purchase money.*

1. Order on a purchaser before conveyance, to pay into court instalments due, and interest according to the contract, the subject being a coal-mine; and the purchaser in possession and working it. *Buck v. Lodge*, 18 Ves. jun. 460.

2. Though generally a purchaser cannot be called on for his money, until he has a title, yet where he is let into possession upon a mutual confidence of a speedy title, and the difficulty is a mutual surprise, he cannot, without express contract, retain the possession, withholding the money. *Gibson v. Clarke*, 1 Ves. & Beam. 500.

3. Motion that a purchaser in possession may pay his purchase-money into court, refused, under the circumstances, viz. possession given independently of the agreement and laches on the part of the vendor in completing his title. *Fox v. Birch*, 1 Mer. 105.

4. Purchaser in possession, under an agreement, having exercised acts of ownership, but objecting to the title, ordered to pay in the purchase-money. *Dixon v. Astley*, 1 Mer. 133.

5. Slighter acts of ownership sufficient, where they have been committed since the discovery of an objection to title. *Ibid.*

6. On a bill by vendor for a specific performance, the court will not, before answer, make any order for payment of the purchase-money by the defendant in possession, unless under special circumstances, such as unreasonable delay, committing acts of ownership in alteration of the property, &c. *Bonner v. Johnson*, 1 Mer. 366.

7. In this case the defendant being in possession, not under the agreement to purchase, but as tenant to the plaintiff at the time of the purchase, no order was made. *Ibid.*

8. Vendee in possession, objecting to title, required before answer to pay his purchase-money into court, although the fact of possession appeared not upon the bill, but upon affidavit only. *Burroughs v. Oakley*, 1 Mer. 52.

9. Acts of ownership, amounting to waste, by alteration and conversion of property, sufficient to induce the court to order payment of purchase-money into court, upon the ground that a vendor has a lien on the estate for the amount, and might have filed his bill to restrain the purchaser in possession from committing such acts of ownership. Though the bill contained no charge of such acts having been committed, the order was made on affidavit supplying the fact; the defendant not having answered, nor being in contempt, nor under any order for time. *Cutler v. Simons*, 2 Mer. 103.

10. Generally a purchaser shall not be allowed to keep both the possession of the estate and the purchase-money; but in a case where he was willing to give up possession, which he had taken under the agreement, and it was a question whether there was a subsisting contract, the lord chancellor refused to order the purchase-money into court. *Morgan v. Shaw*, 2 Mer. 138.

11. Affidavits admitted, after answer, to be read in support of a motion to pay purchase-money into court. Defendant being in possession, and having exercised acts of ownership; payment of the money ordered, although an infant heir was a necessary party to the conveyance. *Bradshaw v. Bradshaw*, 2 Mer. 492.

12. Purchaser, a trustee acting on behalf of himself and others his co-trustees, and of the *cestui que* trust, ordered to pay purchase-money into court, the agreement having been entered into in the name of himself alone; upon affidavits that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him

under the agreement; in opposition to the answer alleging notice, and denying any acts of ownership by himself, or by any other person to his knowledge. *Crutchley v. Jerningham*, 2 Mer. 502.

13. A vendor permitting the vendee to take possession, before the completion of the title, without any stipulation as to the purchase-money, cannot on motion, have the purchase-money paid into court. *Clarke v. Elliott*, 1 Mad. 606.

14. Purchaser in possession, who has made alterations and improvements on the estate, ordered to pay the purchase money into court. *Branley v. Teal*, 3 Mad. 219.

9. *Purchaser's right to possession and profits.*

Purchaser, under a decree of the court, is not entitled upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate and receipt of rents for all such time so passed. *Barker v. Harper, Cooper*, 32.

10. *Money raised by sequestration, though contempt cleared.*

Estate ordered to be sold for debts; money raised under sequestration paid into court, though contempt cleared. *— v. Bennet*, 1 Ves. 82.

11. *On defendant's admission.*

1. Where a defendant admits money to be in his hands, it will be ordered to be paid into court. *Strange v. Harris*, 3 B. C. C. 365.

2. A motion to compel a defendant to pay money into court, on casting up books, must be upon the ground of admission by reference sufficient to make them part of the examination, as much as schedules to an answer. In this instance it failed: the plaintiff going upon certain books; and the reference being generally to all. *Mills v. Hanson*, 8 Ves. 91.

3. Money may be ordered into court on motion, upon the ground of admission; as by schedules or books containing an account of receipts and payments, and referred to so as to be part of the answer or examination. *Ibid.* 69.

4. Motion for payment of money into court, not admitted to be due even upon examination of the defendant, but appearing due by his schedule, according to the plaintiff's calculation, refused. For such a purpose the result of the schedule, ascertaining the sum due, must clearly appear, verified by affidavit. *Quarrel v. Beckford*, 14 Ves. 177.

12. *On petition of appeal.*

The court will not order money awarded to a party to be paid into court on a petition of appeal being signed by counsel. But *semble*, *scus*, if the appeal had been received. *Lewis v. Harber*, 1 Price, 132.

13. *On obtaining injunction to stay execution pending application for new trial.*

Upon a second verdict the same as the first, but for a less sum, the last sum recovered only, and the costs of the last trial are to be paid out of money in court upon an injunction to stay execution on the first; the costs of which are to be returned. *Waddle v. Johnson*, 1 Ves. 30.

14. *With or without the addition of costs incurred.*

In a suit for dishes, the defendant offering to pay into court the value of some of the articles demanded, must pay all the costs then incurred. *Worsall v. Miller*, 3 Anst. 632.

15. *Form of motion for.*

1. Upon a motion that a defendant may pay money into court, a specific sum must be sworn to be in his hands. *Roberts v. Hartley*, 1 B. C. C. 56.

2. Practice of moving to pay money into court forthwith altered. In future a day must be named. *Higgins v. —*, 8 Ves. 381.

16. *After bill dismissed.*

Order, after the bill dismissed, for payment of money out of court. *Wright v. Mitchell*, 18 Ves. jun. 293.

17. *After abatement of a suit that could not be revived.*

Order for a transfer and payment out of court; though the cause was abated by the death of the plaintiff: the right being clear. *Roundel v. Curren*, 6 Ves. 250.

18. *To party entitled, in spite of his request to the contrary.*

The court will not keep money after the party is entitled to it, even at his request. *Isaac v. Gompertz*, 1 Ves. 44.

19. *Retainer of, on application of claimants thereon.*

Court will retain money decreed to parties on the application of persons having claims upon it. *Duke of Bolton v. Williams*, 4 B. C. C. 430.

20. *Money decreed to be laid out in land.*

Where money was in court decreed to be laid out in land, the court refused to let it be paid out to the person first entitled to an estate-tail in it, with the ultimate remainder in fee, if any intermediate remainders should be found to exist. *Hardcastle v. Shafto*, 1 Anst. 70.

21. *Payment of money under attachment.*

Order upon the sheriff to pay to the party money under an attachment for not paying costs. *Anon.* 11 Ves. 170.

## VI. Dismission of bill by defendant on interlocutory application, after defence put in.

## 1. Dismission of bill for want of prosecution.

1. *On neglect to procure a reference of plea of former suit depending.*

Plea of a former suit depending for the same cause set down by the defendant was struck out; but the plaintiff not having procured a reference to the master within a month, the bill was upon motion dismissed under the standing order. *Baker v. Bird*, 2 Ves. 672.

2. *After an abatement.*

Application to revive in a month, or to dismiss the bill against the surviving defendant, publication having passed, denied upon consideration. *Parkinson v. Kerridge*, Dick. 518.

3. *After general demurrer to the bill.*

1. General demurrer put in, but never argued, and no proceedings afterwards; the defendant cannot have the bill dismissed for want of prosecution, as he had an equal power to move. *Anon.* 2 Ves. 237.

2. A defendant having filed a general demurrer to a bill, cannot move to dismiss the bill for want of prosecution, but should set down the demurrer for argument. *Simpson v. Densham*, 2 Cox, 377.

4. *After order to amend neglected.*

A cause coming on to be heard, stood over with liberty for the plaintiff to amend. He did amend, but did not proceed further. Defendant may move to dismiss the bill for want of prosecution; and it is not necessary to set down the cause again for this purpose. *Mitchell v. Lowndes*, 2 Cox, 15.

5. *After order to speed the cause.*

1. After an order to speed the cause, the plaintiff has a whole term and a vacation before the bill can be dismissed. *Mangleman v. Prosser*, 3 B. C. C. 191.

## 2. Bill

2. Bill retained for a twelvemonth, with liberty for the plaintiff to bring an action, and "in case the plaintiff should not try such action within a twelvemonth, then the bill was to stand, dismissed with costs." The plaintiff did not try his action within the time. The bill is not *ipso facto* out of court; but the defendant must either set down the cause for further directions, or move to dismiss the bill. *Stevens v. Praed*, 2 Cox, 374.

6. *After waiver of contempt by accepting answer.*

Though generally a party cannot be heard until he has cleared his contempt, a step taken by the other party waives the contempt for all purposes except the right of costs in the cause; not to be obtained by process of contempt. Acceptance of the answer, therefore, a waiver of the contempt for the purpose of enabling the defendant to dismiss the bill for want of prosecution. *Anon.* 15 Ves. 174.

7. *Pending demurrer.*

Demurrer to a bill, order for dismissing the bill for want of prosecution before the demurrer was disposed of, held irregular. *Done v. Allen*, Dick. 55.

8. *Pending reference.*

Order to dismiss a bill for want of prosecution, not of course pending a reference on motion; the title alone being in question. *Briscoe v. Brett*, 2 Ves. & Beam. 377.

9. *Saved by a reference for scandal.*

Reference for scandal and impertinence, is a sufficient proceeding with effect to save a bill. *Goodwin v. Davis*, 1 Price, 373.

10. *In case of defendant's bankruptcy.*

Plaintiff driven by motion to dismiss with costs for want of prosecution to an undertaking to speed the cause, notwithstanding the bankruptcy of the defendant; and that all the relief could be had under the commission. *Monteith v. Taylor*, 9 Ves. 615.

11. *Notice of motion for.*

1. Order, dismissing a bill for want of prosecution, after three terms expired without any step taken, obtained upon motion of course; not requiring notice. *Degraves v. Lane*, 15 Ves. 291.

2. Order to dismiss the bill for want of prosecution, after three terms without replication, of course, without notice; and pending an injunction staying execution. *Naylor v. Taylor*, 16 Ves. 127.

3. Order, dismissing the bill for want of prosecution, after three terms without replication, of course, without notice; and not discharged upon special circumstances, except on payment of costs. *Jackson v. Purnall*, 16 Ves. 204.

4. Notice of motion to dismiss the bill for want of prosecution, three terms having elapsed after answer without replication, not necessary; nor the six clerk's certificate on the motion, if produced to register, when the order is drawn up. *Attorney-general v. Finch*, 1 Ves. & Beam. 368.

5. Order to dismiss for want of prosecution, after the regular time elapsed, and an injunction having issued on the merits, not to be discharged for irregularity, although obtained, upon motion by the defendant, without notice. *Flannan v. South London Water Works*, 2 Mer. 61.

6. Notice not proper; and the production of the six clerks' certificate to the register sufficient without producing it in court. *Day v. Snee*, 3 Ves. & Beam. 170.

12. *Motion for, when made.*

1. A defendant may move to dismiss a bill at any time before a rule to produce witnesses. *Fell v. Morris*, 1 Cox, 176.



2. After rejoinder, a defendant cannot move to dismiss a bill for want of prosecution. *Tozer v. Tozer*, 1 Cox, 288.

13. *Form of order for.*

Order to dismiss for want of prosecution regular, according to the practice; though the six clerks' certificate appeared on the face of the order to be of a subsequent date. *M'Mahon v. Sisson*, 12 Ves. 465.

14. *Setting aside order for.*

An order of dismissal set aside on circumstances. *Lingard v. Wegg*, 3 B. C. C. 435.

15. *Motion for, how repelled.*

1. The only answer to the motion to dismiss a bill for want of prosecution is the undertaking to speed the cause. Special circumstances must be the ground of special application. *Lyon v. Dumbell*, 11 Ves. 608.

2. The only answer to the motion to dismiss for want of prosecution is the usual undertaking to speed the cause. A special ground must be the subject of a special application. *Bligh v. ———*, 13 Ves. 455.

3. Order to dismiss the bill for want of prosecution cannot be had, if a proceeding has been taken before the motion: but if the order has been obtained irregularly by misrepresentation of the plaintiff, he shall pay the costs of discharging it. *Anon.* 14 Ves. 492.

4. Order on a peremptory undertaking to speed the cause entered *nunc pro tunc* of course on motion, without notice above two years afterwards. *Dixon v. Shunn*, 18 Ves. jun. 520.

5. Order to dismiss the bill for want of prosecution, though regular according to the present practice, not requiring notice, if before replication, nor the six clerks' certificate at the time of making the motion, discharged without costs upon the defendant's laches. *Browne v. Byne*, 1 Ves. & Beam. 316.

6. Bill after the usual motion to dismiss for want of prosecution, retained on terms of paying costs, &c. on application, within a reasonable time, not, as formerly, *ex parte*, but special, on affidavit with notice. *Fuller v. Willis*, 3 Ves. & Beam. 1.

7. Shewing cause against dissolving an injunction, is not such a proceeding in a cause as to prevent the bill being dismissed for want of prosecution. *Warwick, Earl of, v. Beaufort, Duke of*, 1 Cox, 111.

8. The court will not hear special cause against dismissal of a bill, unless notice of the cause intended to be shewn, be previously given to the plaintiff. *Christie v. De Tastet*, 1 Price, 242.

9. An undertaking to speed a cause signed by counsel, and left at the register's office on the same day a motion to dismiss was made, held sufficient. *Lyndon v. Lyndon*, 3 Mad. 240.

16. *Undertaking to speed the cause.*

1. One defendant may obtain the usual order to speed the cause, by motion to dismiss for want of prosecution, though the other defendant stands out process of contempt, and it cannot be of any use to go to a hearing without him. *Anon.* 9 Ves. 512.

2. Order obtained by plaintiff, under the usual undertaking to speed his cause, for liberty to withdraw his replication, and amend the bill, discharged with costs. *Pitt v. Watts*, 16 Ves. 126.

3. In the undertaking to speed the cause, upon the motion to dismiss for want of prosecution, the term includes the vacation. *Findlay v. Wood*, 1 Ves. & Beam. 499.

4. On an undertaking to speed the cause, on a motion to dismiss, the plaintiff has only the term, and not the vacation also to proceed. *Wilson v. Timpson*, 2 Mad. 123.

17. *Effect of an abatement upon an order to speed the cause.*

An order was made, that the plaintiff should set down his cause to be heard within a limited time, or that the bill should be dismissed without further order. In the mean time the suit abated by the death of a defendant. This abatement suspends the effects of the former order. *Gregson v. Oswald*, 1 Cox, 343.

## 2. Putting plaintiff to his election.

1. *Nature and grounds of the motion for.*

1. To put party to election to sue at law or in equity, is motion of course. *Anon.* 1 Ves. 91.

2. Order to compel election to proceed at law or in equity, of course; but, if upon a false suggestion, that the suits are for the same matter, discharged; and that question, if of any difficulty, referred to the master; and all proceedings stayed in the mean time. *Mills v. Fry*, 3 Ves. & Beam. 9.

3. If answer is put in and exceptions are taken to the answer, the defendant cannot move upon the answer, that the plaintiff may be put to his election to proceed at law or in equity. *Browne v. Poyntz*, 3 Mad. 94.

2. *Time of making election.*

1. After answer put in, if the plaintiff proceeds at law, the defendant may call on him to elect in which court he will sue. 1 B. & B. 119.

2. For to proceed at law and in equity for the same demand, at the same time, would occasion a clashing of jurisdiction, inconsistent with the ends of justice. 1 B. & B. 1120.

3. The defendant may, after answer, require the plaintiff to elect in which court he will sue, if he proceeds at law. *Ibid.* 319.

3. *Grounds and mode of discharging order for.*

1. Application to discharge an order for the plaintiff to make his election, upon the ground that the matters for which he was proceeding against the defendant in this court and at law, were unconnected. *Buller v. Butcher*, Dick. 558.

2. Upon an order being made on the plaintiff to elect whether he will proceed at law or in equity, and a motion afterwards to discharge that order, the court will, if there are sufficient facts before it, decide whether the party ought to be put to an election without a reference to the master. *Anon.* 2 Mad. 395.

VII. *Proceedings preparatory to, and the mode of examining witnesses.*1. *Subpoena duces tecum.*

Under a *subpoena duces tecum*, the party may in court, object to produce the documents; but if the objection is overruled, production will be compelled.

2. *Commission.*2. *To examine witnesses abroad.*

1. To obtain a commission to examine witnesses abroad, there must be an affidavit, that the matter arises there, or sufficient to shew it read out of the answer. *Akers v. Chancy*, 2 B. C. C. 279.

2. In order to obtain a commission to examine evidence abroad, it is sufficient to state the name of the witness, that his evidence is material, and that he is abroad; not the points to which he can give evidence. *Oldham v. Carleton*, 4 B. C. C. 88.

3. To obtain a commission to examine witnesses abroad, it is not necessary to state the points to which it is intended to examine, or the names of the

the witnesses. *Rougemont v. the Royal Exchange Assurance Company*, 7 Ves. 804.

4. A commission to examine witnesses abroad, cannot be obtained without an affidavit of materiality, although the suit is merely to obtain evidence to support an action. *Anon.* 1 Anst. 201.

5. Where an injunction subsists, the court will not grant a commission to examine a witness in India, without a special affidavit of materiality. *Moody v. Steele*, 2 Anst. 386.

6. In a suit to obtain testimony for defence of a suit at law, the court will not grant a commission to examine witnesses abroad, unless on good grounds shewn, although no injunction is moved for. *Shedden v. Baring*, 3 Anst. 880.

7. Application for a commission to examine witnesses in India, to prove the testator's intention that his wife should take legacies given her by two codicils, almost identical in their expressions, refused, except upon her oath, that she believed such to be the testator's intention. *Coote v. Coote*, 1 B. C. C. 448.

8. The sending out a commission to be executed abroad, and receiving it back, must be proved by affidavit. *Bourdillon v. Adair*, 4 B. C. C. 100.

9. A commission for the examination of witnesses abroad may issue before answer, where the suit is merely for a discovery and commission. *Noble v. Garland, Cooper*, 222.

10. An application for a commission to examine witnesses abroad, in an information for breach of the navigation laws; and an application for an order to restore a vessel seized for such breach; cannot be blended in one motion. *Attorney-general v. Laragoity*, 2 Price, 166.

11. Motion for a commission to examine witnesses abroad, before the time for answering had expired, refused. *Cheminant v. De la Cour*, 1 Mad. 208.

12. Commission to examine witnesses abroad granted to a defendant, who had cross-examined, but not examined in chief, under a commission sued out by the plaintiff. *Steward v. Steward*, 2 Ves. & Beam. 116.

13. A defendant in an information for breach of the navigation laws, is not entitled to a commission to examine witnesses abroad, or motion made to the court of exchequer under the 13th and 14th Charles 2., pending the progress of the proceedings under the information. *Attorney-general v. Laragoity*, 2 Price, 166.

14. On a commission to examine witnesses in India not being returned in two years, the court will dissolve the injunction. *Penney v. Edgar*, 1 Anst. 276.

15. Order for a commission to examine witnesses abroad; returnable without delay, pending an injunction against an action, without paying the money into court. *Cock v. Donovan*, 3 Ves. & Beam. 76.

16. A married woman living in America, being entitled to a legacy, a commission to examine her would have been directed: but as she had been examined under a commission issued by the American government, that was considered sufficient. *Campbell v. French*, 3 Ves. 321.

17. *Vide infra*, (5) 6.

2. *To examine witnesses, de bene esse, &c. and examination thereon.*  
(*Vide infra* 5.)

1. Distinction between examination *de bene esse*, and perpetuating testimony. 1 Ves. & Beam. 139.

2. Matters of importance in the cause lying within the knowledge of one person, he may be examined *de bene esse*. *Pearson v. Ward*, Dick. 648.

3. Examination *de bene esse*, where the witness is above the age of seventy, or is the only witness to a particular fact; refused upon affidavit of the agent to his information from the witness that he can prove the fact, and belief that no other person can prove it. *Rowe v. —*, 13 Ves. 261.

4. It

4. It is a ground for examining a witness *de bene esse*, that he is the only witness to some material facts in the court, although he be neither aged nor infirm. But the affidavit should state the particular points to which his evidence is meant to apply. *Pearson v. Ward*, 1 Cox, 177.

5. Witness examined *de bene esse* upon the sole ground of his being the only person in whose knowledge a material fact was. *Brydges v. Hatch*, 1 Cox, 423.

6. Motion that a witness be examined *de bene esse*, on affidavit that he was the only witness to a material fact, though no age was sworn to. *Hankin v. Middleditch*, 2 B. C. C. 641.

7. Witness may be examined *de bene esse* being the only person that knew the facts, without stating the age. *Lord Cholmondeley v. Earl of Oxford*, 4 B. C. C. 157.

8. Examination of persons going abroad *de bene esse*. See *Dicker v. Power*, Dick. 112.

9. Witness examined *de bene esse*, on affidavit that he was going to Scotland. *Bolts v. Verelst*, Dick. 454.

10. Witness going to sea examined *de bene esse*, in order to use his evidence at law; notice of trial being given, and the witness not being returned; his depositions ordered to be published. *Webster v. Pawson*, Dick. 540.

11. Upon a question of legitimacy, depending upon a chain of distinct circumstances, in the knowledge of different individuals, and the defendant, an infant, kept out of the way, an examination *de bene esse* would have been granted; though not within any of the three cases, viz. witnesses of the age of seventy; or quitting the kingdom; or a fact depending on a single witness. But a proposal to have the infant brought into court, and the six-clerk assigned as guardian to put in his answer, was adopted. *Shelly v. —*, 13 Ves. 56.

12. Witness having been examined on his going to the West Indies, and being afterwards in Ireland, held that he must be examined in chief. *Birt v. White*, Dick. 473.

13. Witness examined *de bene esse* afterwards becoming interested. *Brown v. Greenly*, Dick. 504.

14. A witness having been examined *de bene esse*, on a commission of ex parte, and dying before he was examined in chief, and the commission being lost, what was done thereupon. *Jones v. Donithorne*, Dick. 352.

15. A suggestion that if certain persons should die, their death would be very prejudicial to the plaintiff's title, commission issued to examine them, although the defendant had not answered. *Bagnold v. Green*, Dick. 2.; *Carey* 48.

16. The court will grant a commission to examine a witness who is in this country, on an affidavit of his being under a necessity of going abroad before the day when the cause will be tried, and although the cause be not at issue, and the answer has not come in. *Delins v. Rougemont and others*, 1 Priest, 449.

17. Order, after verdict upon an issue, to examine *de bene esse* a witness above seventy; suggesting an intention to move for a new trial. *Anonymous*, 6 Ves. 573.

18. Order to read on a trial directed at law, depositions of witnesses, proved, by affidavit, from age and infirmity incapable of attending without great danger of death, with liberty to examine them on interrogatories, and the depositions of such other persons as should be proved at the trial to be dead, or unable to attend: such order, whether to be made in equity, or left to the judge at law, depending on sound discretion. *Corbett v. Corbett*, 1 Ves. & Beam. 335.

19. Witnesses having been examined *de bene esse*, with the view to a trial at law, the examination of another witness is not permitted without strong

strong circumstances; as upon a second ejectment brought after verdict for the defendant, the examination of a witness, produced at the trial, who had not been examined under a bill to perpetuate testimony, was permitted; not as to other witnesses. *Palmer v. Lord Aylesbury*, 15 Ves. 299.

20. After answer defendant may examine witnesses *de bene esse*. *Williams v. Williams*, Dick. 92.

21. Motion to examine witnesses *de bene esse*, except in certain cases, as upon the ground of age, requires notice. The affidavit must be either, that the witness is of the age of seventy; or the only witness to the particular fact; or, if upon the ground of health in a dangerous state. *Bellamy v. Jones*, 8 Ves. 31.

22. Witness being proved unable to attend a trial, ancillary to a suit in equity, the depositions may be read without an order; but not without producing the bill, answer, and all proceedings. 1 Ves. & Beam. 336.

23. A deposition *de bene esse* having been read at the hearing of a cause, it is of course, if any issue is directed, to order it to be read on the trial, notwithstanding an irregularity in the examination, which might have been effectually objected at the hearing: whether the court will suppress a deposition taken before commissioners, of whom one is attorney in a cause in Scotland between the same parties, on the same question, *quære*. *Ex parte Gordon*, Swanst. 166.

24. Order, that depositions shall be read at the trial of an issue; if the witness shall be then dead; or proved to be in such a state of health as not to be capable of attending. Without such order, to make the depositions evidence at law, the whole record must be read. *Palmer v. Lord Aylesbury*, 15 Ves. 176.

25. An application to read the deposition of a witness on the trial of an issue at law, directed by the court of chancery, on the ground of the witness being so aged and infirm as to be unable to attend in person, must be made to the judge at the trial, and not to the court which directs the issue. *Jones v. Jones*, 1 Cox, 184.

26. A witness had been examined *de bene esse*, and lived eighteen months after the answers; the depositions had been published, the defendants consenting; his honor refused to suppress the depositions, but lord chancellor inclined to think they ought not to be read. *Maybank v. Brooks*, 1 B. C. C. 84.

27. Depositions *de bene esse* having been taken upon an order obtained without notice to the defendants, suppressed. *Lovedon v. Lord Milford*, 4 B. C. C. 540.

28. A witness was examined at the trial of an ejectment; a new ejectment being brought, she was examined to perpetuate the testimony upon the same interrogatories as those upon which the former witnesses had been examined; and her testimony was ordered to be perpetuated. *James v. Newman*, Dick. 338.

### 3. To examine before the master witness examined in the cause.

Witness examined before hearing, not to be examined on a commission without order. *Vaughan v. Lloyd*, 1 B. C. C. 338.

### 4. To falsify examination before the master.

A commission for the examination of witnesses to falsify an examination of a party before a master, cannot be had without the usual certificate from the master of the necessity for such a commission. *Dearcroft v. Berkeley*, 1 Cox, 108.

### 5. New commission.

1. New commission. *Mineve v. Row*, Dick. 18; *Lord Coventry v. Lady Coventry*, Ibid. 25.

2. Com-

2. Commissioners upon one side do not attend : in order to have a new commission, the affidavits must state that the party or his agents have not seen the depositions upon the other side. *Geast v. Barber*, 2 B. C. C. 1.

3. Commissioners having made different returns, a new commission issued. *Corbet v. Davenant*, 2 B. C. C. 252.

4. A second commission granted on special circumstances. *Turbot v. —*, 8 Ves. 315.

5. A bill to perpetuate testimony of a modus, being amended by adding an essential party, after the commission executed, but before publication, a new commission was granted. *Biddeford v. Partridge*, 3 Anst. 646.

6. Commission to examine witnesses in an enemy's country. *Cahill v. Shepherd*, 12 Ves. 335.

#### 6. *Amendment of title.*

The depositions of witnesses taken under a commission, the title of which was mistaken, ordered to stand ; and the mistake to be set right. *Robert v. Millechamp*, Dick. 22.

#### 7. *By whom sued out.*

The plaintiff is first entitled to sue out a commission to examine witnesses, and if the defendant hath an opportunity to examine his witnesses, and doth not, he is not entitled to a new commission ; but if the plaintiff neglect to sue out a commission, the defendant may. *Barnaley v. Powell*, Dick. 793.

#### 8. *Time of obtaining.*

Leave given to a plaintiff on a bill to perpetuate the testimony of witnesses, to sue out a commission to examine witnesses, though no answer were come in. *Coveny v. Athill*, Dick. 355.

#### 9. *Notice of executing, to whom given.*

1. In the course of proceedings on a bill of interpleader, a commission issued on the part of one defendant for the examination of witnesses, of which notice was given to the plaintiff, but not to the other defendant. This practice, thought it may be inconvenient, is not irregular. *Brymer v. Buchanan*, 1 Cox, 425.

2. Giving notice of the execution of a commission to examine witnesses to the plaintiff in an interpleading bill, and not to the defendant, held to be good. *Duncannon v. Campbell*, Dick. 648.

#### 10. *Time of executing.*

1. Commission executed on the day it was returnable. *Moreton v. Moreton*, Dick. 21.

2. Commission to examine to credit, should be executed before decree : costs given on that ground. *White v. Fussell*, 1 Ves. & Beam. 151.

#### 11. *Execution of, the act of the court.*

The execution of the commission in a cause is the act of the court, carried on by its ministers. 6 Ves. 30.

#### 3. *Commissioners.*

*Are officers of the court.*  
Not to consider themselves agents for the parties by whom they are nominated. 11 Ves. 150.

#### 2. *Who eligible as.*

1. Depositions suppressed, because plaintiff's solicitor was one of the commissioners. *Selwyn's case*, Dick. 568.

2. Depositions before publication suppressed ; being taken by commissioners ready prepared ; the witness being agent in the cause ; and the mode in which the court receives the information, whether from the commissioners, or otherwise, is not material. The commissioner directed to proceed for the purpose only of re-examining that witness ; substituting another commissioner for one,

one, who having refused to qualify, was not permitted to be present at the examination. This order not to prevent the courts opening the depositions, if a case of necessity should arise; as, if the witnesses could not be again examined. *Shaw v. Lindsey*, 15 Ves. 362.

### 3. *Their discretion over examination.*

Discretion of commissioners, taking depositions, not to examine each witness to all the interrogatories, and to reject what is not evidence. *White-locke v. Baker*, 13 Ves. 511.

### 4. *Confirmation of their certificate.*

Commissioners certificate to be confirmed as a report. *Keeling v. Cartwright*, Dick. 401.

### 5. *Clerk of.*

1. Depositions suppressed, because the clerk of the plaintiff's solicitor sat as clerk to the commissioners. *Newton v. Foot*, Dick. 793.

2. Depositions suppressed; the commissioners having employed the clerk of one of the parties as their clerk. 15 Ves. 380.

### 6. *Attendance of witnesses.*

1. Commissioners' summons for witnesses to attend and be examined, not sufficient; they must be served with a *subpœna*. *Wardel v. Dent*, Dick. 334.

2. Witness ordered to attend and be sworn and examined in four days. *Osman v. Fitzroy*, Dick. 60.

3. A person having attended under a *subpœna* as a witness, but refusing to be sworn, ordered to attend to be examined, or stand committed. *Hennegal v. Evance*, 12 Ves. 201.

### 4. *Examination of witnesses.*

#### 1. *Number of witnesses.*

1. Proof of constructive notice by one witness not sufficient against a positive denial of notice by the answer. *Howorth v. Deem*, 1 Eden, 351.

2. Plaintiff cannot have a decree on the testimony of one witness, contradicted by the answer of one defendant. 2 Ves. 244.

3. A single witness cannot prevail against a positive denial by the answer. *Lord Cranstown v. Johnston*, 3 Ves. 270.

4. In equity, against the answer there can be no decree upon the testimony of a single witness, unless supported by special circumstances. 6 Ves. 40.

5. A single witness, not corroborated, not sufficient against positive denial by the answer. *Cooke v. Clayworth*, 18 Ves. jun. 12.

6. A single witness cannot prevail against the answer, unless confirmed by circumstances. *Savage v. Brocksopp*, Ibid. 335.

7. Rule of evidence in equity, that, if there is nothing more than the positive, unqualified assertion of one witness, and a positive denial by the defendant, the plaintiff shall not have a decree. Exception to that rule upon circumstances, giving greater credit to the witness. 9 Ves. 283.

8. No decree upon the evidence of a single witness against the answer, unless the answer is not positive, or the witness is confirmed by circumstances. 12 Ves. 80.

9. The parol evidence of one witness, unsupported by other circumstances, is not sufficient to found a decree. 1 B. & B. 234.

10. There being but one witness against an answer, the court directed an issue. *Pemby v. Matthew*, Dick. 550.

11. Evidence of one witness, corroborated by circumstances, admissible against the facts sworn in the defendant's answer, and sufficient to found a decree. *Pember v. Mathers*, 1 B. C. C. 52.

12. One witness, with corroborating circumstances, admitted against an answer. *Biddulph v. St. John*, 2 Sch. & Lef. 532.

13. Spe-

13. Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answers after part-performance by delivery of possession. *Murphett v. Jones*, Swanst. 172.

14. Decree upon the evidence of a single witness against the positive contradiction of the answer, containing circumstances giving greater credit to the deposition : the defendant declining an issue. *East India Company v. Donald*, 11 Ves. 275.

15. It is not considered as a species of impertinence, that many witnesses are examined as to the same fact, provided the fact be material ; but if it be admitted by the answer, and therefore not in issue in the cause, any depositions to this point would be deemed impertinent. *Vaughan v. Lloyd*, 1 Cox, 313.

## 2. *Parties to suit.*

1. Order to examine a party saving just exceptions, of course on the suggestion of no interest ; refused where an interest appeared. *Anon.* 18 Ves. jun. 517.

2. An issue directed ; liberty for each party to examine the other refused, without consent. *Howard v. Braithwaite*, 1 Ves. & Beam. 374.

3. By the order directing a party to be examined as a witness on the trial of an issue, no objection is waived, except that which arises from his being a party in the cause. *Rogerson v. Whittington*, Swanst. 39.

4. Party discharged, as well as charged, by his own examination. *Blount v. Burrow*, 1 Ves. 546.

5. Order on motion of defendant for examination of plaintiff, saving just exceptions ; the plaintiff consenting to be examined. *Walker v. Wingfield*, 15 Ves. 178.

6. A creditor who proves before the master against the estate of an intestate, cannot exhibit interrogatories to the plaintiff, to discover the balance between him and the estate. *Bowen v. Webb*, 2 Anst. 361.

7. An order to examine a defendant as a witness, saving just exceptions, is an order of course, and cannot be discharged upon a suggestion, that the defendant by his answer appears to have an interest. The objection must be reserved until the deposition be offered to be read in evidence. *Lee v. Atkinson*, 2 Cox, 413.

8. As to reading defendant's examination in evidence. *Blount v. Burrow*, 4 B. C. C. 72.

9. The depositions of a defendant without service of the order for liberty so to do, cannot be read ; being a surprise on the other party. *Mulvany v. Dillon*, 1 B. & B. 413.

10. A defendant, after he has been examined before the master upon the account, may be examined upon new interrogatories without an order. *Corrish v. Action*, Dick. 149.

11. Order for the examination of a defendant upon interrogatories who had been examined, and cross-examined ; restrained to such of the points in the cause to which she had not been examined, as the master should think reasonable. *Purcell v. M'Namara*, 17 Ves. jun. 484.

12. Defendant examined as a witness : bill dismissed as to him with costs. *Weymouth v. Boyer*, 1 Ves. 418.

13. Order by one defendant to examine another, not of course after, as before a decree. In a special case, to ascertain which trustee actually received money, all having signed the receipt, the court refused to discharge the order, made two years before ; but required the examination without delay. *Franklyn v. Colquhoun*, 16 Ves. 218.

14. Ground of permitting defendant to be examined for a co-defendant, that the plaintiff might unite distinct claims with the view of depriving the parties of each other's evidence. 2 Ves. & Beam. 405.

15. Ground



15. Ground of the practice, requiring for the examination of a defendant by a co-defendant, general allegation of no interest, or none in the matters in question in the cause, that though he may have no direct interest in the subject of examination, he may in the result have an interest in that subject, the effect perhaps of that examination. 2 Ves. & Beam. 405.

16. Order for examining a defendant by a co-defendant, on the allegation of no interest in the matter, to be examined to: that being the true construction of the general form, that he is not interested, or not in the matters in question in the cause; and any objection to his evidence must be taken at the hearing. *Murray v. Shadwell*, *Ibid.* 401.

### 3. Attesting witness.

1. A witness to a deed must not only prove his own attestation, but also the execution of the deed by the person executing the deed. *Hill v. Unett*, 3 Mad. 370.

2. A witness to a deed must state the circumstances of the execution: the sealing and delivery. In this case an objection, that he had stated merely that he was present at the execution, and was a subscribing witness when the party executed and signed, did not prevail, upon the circumstances: especially as the execution was not put in issue. *Burrowes v. Lock*, 10 Ves. 470.

3. A subscribing witness was ordered to make affidavit of the execution of an instrument attested by her, or show cause to the court why she should not. *Weston v. Faulkner*, 1 Price, 308.

4. Liberty given to exhibit an interrogatory, to prove the hand-writing of a deceased party, who executed a declaration of trust; and the hand-writing of the subscribing witnesses, one being dead, and the other living in Scotland. *Banks v. Farquharson*, Dick. 167.

### 4. Mode of examination.

1. Object of taking evidence in secret to prevent attempts to support defective evidence already given; but farther inquiry, when necessary, not refused. 18 Ves. jun. 443.

2. Deposition suppressed, and a re-examination directed; the deposition being taken from the witness, using during the examination full minutes in writing, which she stated to have been originally her own, put into method by the attorney, and so copied with some corrections by herself. 15 Ves. 382.

3. Witness cannot give as his evidence answers in writing prepared before his examination: nor is any suggestion to him by the attorney-general, or any other person, during the examination, permitted; and in equity, whenever any such fact is disclosed, the deposition will be suppressed. 15 Ves. 381.

### 5. *Vivâ voce*.

1. Power of the court of chancery to examine *vivâ voce*. *Turner v. Burleigh*, 17 Ves. jun. 354.

2. The competency of chancery in examining *vivâ voce*, allowed at law to ground a prosecution for perjury. *Moore v. Aylet*, Dick. 641.

3. Examination *vivâ voce* after publication. *Hammond v. —*, Dick. 50.

4. A master is at liberty, under the usual order, to examine parties *vivâ voce*, after he has examined them on interrogatories, if not satisfied with the former examination. *Ex parte Saunderson*, 2 Cox, 196.

### 6. Time of examination.

Upon a motion for a commission to take defendant's examination, the time is left to the master, not limited by the order. *Harby v. Emmett*, 5 Ves. 683.

### 7. Before whom.

1. The examiners of the court of exchequer have no authority to examine witnesses at a greater distance from London than ten miles, unless by consent;

sent; and such consent must be express. They may examine witnesses brought up to town from any part of the kingdom. *Sed quare*, whether a *subpcna* lies to bring the witnesses to London. *Ivatt v. Ward*, 2 Price, 81.

2. After a decree the master may examine witnesses; but ought not to do so by his clerk; the same *subpcna* issues as to bring them before the examiner; which is the same as a *subpcna* to answer, but the label expresses the purpose; upon an examination in the country, the body of the writ expresses that it is to testify. *Parkinson v. Ingram*, 3 Ves. 603.

#### 8. *Peer.*

Examination of a peer. *Meers v. Lord Stourton*, Dick. 21.

#### 9. *Foreigner.*

1. The course where a witness does not understand English. *Smith v. Kirkpatrick*, Dick. 103.

2. The examination of witnesses, being foreigners, must be in English, and the interrogatories and their answer translated by sworn interpreters. *Lord Belmore v. Anderson*, 4 B. C. C. 90.

3. Under a commission for the examination of French witnesses, who could not speak English, the depositions are not to be taken in French, but must be turned by the interpreter into English, and be so taken down and returned. *Ibid.* 2 Cox, 288.

#### 10. *Interrogatories — to executor under decree to account.*

The examination of an executor under the usual decree for an account, ought to contain an interrogatory, whether he is indebted to the testator; the debt from himself being assets. Liberty was therefore given upon the suggestion of co-defendants, legatees, without affidavit, to exhibit an interrogatory for that purpose: not to go into an account; which must be the subject of a distinct bill. *Simmons v. Guttridge*, 13 Ves. 262.

#### 11. *Interrogatories — new.* (Vide *infra*, 22.)

1. New interrogatories after some witnesses had been examined, publication not having passed, held regular. *Hayward v. Colley*, Dick. 43.

2. Plaintiff examined defendant on interrogatories before the master, pursuant to the decree. He shall not exhibit new interrogatories but on special application. *Bromly v. Child*, Dick. 128.

3. After defendant's examination on interrogatories, and motion for payment into court on that examination, plaintiff permitted to file further interrogatories. *Hatch v. —*, 19 Ves. 116.

4. An interrogatory being suppressed as leading, the court on the circumstances of the case, gave leave to exhibit a fresh interrogatory. *Menthill v. Payne*, 3 Anst. 923.

#### 12. *Interrogatories — custody.*

Carrier ordered to deliver exhibits which had been examined to, under a commission for the examination of witnesses in the country. *Elliot v. Williams*, Dick. 325.

#### 13. *Interrogatories — to falsify examination pro interesse suo.*

Interrogatories exhibited of course to falsify an examination *pro interesse suo*. *Rowley v. Ridley*, 2 B. C. C. 15.

#### 14. *Interrogatories — on a reference to master.*

Where parties go before a master on a reference, he must receive interrogatories from both, though one may not have gone into proof before. *Hough v. Williams*, 3 B. C. C. 190.

#### 15. *Interrogatories — suppression of, when impertinent.*

Impertinent interrogatories suppressed. 1 Ves. 400.

16. *Interrogatories — tending to criminate.*

1. Witnesses are not compelled to answer interrogatories, having a direct tendency to subject them to penalties, &c. or having such a connection with them as to form a step towards it. The question should not be made upon exception to the master's certificate, that he had allowed the interrogatories, but if the witness takes the objection to the certificate, whether the examination is or is not sufficient. *Paxton v. Douglas*, 16 Ves. 239.

2. Relaxation of the old practice, for the court to inform a witness that he was not bound to answer. 16 Ves. 242.

3. The true tests as to whether questions are to be answered or not, are — 1. whether the answers might lead to the crimination of the defendant, — 2. and whether they are relevant, and may be material to the plaintiff's case. *Mant v. Scott*, 3 Price, 477.

17. *Interrogatories — settled by master.*

1. In all cases where personal interrogatories for examinations before the master are exhibited, such interrogatories shall be settled and approved by the master, if the party to be examined shall require the same. Sch. & Lef. 178.

2. Interrogatories for examination of a party, settled by the master. *Parcell v. M'Namara*, 17 Ves. jun. 434.

18. *Demurrer by witness.*

1. A witness objecting to an interrogatory before the examiner, must demur. *Bowman v. Rodwell*, 1 Mad. 266.

2. The course on a witness demurring to be examined under a commission. *Smithson v. Hardcastle*, Dick. 96.

3. Motion that a demurrer to interrogatories by a witness, might be overruled, refused, not being supported by affidavit. *Parkhurst v. Lowten*, 3 Mad. 121.

19. *Cross-examination.*

1. The depositions of a witness read, though he died before cross-examination; the cross-examination not going to any point to which the witness had been examined in chief, nor to his credit: but to matters capable of proof by other witnesses. *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158.

2. Plaintiff's witness, before he was cross-examined, secreted himself; his depositions ordered to be suppressed, unless the plaintiff procured him to attend in a given time. *Flowerday v. Collet*, Dick. 288.

3. Cross-examination as to the execution of deeds; order in the alternative, either that the examiner, with whom they were, should cross-examine; or that they should be delivered to the examiner for the other party for that purpose. *Turner v. Burleigh*, 17 Ves. jun. 354.

4. Cross-examining a witness in equity is no waiver of an objection, on the ground of interest, to the competency of such witness. *Moorehouse v. De Passou*, Cooper, 300.

5. The same examiner not to examine and cross-examine the same witness, nor to act on behalf of both parties. 2 Sch. & Lef. 739.

20. *Depositions.*

1. Depositions allowed to be read, though taken during an abatement. *Thompson v. Took*, Dick. 115.; *Peters v. Robinson*, Ibid. 116.

2. Depositions in a cross-cause, taken after publication of those filed in the principal cause, not admissible in evidence on the hearing of the latter. *Taylor v. Obee*, 3 Price, 83.

3. Depositions in a former cause between other parties, not evidence. *Mackworth v. Penrose*, Dick. 50.

4. Depositions of a witness re-examined before a master, on the same matter

matter to which he had been examined in chief, without order, suppressed. *Sawyer v. Bowyer*, 1 B. C. C. 388.

5. Depositions to a fact, not put in issue, not permitted to be read. *Clarke v. Turton*, 11 Ves. 240.

6. Depositions taken on the part of the plaintiff having been suppressed as against some of the defendants, on the ground of no notice until after publication; upon evidence that the omission arose from a mistake committed by the clerk to the plaintiff's solicitor, in giving at the examiner's office the name of the clerk in court for others of the defendants, as the name of the clerk in court for all the defendants, in consequence of which the plaintiff's witnesses were produced only at the seat of the clerk in court so named; and upon the examiner's certificate, that the name of that clerk in court only was delivered to him; the lord chancellor gave the defendants the option, either of permitting the plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for them to cross-examine those witnesses, and to examine others. *Cholmondeley v. Clinton*, 2 Mer. 81.

7. A commission for the examination of witnesses in Lisbon was executed, but the ship in which the depositions were sent to England was lost on the passage. The court ordered the commissioner to transmit the *drafts* of the depositions, and to certify the circumstances of the return of the commission, but would not make an order for the reading of the drafts on the hearing of the cause, until after the commissioners had made their return and certificate. *Burn v. Burn*, 2 Cox, 426.

8. It was moved, and ordered as of course, the depositions in this cause having been taken in India, where no proper stamps can be had, that such of them as were taken on paper might be engrossed on parchment, and duly stamped, and such of them as were taken on parchment, might be duly stamped. *Chitty v. East India Company*, 2 Cox, 190.

9. Commission having been executed, and sealed with the depositions by the commissioners, was lost on the road and picked up by two travellers. On affidavit that they had not opened or altered the same, the depositions were ordered to be received. *Smales v. Chayter*, Dick. 99.

10. Question concerning examiner's right to take depositions in the country. *Frankland v. Frankland*, Dick. 231.

11. Depositions of witnesses examined to the credit of other witnesses, referred for scandal and impertinence. *Bray v. Bulkby*, Dick. 288.

#### 21. *Rectifying depositions.*

1. Depositions of a witness amended. *Rowley v. Ridley*, Dick. 677.

2. Deposition of a witness rectified, having been first examined in court. *Darling v. Staniford*, 1 Dick. 358.

3. Motion to amend depositions after publication refused. *Ingram v. Mitchell*, 5 Ves. 297.

4. A deposition of a witness permitted to be amended after publication, where there clearly appeared to be a mistake made by him in a material part of his evidence. *Rowley v. Ridley*, 1 Cox, 281.

#### 22. *Second or re-examination — examination before the master — evidence on appeals, and re-hearing.* (Vide *supra*, 11.)

1. Before publication, new interrogatories may be exhibited to new witnesses, though a joint commission hath been executed. *Lewis v. Owen*, Dick. 6.; Toth. 112. S. C.

2. No witness ought to be examined after publication, though sworn before. *Jenkinson v. Pepys*, 3 Anst. 835.

3. Witnesses examined in the cause shall not be again examined before the master, without leave of the court. *Vaughan v. Lloyd*, 1 Cox, 312.

4. A witness examined in chief, is not to be examined again to the account,

count, without special order, and the interrogatories to be settled by the master. *Birch v. Walker*, 2 Sch. & Lef. 518.

5. Re-examination not of course, but at the discretion of the court, on special application. *Purcell v. M'Namara*, 17 Ves. jun. 434.

6. Witnesses examined in the cause, cannot be examined before the master without leave of the court; but other persons may; and to the same points. *Smith v. Althus*, 11 Ves. 564.

7. Practice as to exhibiting further interrogatories before the master. *Lynn v. Buck*, 3 Mad. 280.

8. Witnesses, examined in the cause, re-examined before the master upon different interrogatories by order. *Greenaway v. Adams*, 13 Ves. 360.

9. A witness examined in chief before the hearing, cannot afterwards be examined before the master without a special order, and then not to any matters he has been before examined to, or in which he may be interested; and the master is to settle interrogatories. *Browning v. Barton*, 1 Dick. 508.

10. Witness not to be re-examined before a master, as to matter to which he has been examined in chief, but by order. *Sawyer v. Bowyer*, 1 B. C. C. 398.

11. After publication passed, before the hearing, witnesses cannot be examined in the master's office as to any of the same facts, without special order. A petition was directed to be presented. *Ex parte Willan*, Cooper, 291.

12. Depositions of a witness, taken before a master after a decree, (the witness having been examined in chief before the hearing) shall be suppressed. *Sawyer v. Bowyer*, Dick. 639.

13. A witness, whose evidence had been rejected at the hearing, under particular circumstances, examined again before the master after the decree, but the master to settle the interrogatories. *Sandford v. Paul*, Dick. 750.

14. Evidence in the cause, though not read at the hearing, may be received by the master. *Smith v. Althus*, 11 Ves. 564.

15. The rule of evidence in the accountant-general's office, ought to be the same as in the court. *Clayton v. Gresham*, 10 Ves. 288.

16. Witness re-examined where there has been a mistake, on special application, and the mistake apparent. *Sandford v. St. Paul*, 3 B. C. C. 370.

17. Order before publication for re-examining a witness, upon his affidavit, that through mistake, as to time, he submitted to be examined without looking at papers, which enabled him to answer more fully and precisely. *Kirk v. Kirk*, 13 Ves. 280.

18. Re-examination of a witness before publication refused, the application being for liberty to explain and correct his former evidence, and the affidavit being that he had omitted to state a material circumstance. *Lord Abergavenny v. Powell*, 1 Mer. 130.

19. Witness examined before decree, but then accidentally, and without fraud, incompetent, on motion allowed to be generally re-examined after decree upon interrogatories, to be settled by the master: but if competent at first, second examination can be only to matter substantially different. *Sandford v. —*, 1 Ves. 398.

20. Re-examination of a witness after publication, upon his own application and affidavit, to correct mistake: but confined to that; the court not permitting the whole deposition to be suppressed, and an entirely new examination. *Kirk v. Kirk*, 13 Ves. 285.

21. Defendant, under the circumstances, allowed, after the examination of witnesses, but before publication, to have a commission to examine witnesses as to the point, whether a witness examined by the plaintiff was not interested in the suit. *Vaughan v. Worrall*, 2 Mad. 322.

22. Af-

22. After a decree, if the master see cause for a commission to examine witnesses in the country, he certifies that it is necessary; and the depositions, when returned, are filed by the six clerks: but depositions taken before the master are kept in their offices. 3 Ves. 607.

23. New evidence is admissible on an appeal from the rolls; being in truth a re-hearing. *Buckmaster v. Harrop*, 13 Ves. 465.; *Vide* 11 Ves. 593.; 1 V. & B. 153.

23. *To credit.*

1. The time to examine to the credit of a witness is, after publication is passed, and the application for it is of course, and not founded on affidavit. *Russell v. Atkinson*, Dick. 532.

2. Examination to the credit of witness can only be by order upon special application, with notice, whether before or after publication. Therefore evidence taken to that point upon the examination in chief, suppressed, as impertinent. *Mill v. Mill*, 12 Ves. 406.

3. Application for examination to credit regarded with great jealousy: confined to facts affecting credit, and character, only; and not material to what is in issue. 1 Ves. & Beam. 153.

4. The plaintiff having examined a witness on the merits, and it appearing by his answer to a subsequent interrogatory that he was interested, the objection to his evidence may be taken at any time previous to the depositions being read. *Perigal v. Nicholson*, Wightw. 64.

5. After publication passed, liberty given to exhibit articles as to the credit of a witness, who had been cross-examined by general interrogatories, and as to such particular facts only as are not material to what is in issue in the cause. *Purcell v. M'Namara*, 8 Ves. 324.

6. Order after publication, for liberty to take out a commission, and examine witnesses by general interrogatories as to the credit of a witness, who had been cross-examined, and as to such particular facts only as are not material to what is in issue in the cause. *Wood v. Hamerton*, 9 Ves. 145.

7. Examination to credit after publication, where the witnesses are in the country, by commission, on articles exhibited by one of the six clerks. *White v. Fussell*, 19 Ves. 127.

8. Order to examine witnesses in support of articles exhibited to discredit a witness, on notice and the six clerks' certificate, without affidavit. *Watmore v. Dickinson*, 2 Ves. & Beam. 267.

9. A party having called a witness, cannot discredit him. 7 Ves. 290.

10. Examination to credit of a witness at law. 12 Ves. 408.

11. Examination after publication confined to general credit, and to facts not material to what is in issue in the cause. *Carlos v. Brooke*, 10 Ves. 49.

12. Examination to credit limited to the general question, whether the witness is to be believed upon his oath. *Anon.* 3 Ves. & Beam. 93.

13. An affidavit in bankruptcy, with that view, going to particular facts, and scandalous, taken off the file with costs. *Ibid.*

14. After publication, order for examination by general interrogatories, as to the credit of a witness in the cause, and as to such particular facts only as are not material to the issue, but publication having passed five months, not to delay the hearing. The court does not previously consider whether the subject of the examination is material to the issue: but in that case will suppress the depositions. *White v. Fussell*, 19 Ves. 127.

15. Not competent, even at law, upon an examination to the credit of a witness, to ask the ground of the opinion. The general question only is permitted, whether he is to be believed on his oath. 10 Ves. 50.

5. *Publication.*

1. When defendant may give rules to pass publication. *Walmsley v. Elliot*, Dick. 84.

2. Publication enlarged upon a special case; where further evidence is necessary, and it can be had, without injustice or danger; not upon ignorance, or negligence of an agent; nor to the prejudice of a party, even by delaying the hearing; and affidavit required, that the party, his clerk in court, and solicitor, have not seen, or been informed of, the deposition, and will not, &c. 13 Ves. 512.

3. Publication of the original bill stayed till answer in cross bill. S. C. 4 B. C. C. 478.

4. After answer not of course, to enlarge a publication until answer to a cross bill. Dalton v. Carr, 16 Ves. 93.

5. Motion to enlarge publication in the original cause until answer to a cross bill, the original cause being set down for hearing, and the cross bill filed after rules for passing publication, refused, with costs. Cook v. Broomhead, 16 Ves. 139.

6. The court will not enlarge publication on the application of a party who has taken the depositions of the opposite party out of the office, although by mistake. Lawrell v. Tichborne, 2 Cox, 289.

7. Publication enlarged, and a new commission to examine defendant's witnesses, issued. Dingle v. Rowe, Wightw. 99.

8. A second application to enlarge publication allowed, though cause set down, the same being so far off in the paper, that it was improbable it would be heard before the time for the enlarged publication expired. Moody v. Leeming, 1 Mad. 85.

9. Publication in a tithe cause enlarged, though frequently enlarged before, to enable the defendants to search for records in the Vatican upon affidavits as to the probability of a successful search there. Barnes v. Abram, 3 Mad. 103.

10. The court will not make an order upon motion, that a plaintiff in a cross cause (who has not examined witnesses on his part in the original cause, after having obtained an order to enlarge publication), shall be at liberty to read depositions taken on his behalf in the cross cause, after publication of the depositions taken on the behalf of the plaintiff, on the hearing of the original cause, on an application to put the cross cause into the short paper for that purpose, supported by affidavit of total ignorance on the part of all parties interested, and their attornies, of the depositions published. Ridley v. Obee, 3 Price, 26.

11. Depositions published notwithstanding they were taken during an abatement. Sinclair v. James, Dick. 277.

12. Depositions of a witness examined *de bene esse* who was dead, published in order to be read at a trial at law. Price v. Bridgman, Dick. 144.

13. Deposition of witness *de bene esse*, published in order to be used at a trial at law, the witness being unable to travel. Bradley v. Crackenthorpe, Dick. 182.

14. Injunction dissolved, and deposition taken on the part of the defendant, published that they might be read as evidence at a trial at law. Emmet v. Ayliffe, Dick. 239.

15. In 1764, the plaintiff filed a bill to perpetuate the testimony of witnesses, and examined them, but proceeded no farther; on the death of a witness, which happened in 1777, the plaintiff applied in this cause to publish the depositions. Held, that he had precluded himself. Morse v. Stevens, Dick. 686.

16. Depositions of witnesses taken *de bene esse* in 1711, and publication not having passed till 1743, the depositions ordered to be published without prejudice. Duke Hamilton v. Meynal, Dick. 788.

17. Depositions, taken *de bene esse*, upon the incapacity of the witness from a bodily injury, to attend a trial at law, not published, as they could not be read, without proof, at the trial, that the witness was then unable to attend; but on the affidavit of the surgeon, as to the probability of his attendance

tendance, an order was made for the officer to attend at the trial with the original deposition; to be tendered, if the incapability of the witness to attend should be proved. *Andrews v. Palmer*, 1 Ves. & Beam. 21.

18. Publication of the depositions of a deceased witness examined on behalf of a defendant, under the plaintiff's commission upon a bill to perpetuate testimony. *Earl of Abergavenny v. Powell*, 1 Mer. 434.

19. On a bill for examining witnesses *in perpetuam rei memoriam*, held that publication of the deposition should not be allowed unless in a strong case. *Harris v. Cotterell*, 3 Mer. 678.

20. The motion that publication of the depositions of a witness, taken on a bill to perpetuate his testimony, may pass publication, he being since deceased, is of course. *Bourne v. Bligh*, 1 Price, 307.

21. Leave given by a decree to exhibit interrogatories to prove a will of real estate. The examiner thinking that he was not authorized to publish the depositions, an order was made that they should be published. *Rossiter v. Pitt*, 2 Mad. 165.

#### 6. Reference of interrogatories, and depositions for scandal and impertinence.

1. Depositions referred for scandal, upon motion of course, without notice. *Eastham v. Liddell*, 12 Ves. 201.

2. Interrogatories and depositions not referred for impertinence alone, without scandal. *White v. Fussell*, 19 Ves. 113.

#### 7. Who entitled to a copy of.

Examination of defendant's executors to interrogatories, exhibited by the plaintiff, a co-executor, under a decree to account taken by commission, and returned to the six clerks' office, being for the benefit of all parties, the other defendants, creditors and legatees, entitled to the benefit of it, and to take copies. *Dyott v. Anderton*, 3 V. & B. 176.

#### 8. Replication and rejoinder.

##### 1. *Rejoinder gratis.*

If a plaintiff replies, defendant may rejoin gratis, and give rule to produce witnesses. *Flower v. Herbert*, Dick. 349.

##### 2. *Replication, pending rule to dismiss bill.*

A replication filed on the day of cause shown against dismissing a bill is irregular, and the court will order it on motion to be taken off the file. *Christie v. De Tastet*, 1 Price, 242.

### VIII. *Proceedings preparatory and at the hearing.*

#### 1. Setting down cause for hearing.

##### 1. *The return of the postea on an issue is such.*

The return of the postea on an issue is a setting down of the cause for hearing, and the court will not grant a motion to exclude it for a time from the paper. *Mitchell v. Rabbetts*, 1 Price, 263.

##### 2. *Time of.*

A plaintiff cannot set down a cause until after publication is passed, unless it be enlarged at the instance of the defendant, and so as not to hinder the plaintiff's setting down the cause. *Yate v. Bolland*, Dick. 495.

##### 3. *Short cause.*

1. Cause set down to obtain a decree *pro confesso*, advanced in the paper on motion. *Hart v. Ashton*, 1 Mad. 175.

2. Motion to advance a demurrer to a bill for an injunction and receiver,  
R 4 refused,



refused, on account of the delay in the filing of the bill. *Jones v. Taylor*, 2 Mad. 181.

3. The court will not order a cause which is set down for hearing, to be advanced in the paper, on the ground that the subject-matter of the suit is an arbitration of matter of account; and that if the award should be set aside the applicant would, on going into the account again, which he would then be obliged to do, probably lose the advantage of a material and essential witness, who is old and bedridden, and not expected to live. *Dalzell v. Bailey*, 3 Price, 2.

4. *Demurrer in the petty bag.*

Order to set down demurrer in the petty bag for argument, made upon motion in court. *The King v. Knox*, Cooper, 98.

2. *Subpœna to hear judgment and hearing.*

1. *Days of hearing in the exchequer.*

Days of hearing causes in the exchequer. 4 Price, 21.

2. *Days of hearing before the lord chief baron.*

Days appointed for hearing causes before the lord chief baron alone. Price, 21.

3. *Advancing demurrer by vice-chancellor.*

A demurrer in the vice-chancellor's paper cannot be directed by him to be heard at an earlier day than the paper mentions, but may be advanced to the head of the paper on that day. Anon. 1 Mad. 557.

4. *Who is to open.*

If plea be allowed, and the cause is heard, the defendant is to open the case. *Ellis v. Unet*, Dick. 338.

5. *Cause heard on bill and answer.*

In the cause of an infant plaintiff, whether the cause can be heard on bill and answer, *quære*. *Cowdell v. Tatlock*, 3 Ves. & Beam. 19.

6. *Private hearing.*

Private hearings always on the consent of both parties. In the matter of *Lord Portsmouth*, Cooper, 106.

7. *After setting down cause on peremptory undertaking.*

Service of *subpœna* to hear judgment necessary, though the cause was set down under the order upon a peremptory undertaking to speed the cause. *Dixon v. Shum*, 18 Ves. jun. 520.

8. *Hearing against some of several defendants.*

A cause cannot be heard against some of several defendants, in the absence of the rest, although it is not intended to proceed against them. The bill must be formally dismissed as to them. *Rumney v. Morgan*, 4 Price, 266.

9. *Reading admissions.*

Where relief is prayed, and the answer replied to, the plaintiff reading admissions must proceed to the completion of the immediate subject to which the defendant is answering; according to the course of evidence at law; but this does not apply to distinct matter. *Lady Ormond v. Hutchinson*, 13 Ves. 47.

10. *Dismissal of bill as to a joint plaintiff.*

Bill of two plaintiffs, dismissed as to one of them. *Gammel v. Block*, Dick. 513.

11. *Dismissal of bill, though defendant made default.*

Bill dismissed against defendant, though he made default at the hearing. *Speidall v. Jervis*, Dick. 632.

12. *Dis-*

12. *Dismissal of bill by consent after decree.*

After decree the bill cannot be dismissed by consent; but an arrangement for disposing of the fund in court may have effect by consent on further directions. *Lashley v. Hogg*, 11 Ves. 602.

13. *Dismissal of bill against defendants in contempt.*

Defendants were in contempt to a sequestration for want of their answer; bill dismissed against them for want of equity. *Molesworth v. Lord Verney*, Dick. 667.

14. *Dismissal of bill under circumstances.*

Plaintiff, under an undertaking to speed his cause, obtained an order to withdraw his replication, and set down on bill and answer; but did not serve a *subpœna* to hear judgment, or appear when the cause was called. The bill was dismissed with costs. *Rogers v. Goore*, 17 Ves. jun. 130.

15. *Retaining bill.*

1. The cases where the bill is retained, that there may be a trial at law, are, where it is necessary to establish the legal right, in order to found the equitable relief; but, where the subject appeared to be matter of law, the bill was dismissed. *Walton v. Law*, 6 Ves. 150.

2. It is not a necessary consequence that the bill will not be dismissed because it has been retained for the purpose of a trial at law. *Ibid.* 225.

3. The bill retained for twelve months, with liberty for the plaintiff to bring an action and to proceed to trial; and in default, the bill to be dismissed with costs. The plaintiff did not proceed according to the liberty given him; and therefore the defendant moved to dismiss the bill: held to be improper, not being such a judgment as could be pleaded; and the cause ordered to be set down for further directions. *Cater v. Dewar*, Dick. 654.

4. Bill for rent of a mine which depended upon the measure of a stack, retained, to suffer the plaintiff to try an issue as to the quantity constituting a stack by the custom of the country. *Geast v. Barber*, 2 B. C. C. 61.

5. Bill for fee farm rents retained for a year, and plaintiff to try his right at law. *Duke of Leeds v. Corporation of New Radnor*, *Ibid.* 338. But such retainer held to admit the equitable right, and draw after it an account. *Ibid.* 518.

16. *Hearing after decree by default.*

When defendant does not appear at the hearing of the cause, and on the usual affidavit a decree is obtained, and it is afterwards moved to set down the cause again, the court will direct a particular day on which it is to be heard. *Margravine of Anspach v. Noel*, 1 Mad. 313.

17. *Re-argument.*

The court will not appoint a re-argument after a decision, in the absence of the crown-officer, to give him an opportunity of being heard. *Rex v. Boyle*, 2 Price, 5.

18. *New subpœna on defendant's death.*

The defendant dying after service of the *subpœna* to hear judgment, whether upon a bill of revivor a new *subpœna* to hear judgment is necessary. *quære*. *Byne v. Potter*, 5 Ves. 305.

19. *Order for time on demurrer overruled.*

After demurrer overruled, order of course for a month to plead or answer. *Griffith v. Wood*, 1 Ves. & Beam. 541.

20. *Order for cause to stand over to add parties.*

Cause ordered to stand over, to make persons, supposed to have an interest, parties, who afterwards, on the further hearing, appeared not to have any. *Lamplugh v. Hcbden*, Dick. 78.

21. *Put.*

21. *Putting off cause.*

1. Plaintiff cannot put off the cause for defect of parties, without consent, or a special ground; as, that he was not aware of the existence of such parties. *Innes v. Jackson*, 16 Ves. 356.

2. If the office copies of the pleadings, or proofs necessary to be read for one party on hearing of a cause, be not signed by the proper officer, the cause must stand over, on payment of 5*l.* costs of the day's attendance to the other party. *Attorney-general v. Milward*, 1 Cox, 437.

22. *Certiorari cause.*

The course pursued when a *certiorari* cause is brought to hearing. *Clifford v. Beeston*, 1 Dick. 33.

## 3. Rectifying minutes and decree.

1. *Decree pro confesso distinguished from decree nisi.*

*Decree pro confesso distinguished from decree nisi.* 2 Ves. & Beam. 186.

2. *Decree ex parte.*

A decree taken *ex parte* is taken at the peril of the party obtaining it; and is the act not of the court, but of the party, conceiving what the judgment of the court would be if the other party had appeared. *Carew v. Johnston*, 2 Sch. & Lef. 300.

3. *Decree upon interlocutory order.*

Final decree cannot be made on an interlocutory order, without consent. *Allen v. Bower*, 3 B. C. C. 149.

4. *Decree on default at hearing postponed.*

Defendant appears, and cause going off till a further day, when defendant makes default, there may be an absolute decree against him. *Venemore v. Venemore*, Dick. 93.

5. *Decree in a suit of interpleader on default at hearing.*

Decree in a suit of interpleader against a defendant who did not appear. *Hodges v. Smith*, 1 Cox, 357.

6. *Decree founded on collateral pleadings and proofs.*

1. A decree made between co-defendants upon evidence arising from pleadings and proofs between plaintiffs and defendants. *Coury v. Caulfield*, 2 B. & B. 255.

2. A decree between co-defendants, founded on pleadings and proofs between plaintiff and defendant, is regular. *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 690. The court is bound to make such a decree, to avoid multiplicity of suits. *Ibid.*

3. The answer of a co-defendant, not brought to hearing, read as evidence against his companion at the hearing. Dick. 24.

7. *Decree for balance reported due to defendant on a bill to account.*

By a decree confirming the master's report, a defendant declared entitled to a balance reported due to him with interest, though no offer by the bill, praying an account, to pay it. *Bodkin v. Clancy*, 1 B. & B. 216.

8. *Decree establishing rights of lord of manor.*

A decree for establishing the rights of the lord of the manor. *Wentworth v. Prince*, Dick. 154.

9. *Decree for payment of surplus of sale.*

It is error in a decree to direct the surplus-money after a sale, to be paid to a tenant for life. *Lightburne v. Swift*, 1 B. & B. 212.

10. *Decree against trustees on default of the other defendants.*

Decree for execution of a trust to pay debts against the trustees: the  
14 other

other defendant not appearing, upon process to sequestration. *Downes v. Thomas*, 7 Ves. 206.

#### 11. *Form of decree in general.*

1. The old practice to insert in the decree a direction, that the master is to be armed with power to examine witnesses, which still prevails in the exchequer and other courts of equity, has been long disused in chancery. By the present course, the master may certify that a commission is necessary; which then issues of course. *Sanford v. Biddulph*, 9 Ves. 36.

2. The decrees in the exchequer always express that the master is to be armed with a commission to examine witnesses, and power to direct the same to the country; as formerly in chancery, 3 Ves. 607.

#### 12. *Form of decree dismissing bill for specific performance.*

The use of inserting in a decree, dismissing a bill for a specific execution, "without prejudice to the plaintiff's remedy at law," is to prevent an unfavourable impression against the plaintiff on the trial at law. *M'Namara v. Arthur*, 2 B. & B. 353.

#### 13. *Form of decree dismissing bill to perpetuate testimony.*

Where a bill to perpetuate testimony is dismissed, it is not necessary to state in the decree, that it is to be without prejudice to the perpetuating of the testimony. *Mackrell v. Hunt*, 2 Mad. 37.

#### 14. *Entry of evidence.*

Upon a decree, taken by default of the defendant at the hearing, the evidence is not to be entered as read. *Stubbs v. ———*, 10 Ves. 30.

#### 15. *Interest.*

1. Unless interest be reserved by the decree, the court cannot give it; but the cause was re-heard merely to introduce a reservation of interest. *Herle v. Greenbank*, Dick. 370.

2. Where the question of interest is not reserved by the decree, it cannot be given on petition; the object of a petition being only to carry on what is directed by the decree. *Creuze v. Hunter*, 2 Ves. 157.

3. Whether interest can be claimed by petition, the decree containing no direction as to interest, *quærs*. *Bruere v. Pemberton*, 12 Ves. 386.

4. After the usual decree for an account, order or motion to pay into court the amount of the principal sums admitted to be due by examination upon interrogatories: not extended to interest. *Wood v. Downes*, 1 Ves. & Beam. 49.

5. According to the practice in Ireland, the master may compute interest on legacies, although the decree does not contain an express direction for the purpose. *Birmingham v. Kirwan*, 1 Sch. & Lef. 444. 447.

6. Interest decreed under a general reservation of further directions. *Sammes v. Rickman*, 2 Ves. 36.

#### 16. *Drawing up decree.*

1. Original decree not to be found; but, having been acted upon by reports, and recited in an order on further directions, was allowed to be drawn up from an office copy, and entered *nunc pro tunc*. *Donne v. Lewis*, 11 Ves. 601.

2. A plaintiff is allowed the vacation of the term in which the decree is pronounced, and the following term, to draw up the decree in, but not the vacation of the last term. And if he does not draw it up in that time, the defendant may. *Calvert v. Dignum*, 4 Price, 133.

3. Decree upon a bill taken *pro confesso* is to be pronounced by the court, not to be drawn up by the plaintiff. *Geary v. Sheridan*, 8 Ves. 192.

#### 17. *Varying minutes of decree before chief baron sitting alone.*

Motion to vary the minutes of a decree before the chief baron alone,  
must

must be made, not to the court of exchequer, but to the chief baron when sitting alone. 1 Dan. 135.

18. *Legal effect of decree.*

1. Equal to a judgment at law. 9 Ves. 125.
2. A final decree, upon a sum ascertained, is equal to a judgment; but a mere decree for an account of the plaintiff's demand, and of the personal estate come to the hands of the defendant, with a mere direction for payment out of the result of that account, does not prevent the executor praying a judgment. *Perry v. Philips*, 10 Ves. 34.

19. *Who are bound by a decree.*

1. Decree against a person, representing the inheritance, binding upon all remainders behind; by analogy to the rule at law, that a recovery, in which a subsequent remainder-man is vouched, bars all remainders behind, without prejudice to those intermediate. 9 Ves. 64.

2. Decree against a tenant in tail shall bind a remainder-man. 1 Sch. & Lef. 407. But the remainder-man may appeal, or re-hear the cause. *Ibid.* 409.

3. A minor is bound by a decree. *Lightburne v. Swift*. 2 B. & B. 213.

20. *Who are not bound by a decree.*

1. A decree always guards against the rights of persons, not parties to the suit; for it gives relief on the terms that such persons be not prejudiced. 1 B. & B. 447.

2. Equity will not permit a decree to be made use of, to evict the interest of persons not parties to, and who were tacitly protected by, it. *Foley v. Gough*, 1 B. & B. 448.

3. Where a decree giving relief to a party, whose title was gone at law, directs the accounts on the rents reserved in *bonâ fide* leases of tenants, not parties to the suit; the party relieved will be restrained from proceeding at law to evict the tenants; they being tacitly protected by the decree; and equity not permitting a decree to work an injury to innocent persons, not parties to it. *Shine v. Gough*, 1 B. & B. 436.

21. *Amendment of decree.*

1. Enrolment of a decree amended. *Eyles v. Ward*, Dick. 58.

2. An omission in a decree, if perfectly of course, supplied on motion. In this instance the common direction to examine all parties upon interrogatories being omitted, an order was made, on motion, that the master should be at liberty to examine, &c. *Wallis v. Thomas*, 7 Ves. 292.

3. An omission in a decree, if perfectly of course, supplied on motion; viz. in the usual decree upon a creditor's bill against executors the direction for an account of the personal estate. *Pickard v. Mattheson*, 7 Ves. 293.

4. Order on motion, with consent, to rectify a clear mistake in a decree. *Newhouse v. Mitford*, 12 Ves. 456.

5. Order on motion, with consent, to rectify a clear mistake in a decree. It must be a separate, supplemental order. *Lane v. Hobbs*, 12 Ves. 458.

6. After enrolment of a decree, errors appearing on the face of schedules permitted to be corrected upon motion, without a bill of review; but the court will not permit an affidavit producing a new fact to be used for that purpose. *Weston v. Haggerston*, Cooper, 134.

7. A mistake being made in a decree, by mis-naming the defendants, and the accountant-general having in consequence entered an account in wrong names, an order was made that the register should alter the decree, and that the accountant-general should also alter the account in his books. *Hawker v. Duncombe*, 2 Mad. 391.

8. Point argued by leave of the court, on motion to vary minutes. *Perry v. Philips*, 1 Ves. 251.

9. No addition to or alteration in a decree by motion or petition. 13 Ves. 394.

### IX. *Proceedings upon interlocutory decrees.*

#### 1. General mode of proceeding in master's office under decree.

##### 1. *General rules.*

On the hearing of the cause an inquiry will not be directed before the master unless a ground for it is laid in the pleadings. *Holloway v. Millard*, 1 Mad. 414.

##### 2. *Reference of the question of intention.*

Question of intention to be determined by the court; but not proper for the master. *Pitt v. Lord Camelford*, 1 Ves. 83.

##### 3. *To ascertain a child's existence.*

Devisee of stock for life, with absolute power of appointment, if no children; referred to the master for inquiry about a child, upon the grounds for suspicion. *Sculthorp v. Burgess*, 1 Ves. 91.

##### 4. *To ascertain the existence of a debt.*

A plaintiff praying an assignment of a bond alleged to have been satisfied by the payment of the sum due upon it, from the defendant, by the testator in his life-time, on account of the defendant, referred to the deputy-remembrancer, to ascertain the facts of the debt having been satisfied — on whose account — and whether it was a specialty, or due on the bond. Such an assignment not being available, the court would direct (if they relieved the plaintiff) that the obligees shall permit their names to be used by the plaintiff in putting it in suit. *Jackson v. Radford*, 4 Price, 274.

##### 5. *Affidavit in support of creditor's claim.*

Reason of the practice in the master's office of receiving the party's affidavit in support of his claim, as a creditor, that he must give that assurance that the debt is due; but if it is contested, no attention is given to the affidavit. *Fladong v. Winter*, 19 Ves. 196.

##### 6. *Investing money in the funds.*

The court, in laying out money in the funds, does not attend to the difference in the price of stock. 7 Ves. 551.

##### 7. *Decree for money to be laid out in land.*

Where money is to be laid out in purchases, a separate application must be made to court upon each purchase. *Harrington v. Flemming*, 1 B. C. C. 74.

##### 8. *Proceeding de die in diem without an order.*

1. The master may proceed *de die in diem* without an order. *Sturdy v. Lingham*, 5 Ves. 423.

2. The practice settled that there should be an order for the master to proceed *de die in diem*. Such order not imperative on the master, but subject to his discretion. *Purcell v. M'Namara*, 11 Ves. 362.

##### 9. *Of changing the master.*

Reference removed from one master to another, on the allegation of counsel, that he found the former in such a state, from his advanced age and infirmity, that it was not proper to go into the business before him. *Anon.* 9 Ves. 341.

#### 2. Accounting before the master.

##### *Of making rests.*

On a decree against a mortgagee in possession to account, rests cannot be made

made by the master, unless directed by the decree. *Webber v. Hunt*, 1 Mad. 13.

### 3. Sales before the master.

#### 1. *Preliminaries to.*

Lands not to be set up to sale under a decree, until a true state of the title, with counsel's opinion thereon, be produced; the title-deed deposited with the master, &c. 2 Sch. & Lef. 738.

#### 2. *Sale decreed — under a will.*

Where an estate is devised, charged for the payment of debts, the court will order a sale, although the heir be abroad, and the devisee insane. *Williams v. Whinyates*, 2 B. C. C. 399.

#### 3. *Sale decreed — of real estate provisionally.*

Sale of real estate decreed provisionally, without waiting the account of the personal estate, previously applicable. 12 Ves. 105.

#### 4. *Sale decreed — to satisfy incumbrances.*

Sale of a plantation at St. Christopher's decreed for satisfaction of money charged on it. *Gascoine v. Douglas*, Dick. 431.

#### 5. *Sale decreed — to satisfy judgments.*

Sale of a moiety of a debtor's real estate decreed for satisfaction of a judgment, and costs. *Rowe v. Bant*, Dick. 150.

#### 6. *Sale decreed — excess in.*

Where a will directs, and a decree orders a sale of lands, or so much thereof as shall be necessary to pay incumbrances, and the master, by consent of the parties interested, sells the whole, it is no objection on the part of the purchaser that more is sold than will pay the incumbrances. *Lutwych v. Winford*, 2 B. C. C. 248.

#### 7. *Bidders — sham.*

Solicitor on behalf of sham-bidders, obtained an order to open the bidding; on the report of their being the best bidders, and their not proceeding, the solicitor was declared to stand as the best bidder, at the price at which he opened the bidding. *Molesworth v. Opie*, Dick. 289.

#### 8. *Bidders — lunatic.*

Estate sold before the master for payment of debts, and A. reported the best bidder. Before the report was confirmed, it was discovered that A. was insane at the time of the bidding. It was moved on behalf of all the parties in the cause, that B. the next best bidder, might be reported the purchaser at the sum bidden by him, and B. consented; but the court thought that this was irregular, and directed the estate to be re-sold generally. *Blackbeard v. Lindigren*, 1 Cox, 205.

#### 9. *Bidders — mortgagee.*

Mortgagee of a bankrupt's estate allowed on petition to bid for the same, on a sale of the mortgaged estate. *Ex parte Marsh*, 1 Mad. 148.

#### 10. *Opening biddings — from inadequacy of price.*

Bidding opened where a considerable advantage offered, and the estate ordered to be sold in one lot. *Watts v. Martin*, 4 B. C. C. 113.

#### 11. *Opening biddings — upon advance offered.*

1. Biddings opened. *Tait v. Lord Northwick*, 5 Ves. 655.

2. Biddings opened on advancing 100*l.* on 800*l.*, and 200*l.* on 1,200*l.* *Anon.* 2 Ves. 487.

3. Biddings opened after the report confirmed, simply upon advance of 61*l.* on 305*l.*; 35*l.* not sufficient. *Chetham v. Grugeon*, 5 Ves. 86.

4. Bid-

4. Biddings opened on advance of 200*l.* upon 3,200*l.*; but 100*l.* was held too little. *Anon.* 5 Ves. 148.

5. Bidding opened on advance of 50*l.* on 380*l.* paying the expence; 10*l.* *per cent.* not sufficient on a small sum. *Upton v. Lord Ferrers*, 4 Ves. 700.

6. The rule, that an advance of 10*l.* *per cent.* entitles the party to open biddings, not to prevail in future. *Andrews v. Emerson*, 7 Ves. 420.

7. No rule, fixing the advance on opening biddings at 10*l.* *per cent.*; more or less will be required according to circumstances. *White v. Wilson*, 15 Ves. 151.

8. In a creditor's suit bidding opened upon an advance of 500*l.* upon 10,000*l.* paying the advance into court, and the expences of the discharged purchaser. *Brooks v. Snaith*, 3 Ves. & Beam. 144.

9. General rule not to open biddings after confirmation of the report, upon negligence, surprise, the circumstances of the estate, &c.; without something unconscientious on the part of the purchaser. *White v. Wilson*, 14 Ves. 151.

10. Increase of price offered is not alone a reason to open biddings after the report confirmed. *Boyer v. Blackwell*, 3 Anst. 656.

11. Biddings not opened after confirmation of the report, unless fraud in the purchaser; or fraudulent negligence in another person, as the agent; of which it would be against conscience that the purchaser should take advantage; or, unless some particular principle arises out of the character of the purchaser, as connected with the ownership of the estate, or some trust or confidence, or his conduct in obtaining the report. *Morice v. Bishop of Durham*, 11 Ves. 57.

12. Biddings opened after confirmation of the report on circumstances; as, where the owner of the estate, who joined in the motion, was in prison at the time of the confirmation, and a fourth of the original price was offered in advance; but a deposit of the whole advance was required. Increase of price alone will not do; but when large it is a strong auxiliary circumstance. *Watson v. Birch*, 2 Ves. 51.

13. On opening biddings, the court, in the reference of costs of the purchaser, will not give a particular direction for a specific expence. *Anon.* 2 Ves. 286.

12. *Opening biddings — by one present at the sale.*

A person present at a sale is not permitted to open biddings. *M'Culloch v. Cothach*, 3 Mad. 314. The contrary was held in *Rigby v. M'Namara*, 6 Ves. 117.

13. *Opening biddings — as to one or all the lots of a purchase.*

Where one person is reported purchaser of several lots before the master, if the biddings are opened as to one of the lots, he shall have an option to open them as to all, *comme semble*. *Boyer v. Blackwell*, 3 Anst. 656.

14. *Opening biddings — after confirmation of report.*

1. Upon a sale in this court, the bidding may be opened, even a second time, when the report of the purchaser has not been confirmed; but shall not be opened at all if the report has been confirmed. *Scott v. Nesbit*, 3 B. C. C. 475.

2. After a sale, and the master's report confirmed, the bidding shall not be opened but on special circumstances; mere increase of price is not sufficient for this purpose; but that, together with the person principally interested being a prisoner for debt at the time of sale, is sufficient. *Watson v. Birch*, 4 B. C. C. 172.

3. Fraud is an exception to the general rule not to open biddings after confirmation of the report. 2 Ves. 55.

4. Biddings are opened for benefit of the suitor and estate; not of the  
the



the purchaser; as where he was too late, and the overbidding is small. *Anon.* 1 Ves. 453.

5. Biddings opened upon a second application by the same person; the purchaser not appearing upon notice. *Preston v. Barker*, 16 Ves. 140.

15. *Opening biddings — deposit thereon.*

1. Upon opening biddings the court refused to dispense with a deposit, or to order a trifling one, upon particular circumstances. *Anon.* 6 Ves. 518.

2. The deposit made upon opening a bidding is considered as part of the purchase-money paid, although on the event of the depositor not being reported the best bidder, it must be returned to him, and therefore where the deposit is laid out in the public funds, which rise between the time of the deposit and the purchase being completed, the estate will have the benefit of the rise. *Ambrose v. Ambrose*, 1 Cox, 194.

16. *Of compelling the purchaser to complete, or discharging him from, his purchase.*

1. Motion, that a person reported best purchaser should complete his purchase by a certain day, refused; the report not being absolutely confirmed. *Anon.* 2 Ves. 335.

2. One reported the highest bidder before the master was compelled to complete his purchase. *Cunningham v. Williams*, 2 Anst. 344.

3. Purchaser discharged on motion, upon affidavit of imprisonment for debt and insolvency. *Hodder v. Ruffin*, 1 Ves. & Beam. 544.

17. *Purchase-money — to whom paid.*

In sales under a decree, it is irregular to pay the purchase-money to the party; it ought to be paid into court. *Bennett v. Hamil*, 2 Sch. & Lef. 581.

18. *Purchase-money — payment of before taking possession or conveyance.*

Motion against purchasers in the master's office, to pay in their purchase-money, refused; the estate sold being copyhold, limited for life, and then in remainder; and the remainder-man being abroad, he not having surrendered. *Noel v. Weston*, Cooper, 138.

19. *Purchase-money — payment of by one antecedently in possession.*

Motion by one tenant in common who had agreed to sell to the other, that the latter should pay his purchase-money into court, refused, where such purchaser had been before and at the time of the purchase in possession of the whole, with the approbation of the other tenant in common. *Freebody v. Perry*, Cooper, 91.

20. *Purchase-money — payment of joint-purchaser's proportion.*

Where two persons jointly purchased a lot sold under the decree, the court would not permit one of them to pay into court his proportion of the purchase-money. *Darkin v. Marye*, 1 Anst. 22.

21. *Purchase-money — disposition of, on adverse claim made.*

In a suit for the payment of creditors, the real estates of the testator were ordered to be sold. A. being reported the purchaser of one of the estates for 14,800*l.*, entered into possession and accepted the title, and proper conveyances were executed. On application by the creditors to have the purchase-money paid out, the purchaser stated that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title. But the court thought that the purchaser having accepted the title, &c. could not now prevent the money being paid out of court, and ordered accordingly. *Thomas v. Powell*, 2 Cox, 394.

22. *Mode*

*22. Mode of computing value of premises.*

As to the mode of computing the value of premises in the master's office, See *Finnell v. Hallet*, 2 Ves. & Beam. 277.

*23. Invalidating of.*

1. An estate being sold before a master when the purposes of the decree did not require it, the sale shall be set aside, although the reports of the several purchasers were confirmed; but the purchasers must be fully reimbursed all their expences out of pocket. *Quære*, whether inadequacy of price alone is a sufficient ground to set aside such a purchase. *Prideaux v. Prideaux*, 1 Cox, 34.

2. A sale under a decree, all necessary parties being before the court, not set aside after a lapse of time, though the surplus of the purchase-money was directed to be paid to the tenant for life; there being no surplus, and the sale appearing to be properly conducted. *Lightburne v. Swift*, 2 B. & B. 207.

*24. Appointment by purchaser of clerk in court.*

Court will not make purchaser appoint a clerk in court: which is only necessary where the party is to appear. *Child v. Abingdon*, 1 Ves. 94.

*4. Master's report, and exceptions thereto.**1. Of anticipating the opinion of the court respecting its form.*

A motion cannot be made for the opinion of the court, to obviate difficulties of the master as to the form of his report. *Agar v. Gurney*, 2 Mad. 389.

*2. Annexation of schedules to report.*

Schedules of accounts referred to in the master's report, must be annexed to and filed with the report, and not entered in a book, and kept in the master's office, as was attempted in this case. *Smith v. Smith*, Dick. 789.

*3. Form of a report touching an uncertain surplus to be distributed.*

Where a surplus to be distributed is an uncertain sum, the master ought to report the shares in aliquot parts, not in money. *Attorney-general v. Haberdashers' Company*, 1 Ves. 295.

*4. Separate reports.*

Motion for separate report, and proceedings *de die in diem*. 1 Ves. 72.

*5. Precedence of separate over the general report.*

The exchequer will not direct the deputy remembrancer to proceed to make a general report until the previous orders for separate reports are regularly disposed of, although he have before him a full state facts. *Lewes v. Morgan*, 3 Price, 175.

*6. Amendment of report.*

A mistake of a report made in 1772, and enrolled, ordered to be amended, and the docquetting of the enrolment, to be altered accordingly. *Yow v. Townsend*. Dick. 59.

*7. Admission of evidence after closing report.*

Evidence not to be received by the master, after he has settled his report. *Thompson v. Lambe*, 7 Ves. 587.

*8. Service of order nisi to confirm report.*

After final report of costs, &c. nothing remaining but application of the fund, ordered that service on the clerks in court of the defendant should be good service, in order to confirm the report, on motion and affidavit that some lived in the East and West Indies, and others in different parts of this country, though there were only five defendants. *Jackson v. Anon.* 1 Ves. 417.

9. *Cause against confirming report, filing exceptions, and making deposit.*

After an order for confirming the report *nisi*, filing exceptions, and making the deposit with the register, are no cause to prevent that order being made absolute, unless an order for setting down the exceptions to be argued is obtained; which may be done either by the plaintiff or defendant. The order confirming the report was discharged on payment of costs. *Gilbart v. Moss*, 4 Ves. 617.

10. *Reviewing report, after confirmation.*

1. Reference to the master to review his report, though it had been confirmed. *Turner v. Turner*, Dick. 313.

2. The master ordered to review his report after confirmation. *Ex parte Turner*, Swanst. 157.

11. *Report relative to infant trustees.*

Exceptions do not lie to reports relative to infants, being trustees within the statute of 7 Ann. They must be objected to by the petition. *Ex parte Burton*, Dick. 395.

12. *Report approving of draft of conveyance directed.*

Master directed to make his report of his approving the draft of a conveyance. *Lloyd v. Griffith*, Dick. 103.

13. *Touching trustees approved of by him.*

The report of the master concerning trustees approved of by him, does not require confirmation. *Latimer v. Clare*, 1 Anst. 57.

14. *Motion anticipating his certificate.*

As to the practice of moving upon the certificate of the master, that no examination is put in, or of the six-clerk, that there has been no proceeding, &c. before the certificate actually granted, and whether notice should be given by the master before he grants it, *quære*. *Wills v. Pugh*, 10 Ves. 402.

15. *Whether a certificate countervails a report.*

No certificate by a master as by accountant-general; but there must be a report, in order to take notice of any thing in the master's office. 1 Ves. 70.

16. *Preliminaries to exceptions.*

It is of course to except to a report, that an examination or deposition is impertinent, without previously taking objections, as the master does not deliver a draft of such reports. *Price v. Shaw*, Dick. 732.

17. *Deposit.*

1. Where the exceptant prevails in any of the exceptions, he is entitled to the deposit. *Parker v. Prout*, 4 B.C. C. 1.; *sed vide Dawson v. Bush*, 2 Mad. 184.

2. When several exceptions are taken to an answer, and the master reports the answer sufficient, and one general exception is taken to his report, and some of the exceptions to the answer are allowed, some not, and others waived, the court, in its discretion, may order the deposit to be divided. *Dawson v. Busk*, 2 Mad. 184.

18. *Reviewing report, to found exceptions.*

Reference to the master to review his report in order to give liberty to take objections for the purpose of grounding exceptions. *Vallence v. Weldon*, Dick. 290.

19. *Exceptions to report, after passing over draft.*

Though no objections were taken to the draft of a report, and it was confirmed;

firm; plaintiff permitted to take exceptions to the report as if he had objected to the draft. *Allen v. Allan*, Dick. 362.

#### 20. *Time of excepting to report.*

1. Defendant permitted to take exceptions to a report after confirmation, without having taken objections. *Ex parte Turner*.

2. Exceptions allowed to be taken to a report, though no objections were made before the master while the report was in draft, and the report confirmed  *nisi*; a special case being made. *Pennington v. Lord Muncaster*, 1 Mad. 555.

3. Exceptions permitted, with reference to one object of inquiry, after exceptions to the same report with reference to another subject, allowed or overruled on argument. *Ex parte Turner*, Swanst. 160.

4. A party who means to object to the report of the deputy remembrancer must state his objections in a reasonable time, before the time fixed for signing the report. *Anon.* 1 Anst. 277.

5. Exceptions to a report for impertinence, may be taken after an order to expunge, until that order has been acted upon. Not necessary to take objections before the master previous to excepting to a report of impertinence. Under the circumstances of the case, the defendant was at liberty to take a general exception, without setting out the particulars in which he alleged the report to be erroneous. *Norway v. Rowe*, 1 Mer. 135.

#### 21. *Filing exceptions nunc pro tunc.*

Exceptions, under the circumstances, allowed to be taken *nunc pro tunc*, to the master's report of insufficiency of answer, though after such a report a plea and further answer were put in and plea overruled. *Noel v. Ward*, 1 Mad. 339.

#### 22. *Form of excepting.*

1. Where an exception is taken to a master's report, including several distinct matters, and the report appears right in any one instance, the exception must be overruled. *Hodges v. Salomons*, 1 Cox, 249.

2. Order to refer back to the master an examination, under the direction in a decree for examination of the parties, to see whether it was sufficient. Exception to the report, and in the general terms, that the master had reported the examination sufficient, whereas he ought to have reported it insufficient, is regular; but not to be encouraged; and therefore being overruled, costs beyond the deposit were given. *Purcell v. M'Namara*, 12 Ves. 166. *Vide infra* (3).

#### 23. *Setting down exceptions.*

1. The bare filing of exceptions to a report, and not setting them down to be argued, is not cause against confirming the report. *Hall v. Mulliner*, Dick. 604.; *Abel v. Nodes*, Ibid. 730.

2. Filing exceptions without setting them down to be argued, is no cause against confirming a report. *Abel v. Nodes*, 2 Cox, 169.

3. Exceptions ought to be set down before the lord chancellor; but on special reasons may be transferred to the master of the rolls. *Fretwell v. Kay*, Dick. 605.

#### 24. *Taking exceptions off the file.*

Exceptions to a report may be taken off the file, if filed after the report has been confirmed absolute. *Sterling v. Thompson*, Cooper, 271.

#### 25. *Exception as too general.* (*Vide supra*, 22. 2.)

1. Exceptions to report for not stating the bill to be impertinent, without specifying in what particulars, allowed. *Mackworth v. Briggs*, Dick. 81.

2. The master in reporting an examination impertinent, must specify in what particulars. *Anon.* 3 Mad. 246.

26. *Exception, as stating circumstances instead of conclusions.*

Upon a reference to the master as to the fact of a person's death, the report only stating the circumstances, viz. absence abroad fourteen years without any account of him, but not drawing the conclusion, it was referred back to the master to state whether he was dead at the time when administration was granted; especially as two years more had elapsed since the report. *Lee v. Willcock*, 6 Ves. 605.

27. *Exception to report in favour of title from want of parties to suit.*

Bill by devisees in trust, to sell for specific performance of an agreement to purchase; that the heir of the deviser is not a party to the suit, is not matter of exception to the report in favour of the title. 3 Ves. 234.

28. *Exception to award of referee under a decree.*

Exceptions will lie to an award of a referee under a decree if only *ad computandum*; but not if to all matters in difference. *Woodbridge v. Hilton*, Dick. 640.

29. *Exception to certificate of opinion.*

Exceptions do not lie to the master's report certifying his opinion. *Neal v. Billing*, Dick. 93.; *Hamlyn v. Lee*, Ibid. 94.

30. *Exception to report for costs.*

Exceptions will not lie to a master's report for costs only, but it must be by petition. *Pitt v. Mackreth*, 3 B. C. C. 321.

31. *Exception to report for maintenance.*

Exceptions will not lie to a master's report for maintenance; and a title being set up against the infant must be established elsewhere. *Nicholls ex parte*, 1 B. C. C. 577.

32. *Exception to report relative to suit by prochein amy.*

A master's report on a reference to inquire whether a suit instituted in the name of an infant by a *prochein amy* was necessary, is not a subject for exceptions; but any objection to it must be made on the motion to confirm the report. *Whitaker v. Marlar*, 1 Cox, 285.

33. *Exception to certificate of settlement of interrogatories.*

Exceptions do not lie to a master's certificate of his having settled interrogatories. *Stanyford v. Tudor*, Dick. 548.

34. *Miscellaneous.*

The master by his report stated that he had not allowed a discharge to the execution for want of evidence, but had received a claim. The report was excepted to; and it was admitted that the evidence before the master did not warrant the claim, but that additional evidence clearly established it. Held, that to support the exception, it must be shown that the master ought to have allowed the discharge on the evidence before him; and that if the master refused to act upon the additional evidence, a distinct motion should be made for a direction that he should receive it. *Ridifer v. O'Brien*, 3 Mad. 43.

5. Issue and special case.

1. *General rules as to granting an issue.*

1. Right of this court to be exercised very tenderly, of jurisdiction deciding upon facts without an issue. 9 Ves. 168.

2. Where there is contradictory evidence raising a doubt, or witnesses are discredited after the case proved, an issue or inquiry will be directed; but not where a party fails to establish his case. 1 B. & B. 283. 550.

3. A defendant not entitled to an issue, or inquiry to establish a case, relied on by his answer, but omitted in proof. *Savage v. Carroll*, 1 B. & B. 548.

2. *Issue*

2. *Issue when granted — to try the genuineness of papers.*

Issue to try if certain papers were forged: on being found so, they were cancelled in court, and kept by the master. *Kemp v. Mackarel*, Dick. 267.

3. *Issue when granted — to try the validity of a will.*

1. A will never set aside without an issue, *devisavit vel non*. 11 Ves. 53.

2. Bill by an heir at law, for an issue to try the validity of a will made in England, dismissed, partly on the ground of his acquiescence both in the ecclesiastical court, and upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania. *Pike v. Hoare*, 2 Eden, 182.; Amb. 428.

4. *Issue when granted — to try testator's title.*

Bill by devisees, praying a conveyance, upon the ground of an alleged equitable title in the testator, originating in an agreement denied by the answer, but supported by evidence of ownership, such as the receipt of rents, and profits, &c. Issue directed to try whether the testator was at his death beneficially entitled. *Burkett v. Randall*, 3 Mer. 446.

5. *Issue when granted — to try the amount of a legacy.*

Upon a question as to the amount of a legacy, from a doubt as to a figure, an issue was directed, instead of a reference to the master. *Norman v. Morrell*, 4 Ves. 796.

6. *Issue when granted — upon the question as to residue between executor and next of kin.*

No instance of an issue upon the question between executor and next of kin as to the residue. 14 Ves. 323.

7. *Issue when granted — to try the question of heirship.*

The form of an issue to try who were the co-heirs of the late Duke of Becks. *Legard v. Sheffield*, Dick. 87.

8. *Issue when granted — to try the existence of an illegal agreement.*

Issue directed to try whether an agreement to carry on an illegal game, and a contribution for that purpose, had been made or not. *Nash v. Ash*, 1 Eden, 378.

9. *Issue when granted — to try the competency of a witness examined.*

It becoming suspicious that a witness who had been examined, was interested, and issue was directed to try the fact. *Stokes v. M'Keral*, 3 B. C. C. 228.

10. *Issue when granted — to assess damages for breach of covenant to settle estate.*

To settle a particular estate, the breach is matter of damage, and an issue shall be granted to try what the damage is. *Wade v. Paget*, 1 B. C. C. 363.

11. *Mode of obtaining an issue.*

1. The court will not direct an issue on motion. *Anon.* 2 Aust. 480. *Contra*, the Attorney-general v. Lane, Ibid. 589.

2. A trial at law, directed by consent to try the right of stopping up or obstructing lights, and a view to be had to see if the new buildings are on old foundations. *Attorney-general v. Bentham*, Dick. 277.

12. *Order for issue nisi or absolute.*

Defendant having made default at the hearing, order directing an issue must be an order *nisi* in the first instance. *Peacock v. M'Kercher*, Dick. 434.

13. *Time of obtaining an issue.*

Issue, whether an instrument was obtained by fraud, &c. not directed on motion

motion after answer, as where the decree depends upon a simple fact, viz. legitimacy or competency, according to the present practice to refer a title on motion. *Fullagar v. Clark*, 18 Ves. jun. 481.

14. *Who is to be the plaintiff in an issue.*

The party who has to sustain the affirmative, is to be plaintiff in an issue, and, as such, has the choice of the court in which it is to be tried. *Ex parte Malkin*, 2 Rose, 27.

15. *Form of an issue to try who were the co-heirs of B.*

The form of an issue to try who were the co-heirs of the late Duke of Bucks. *Legard v. Sheffield*, Dick. 87.

16. *Trial of issue at bar.*

Trial of issue at bar of king's bench, ordered on terms. *Hite v. Salter*, Dick. 495.

17. *Evidence on an issue regulated.*

1. In directing an issue, the court will not order the examination of persons at the trial who, by the rules of the courts of law, could not be examined without such order, except sometimes in cases where the facts in dispute rest only on the knowledge of the plaintiff and defendant. *Ex parte Dister, in re Thomson*, 1 Buck. 234.

2. On an issue from chancery, original answer not sent down to the trial, whether between same parties or not, till after refusal of the office-copy as evidence. *Anon.* 1 Ves. 152.

3. It has never been laid down as a rule, that a will cannot be proved without examining all the witnesses, though the practice has been to examine all. *Powel v. Cleaver*, 2 B. C. C. 499.

4. On the trial of an issue *devisavit vel non*, directed by this court, all the witnesses to the will should be examined. *Bootle v. Blundell, Cooper*, 136.

5. In proving the execution of a devise, actual signature by the devisor in the presence of the three subscribing witnesses, not required, if he declares it to be his will before those who did not see him sign; and separate attestations sufficient. *Westbeeche v. Kennedy*, 1 Ves. & Beam. 362.

18. *New trial — from misdirection of the judge.*

Where an occupier of lands is plaintiff in an issue directed by the exchequer to try a *modus*, and proves on the trial that the defendant (the vicar) and his predecessors have not received tithe of hay within a certain township, either in kind, or *sub modo*, within living memory; and that the vicar and his predecessors have been in possession of a piece of meadow within the same township, laid in some of the terriers produced to have been given in lieu of tithe hay; and no evidence is adduced to rebut such a case on the part of the defendant; if the jury find for the defendant, under the direction of the judge, "that they must be satisfied from the evidence, that the defendant and his predecessors have held the meadow, in lieu of tithes, from before the commencement of legal memory," it is not ground for a new trial. *Adams v. Evans*, 4 Price, 14.

19. *New trial — from rejecting material evidence.*

1. Discretion to refuse a new trial of an issue, if justice has been done upon the whole; though some evidence may have been improperly rejected at law. 11 Ves. 51.

2. The improper rejection of written evidence no ground for granting a new trial of an issue; the court being satisfied with the verdict upon all the evidence, including that rejected. *Hampson v. Hampson*, 3 Ves. & Beam. 41.

3. After two trials at bar in favour of the claim of the warden and minor canons

canons of St. Paul's, to tithes at 2s. 9d. under the decree, and act of parliament 37 H. 8., upon an issue, whether any, and what less sum had been paid, a new trial was refused; though evidence was rejected that ought to have been received, material; this being in the discretion of the court, for its information; and all the evidence, though proving that less than 2s. 9d. had been paid, not showing any certain payment in lieu of tithes. Whether the issue ought to have been directed in the cross-cause, *quære*, first, as being upon the bill of mere lessees, not owners: secondly, as tending to proof of a payment, different from that relied upon by their answer, and the establishment of which was prayed by their bill. *Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. 155.

20. *New trial — to adduce new evidence.*

1. After verdict on issue directed, new trial, on account of having further evidence to produce, refused; there being no fraud or surprise, but the evidence having been kept back by the party applying; though court much dissatisfied with the verdict. *Standen v. Edwards*, 1 Ves. 134.

2. H. employed B. as his bailiff, and gave him a general authority to accept bills for him. B. accepted several bills without the knowledge of H., and discounted them at H.'s bankers, and applied the money to his own use; and then died. The bankers afterwards obtained a bond from H. for the balance of his account with them, including the several bills so accepted by B. On a bill filed to set aside this bond, as improperly obtained from H., the court directed the bankers to sue the plaintiff at law upon these bills. The bankers selected some of these bills, on which they brought their actions, and which were just sufficient to cover their demand; but on the trial there appeared a receipt endorsed on one of them, and the jury, for that reason, gave a verdict against the bankers on that bill, and for them on all the rest. There was no application for a new trial; but when the cause was set down again, the bankers applied for an opportunity of proving their demand on some other of the bills. But the court thought that the remedy, if any, must be by motion or petition for a new trial; but that, under the circumstances of this case, the court would not be inclined to give any assistance to the bankers towards rectifying the consequence of their own inadvertence. *Holworthy v. Mortlock*, 1 Cox, 141.

21. *New trial — after perpetual injunction.*

Will set aside after two verdicts in its favour, and a perpetual injunction granted against the heir at law, on discovery of fresh evidence, on which another trial was directed, and a verdict found against it. *Attorney-general v. Montgomery*, Dick. 74.

22. *New trial — in case of bankruptcy.*

A new trial granted of an issue, to try whether a bankrupt had committed an act of bankruptcy at a given time, founded on a general assignment of his effects, when not indebted, and in full credit. *Hassel v. Simpson*, Dick. 583.

23. *New trial — where inheritance will be bound.*

New trials granted in issues directed to try the right of the soil, though the judge certified in favour of the verdict; as there was no precedent of a decree, where the inheritance would be bound, being made upon one verdict only. *Lord Darlington v. Bowes*, 1 Eden, 270.

24. *New trial — terms of.*

1. New trial granted on payment of the costs of the former. *Birt v. Pitt*, Dick. 87.

2. Two new trials of an issue *devisavit vel non*, granted at the instance of the heir at law, upon terms. *Blount v. Swinnerton*, Dick. 500.



3. A new trial of an issue *devisavit vel non*; the heir at law paying the costs of the former trial. *Mountain v. Bennet*, Dick. 683.

25. *New trial—after trial at bar.*

1. No doubt of the right of this court to grant a new trial after a trial at bar. Principle, that the conscience of the court must be satisfied. 9 Ves. 165.

2. New trials after trials at bar granted here, when the courts of law would not grant them. *Ibid.* 169.

26. *New trial—third trial.*

1. There is no question of civil right, that in ordinary course of the jurisdiction of this country may not go through three inquiries. 4 Ves. 207.

2. Verdict against verdict; a new trial denied. *Bradley v. Hind*, Dick. 20.

3. New trial refused, after two verdicts against deeds and a will for fraud. *Bates v. Graves*, 2 Ves. 287.

27. *New trial—fourth trial.*

1. Three trials frequent; and a fourth has been granted. 4 Ves. 206.

2. Two wills, originally duplicates, but one altered and cancelled; and a codicil without date. After three verdicts for the devisee, the lord chancellor, being satisfied with the result of the third trial, refused a fourth. *Pemberton v. Pemberton*, 13 Ves. 290.

28. *New trial—fifth trial.*

After three ejectments tried in Ireland, an issue was directed out of chancery between the same parties upon the same point. A new trial was afterwards granted upon appeal to the house of lords; and after that another ejectment was tried. *Lord Sherborne v. Naper*, 4 Ves. 206.

29. *New trial—application for, to what court made.*

1. When the court of chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined upon oath, the application for a new trial must be to the court of law; but it is otherwise with an issue. *Ex parte Kensington*, Cooper, 96.

2. In an issue, and in an action directed by the court, the practice varies. In the first, the motion for a new trial must be made to the court directing it; in the second, to that in which it is tried. Nor is this rule affected by any special provisions by which the direction of the action is accompanied. *Carstairs v. Stein*, 2 Rose, 178.

3. When a bill is retained, with liberty for the plaintiff to bring an action to establish his right, and there is a verdict against him, it not being to satisfy the conscience of the court, the party must apply to the court where it was tried, for a new trial. *Fowkes v. Chadd*, Dick. 576.

4. Issue directed at the rolls: a motion for a new trial may be made before the lord chancellor. *Pemberton v. Pemberton*, 11 Ves. 50.

5. When a motion for a new trial has been refused at the rolls, upon an issue directed by his honour; the lord chancellor will not, by way of appeal, entertain a similar application. *Bourke v. Rothwell*, 2 B. & B. 56.

30. *Summary of proceeding in case of an issue.*

Summary of the usual proceedings, on the direction of issues out of this court, to be tried at law, and on the return of the *postea*. *Askew v. Greenhow*, 2 Price, 314.

31. *Special case.*

1. His honour sitting for lord chancellor, may direct a case to the court of king's bench, though not when sitting at the rolls. *Horton v. Whitaker*, 2 B. C. C. 88.

2. The

4. Re-hearing on terms, after a decree *nisi* by default, made absolute. *Vowles v. Young*, 9 Ves. 172.

14. *On dismissal of bill for default of hearing.*

The plaintiff allowed to re-hear the cause when his bill had been dismissed for want of his appearing at the hearing. *Terran v. Waite*, Dick. 782.

15. *On dismissal of bill through solicitor's negligence.*

Bill dismissed, owing to the neglect of the plaintiff's solicitor, and the order of dismissal enrolled; the enrolment discharged, and the cause re-heard. *Robson v. Cranwell*, Dick. 61.

16. *After proceedings before the master.*

Decree *nisi* made absolute, and proceedings before the master; defendant to be at liberty to re-hear upon terms. *Fry v. Prosser*, Dick. 298.

17. *After decree by consent.*

After a decree by consent there cannot be a re-hearing, *comme semble*. *King v. Wightman*, Anst. 80.

18. *In spite of agreement to the contrary.*

The cause re-heard, notwithstanding the parties had entered into an agreement, which was made an order of court, not to re-hear the cause. *Bowker v. Hunter*, Dick. 611.

19. *A second time.*

1. Generally there can be only one re-hearing. 16 Ves. 214.

2. Petition of re-hearing, after an appeal from the *rolls*, dismissed. *East India Company v. Boddam*. 13 Ves. 421.

20. *Miscellaneous.*

After a decree, referring it to the master, to inquire whether an annuity had been properly enrolled, the master having reported against the enrolment, it was objected by the defendant (the annuitant) on a re-hearing, that the decree had been obtained after two several orders made in the court, in another cause, for payment of the annuity, and after a rule to show cause in favour of the annuity in the court of K. B. had been discharged. Held not a sufficient ground for setting aside the decree, the former cause in which those orders had been obtained not having been instituted for the purpose of setting aside the annuities, and this court having jurisdiction after the failure of an attempt to set aside the annuity at common law. *Angell v. Hadden*, 2 Mer. 164.

2. Bill of review.

1. *Limitation of in point of time.*

Though a bill of review cannot in general be brought to reverse a decree after twenty years, that does not apply to persons having contingent interests, and then not existing, or being under disabilities. *Lytton v. Lytton*, 4 B. C. C. 441.

2. *Deposit.*

Deposit on a supplemental bill in nature of a bill of revivor made *nunc pro tunc*. *Loubier v. Cross*, Dick. 223.

3. *Re-hearing of.*

Bill of review re-heard. *Neal v. Robinson*, Dick. 15.

3. Appeal to the house of lords.

1. *To what ends essential.*

The execution of a decree shall not be impeded so long as it remains unappealed. *Selby v. Selby*, Dick. 678.

2. *Grounds*

2. *Grounds of.*

1. No point ought to be insisted on upon appeal, that was not mentioned below. 2 Sch. & Lef. 690.
2. It is not a ground of appeal that an account was not directed, which was not prayed by the bill, nor asked for at the hearing below. *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 690.

3. *Subjects of.*

1. An appeal will not lie for costs only. *Wirdman v. Kent*, Dick. 594. (*Vide supra*, 1. 3.)
2. An appeal shall not lie for costs only. *Ibid.* 1 B. C. C. 140.
3. An appeal, or re-hearing for costs, only allowed under particular circumstances. *Cowper v. Scott*, 1 Eden, 17.; 1 B. C. C. 141.
4. An order for a cause to stand over, with liberty for the plaintiff to amend his bill by adding parties, is in its nature an order by consent, and therefore cannot be appealed from. If the plaintiff thinks there is no want of parties, he should let his bill be dismissed for this reason, and then appeal. *Beresford v. Adair*, 2 Cox, 156.

4. *Its effects.*

1. An appeal to the house of lords does not stay proceedings in the court below. *The Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. 316.
2. General rule, that an appeal does not stay proceedings without a special ground. The decree, being for the specific performance of a contract for purchase according to the answer, the execution only was suspended: the master to proceed to settle the conveyance, &c. *Gwynn v. Lethbridge*, 14 Ves. 585.
3. Order of the house of lords, that proceedings under a decree of a court of equity shall not be staid by an appeal, unless by special order upon application to the house or the court. *Huguenin v. Basely*, 15 Ves. 180.
4. Decree, generally, not staid by an appeal. Upon special application, if unsuccessful, with costs. *Waldo v. Cayley*, 16 Ves. 206.
5. Appeal, generally, does not stay proceedings under a decree. The costs upon application follow the judgment, if unfavourable. *Willan v. Willan*, *Ibid.* 216.
6. Execution of a decree not staid by an appeal without a special order. *Ibid.* 89.
7. Decree not suspended by an appeal without a special ground, the subject of discretion. A legacy therefore paid out of court upon security, notwithstanding an appeal. *Way v. Foy*, 18 Ves. 452.
8. A defendant may, notwithstanding an appeal, sue out a *subpoena* for costs. *Tyson v. Cox*, 3 Mad. 278.; *Dunster v. Mitford*, *Ibid.*

5. *Who entitled to appeal, or precluded from.*

1. Even creditors, not parties to the suit, but who came in under the decree, may appeal, or re-hear: so a person entitled in any way. 1 Sch. & Lef. 409.
2. An appeal lies at the suit of tenant in tail in remainder against a decree affecting his rights, had against a prior tenant in tail. And in case of abatement, such remainder-man may file a supplemental bill to make himself party to the former suit, for the purpose of appealing. *Giffard v. Host*, 1 Sch. & Lef. 386. 412.
3. *Quare*, whether, by consenting to an order consequential on a decree, the party so consenting precludes himself from the right of appeal. *Wood v. Griffiths*, 1 Mer. 35.

6. *Answer to petition for.*

Petition of appeal not being answered till the day after it has been presented,

sented, not to prejudice, the party being strictly entitled to have it answered immediately. *Robinson v. Newdick*, 3 Mer. 15.

7. *Signature of counsel.*

1. Abuse of the right of appeal prevented, not only by costs, but also by requiring the signature of counsel. 17 Ves. jun. 381.

2. Signature of counsel, on appeal to the house of lords, equivalent to the certificate on appeal to the lord chancellor. 18 Ves. jun. 453.

8. *Order of the house to print the case forthwith.*

Object and effect of the late order of the house of lords, requiring the parties to appeals to print their cases forthwith, applying generally to all appeals, to check the abuse of appealing merely for delay and vexation. *Ibid.*

9. *Dismissal of.*

Appeal dismissed by the house of lords, without going into the merits, being in the nature of an original hearing. *Dean v. Abel*, Dick. 287.

10. *Revival of, on its abating.*

When an appeal is abated in the house of lords, the order to revive is obtained of course; and there is no fresh summons. 5 Ves. 305.

4. *Enrolment of decrees.*

1. *To what ends essential.*

Enrolment of the decree not necessary to entitle the representative of a party to revive for costs. *Lowten v. Colchester*, 2 Mer. 115.

2. *Signature.*

1. In strict practice, the docket ought not to be presented until after the order to enrol *nunc pro tunc* has been obtained, and actually, passed and entered. *Robinson v. Newdick*, 3 Mer. 13.

2. Service on the clerk in court of a docket having been presented for signature is sufficient service. *Ibid.* 15.

3. *After a year.*

A decree may be enrolled without special order, though more than a year has elapsed since it was pronounced. *Tisdall v. Lady Charleville*, 2 Sch. & Lef. 392.

4. *On loss of original.*

Pleadings and a decree are lost; a paper writing dated 26th October 1684, ordered to be entered as the decree, and to be enrolled *nunc pro tunc*. *Jason v. Brewer*, Dick. 370.

5. *Decree ad computandum, omitting the answers.*

Decree *ad computandum* enrolled, some of the answers being omitted. *Holmden v. Tilly*, 1 Dick. 20.

6. *Caveat.*

Where a caveat has been entered against the enrolment of a decree, it stays the signing for twenty-eight days after notice given of the docket having been presented for signature; and the twenty-eight days are twenty-eight clear days. *Robinson v. Newdick*, 3 Mer. 13.

7. *Vacating or opening of.*

1. The court refused to vacate the enrolment of a decree dismissing the bill with costs by default: and afterwards, upon a new bill for the same purpose, granted a motion for time to answer till a month after payment of the costs of the other cause; adopting the practice at law. *Pickett v. Loggon*, 5 Ves. 702.

2. Motion to open the enrolment of a decree, and to stay proceeding under it, to give an opportunity of appeal, refused: the decree being made upon the

the merits: as at law a judgment by default is vacated on motion; not a judgment on the merits. *Charman v. Charman*, 16 Ves. 115.

#### 5. Execution of decrees.

##### 1. *Who may execute.*

Plaintiff coming in under a decree in a cause in which he is no party, in case the plaintiffs in the former cause delay prosecuting the suit, may prosecute the suit in their names, indemnifying them. *Torin v. Fowke*, Dick. 235.

##### 2. *Against a stranger.*

Writ of execution only in the case of a party. A stranger must be served, first with an order to pay the money by a given day, and in case of default, with another order to pay on another day, or stand committed. *Anon.* 14 Ves. 207.

##### 3. *Short execution.*

Reasons for granting a partial or short writ of execution of a decree. *Parkins v. Morris*, Dick. 689.

##### 4. *Suspension of.*

The court refused to suspend the execution of a decree obtained by a mortgagee, until six months after hearing an appeal; but gave six months on bringing the money into court, consenting to a receiver, and praying interests and costs, on plaintiffs undertaking to repay if the decree should be reversed. *Monkhouse v. Corporation of Bedford*, 17 Ves. jun. 380.

##### 5. *After twenty years.*

1. A decree, establishing a charge, carried into execution, though not proceeded on for forty years; there being an acknowledgment within twenty years of the subsistence of the charge. *Barrington v. O'Brien*, 1 B. & B. 173.

2. A decree, setting aside a sale, not carried into execution from the length of time that had elapsed, and from the change of circumstances by the rise in land, and proportionate depreciation of money. Therefore, a bill in 1799, to have the benefit of a decree pronounced in 1740, setting aside a sale in 1721, and directing accounts, the suit abating in 1741, by the death of the defendant, and in 1774, by the death of the plaintiff, dismissed. *Earl Egremont v. Hamilton*, 1 B. & B. 516.

##### 6. *Contempt.*

1. The practice of personal service, as a foundation for process of contempt, dispensed with, where the party must have notice; as upon a short order for execution of a decree. *Rider v. Kidder*, 12 Ves. 202.

2. A writ of execution of an order for payment of money was issued, and afterwards an attachment, upon which the defendant was taken, and he paid the money. A motion was then made for a reference to the master to tax the subsequent costs, and that the defendant might be ordered to pay such costs, but the motion refused. *Collins v. Crumpe*, 3 Mad. 390.

##### 7. *Confirming report in defendant's favour.*

A defendant may enforce a decree confirming a report in his favour. 1 B. & B. 217.

##### 8. *Writ of assistance.*

1. Course of proceeding to be observed, previous to an application for a writ of assistance. *Dove v. Dove*, Dick. 617.

2. Writ of assistance, when granted. *Ibid.* 1 Cox, 101.

3. After an order to the tenant in possession to deliver up the possession, service of a writ of execution of that order, attachment, and injunction personally served, and affidavit of the facts, a writ of assistance shall issue. *Ibid.* 1 B. C. C. 375.

##### 6. Open-

## 6. Opening and invalidating of, by other modes.

1. *Decree pro confesso.*

Decree *pro confesso* not opened without a strong ground: therefore not upon a general affidavit of derangement by the party himself; evidence more satisfactory, and extending to the whole period, being required. *Knight v. Young*, 2 Ves. & Beam. 184.

2. *By motion.*

1. A decree drawn up in a manner not warranted by the minutes on hearing, set aside, with costs, on motion. *Loftus v. Smith*, 2 Sch. & Lef. 642.

2. Decree by surprize; application to discharge it. *Price v. Solly*, Dick. 21.

3. Decretal order cannot be discharged upon motion, though made by consent, and surprize alleged. *Anon.* 1 Ves. 93.

4. A decree by default having been made absolute, the proper course, to set it aside, is by presenting a petition for a re-hearing. A motion to discharge the order to make absolute, and for a day to show cause, refused accordingly. *Attorney-general v. Brooke*, 3 Mer. 698.

3. *By petition.*

1. Decree, though obtained by fraud, shall not be set aside on petition. *Musiel v. Morgan*, 3 B. C. C. 74.

2. Irregular to set aside a decree upon petition to the court, assigning errors in the decree. *Bennet v. Hamill*, 2 Sch. & Lef. 566. 574.

4. *On new person or interest being brought before the court.*

Where a new person or interest is brought before the court, it is open to the parties to make any objection to the decree, which they might have made at the first hearing. *Hill v. Chapman*, 3 B. C. C. 391.

5. *By new plaintiff by supplemental bill.*

New plaintiff by supplemental bill may impeach a decree upon re-hearing, on petition of former parties. *Hill v. Chapman*, 1 Ves. 405.

6. *In a collateral cause.*

1. A decree cannot be impeached collaterally in another cause. *Lord Clinton v. Lord Robert Seymour*, 4 Ves. 440.

2. A decree, taken *pro confesso*, in the ordinary course, after appearance, not under the statute 5 Geo. 2. c. 25. can be impeached, as any other decree, only directly, by a bill of review, or a bill to set it aside for fraud; not collaterally, by an original suit, seeking a decree inconsistent with it. Such a bill therefore dismissed, with costs. *Ogilvie v. Herne*, 13 Ves. 563.

7. *By plea of fraud.*

A decree obtained by fraud and imposition shall have no effect. *Kennedy v. Daly*, 1 Sch. & Lef. 355. 375.

8. *By another suit for the same cause.*

Practice, after a decision by one court, instead of re-hearing or appealing, to institute a suit in another court for the same object, disapproved. *Reynolds v. Pitt*, 19 Ves. 134.

## 7. Court of delegates.

1. *Preliminaries to the appointment of.*

Upon an application for a commission of delegates, the chancellor will not decide whether the appeal be in time, but will leave that question to the court of delegates. *Head v. Harris*, 2 Sch. & Lef. 563.

## 8. Commission of review.

1. *When granted.*

1. Grounds of granting a commission of review. 8 Ves. 465.

2. A different conclusion of fact upon the evidence, not a sufficient ground for the extraordinary relief of a commission of review. 8 Ves. 471.

3. The prerogative of granting a commission of review is to be exercised upon the peculiar circumstances, and the importance of the case. In this instance, a sentence of the court of delegates setting aside a will, the report of the lord chancellor was against the application: his lordship concurring upon the evidence, that the will was obtained, or an alteration prevented, by undue influence; and there being no question of law. Upon this proceeding no costs are given. *Ex parte Fearon*, 5 Ves. 633.

4. Application for a commission of review to re-hear a sentence of the prerogative court, upon a will affirmed by the delegates, referred to the lord chancellor; who certified against granting the commission, on the ground, that the case did not furnish any such doubt with reference to the facts, or to important points of law, as made it expedient to grant the commission; which is prayed of the grace and benignity of the crown, regulated by sound discretion, usually withholding it upon grounds of public expediency, unless there are very cogent reasons for believing that the sentence is founded on error in fact or in law; or, unless the doctrines of law, upon which it is supposed to be founded, are so questionable and important as to make it clearly fit that they should be considered in the most solemn manner. *Eagleton and Coventry v. Kingston*, Ves. 438.

#### 2. *On the sentence of the court of delegates.*

1. Commission of review granted upon a sentence of the court of delegates, affirming a sentence of the prerogative court establishing a will. *Matthews v. Warner*, 5 Ves. 186.

2. Commission of review in Ireland, upon a sentence of the court of delegates, affirming a sentence of the prerogative court. *Goodwin v. Giesler*, *Ibid.* 211.

3. Upon a commission of review, the sentences of the court of delegates and of the prerogative court, establishing a testamentary paper as the will, were reversed. *Matthews v. Warner*, 5 Ves. 23.

#### 3. *Form of.*

Whether a commission of review can be granted with a clause admitting a new plea and new proofs, *quære*. At least the memorial ought to contain allegations, and a special prayer. 8 Ves. 466.

#### 9. Commission of escheat.

##### *Traverse of.*

Order upon petition for leave to traverse an inquisition, upon a commission of escheat, found in favour of the crown. *Ex parte Webber*, 6 Ves. 809.

### XI. Costs.

#### 1. Are in the discretion of the court.

1. Costs are in the discretion of the court. *Bennet v. College*, 3 B. C. C. 390.

2. There is no general rule as to costs; the court must be governed by circumstances. 1 Ball & Beatty, 435.

3. Costs do not follow the event of the suit, where a fair question is raised. *Staines v. Morris*. 1 Ves. & Beam. 8.

3. The court looks at the answer upon a question of costs. *Vancouver v. Bliss*. 11 Ves. 458.

#### 2. Security for.

##### 1. *General rule.*

Security for costs from plaintiff, when required. 1 Ball & Beatty, 566. n.

##### 2. *From*

2. *From plaintiff resident abroad.*

1. To obtain security for costs, it must appear the plaintiff is resident abroad. *Green v. Charnock*, 3 B. C. C. 371.

2. To entitle defendant to security for costs, it is not sufficient that plaintiff appears by the bill to be out of the jurisdiction: he must appear to be resident abroad; then it is of course. *Green v. Charnock*, 1 Ves. 396.

3. The simple fact, that the plaintiff is gone abroad, is not a sufficient ground to compel him to give security for costs. *Hoby v. Hitchcock*, 5 Ves. 699.

4. Plaintiff is not compellable to give security for costs unless he states himself, or it be sworn, that he is resident abroad, or going to reside abroad. *Green v. Charnock*, 2 Cox, 284.

5. Security for costs by plaintiff gone abroad refused, after answer on affidavit of his intention to return; and his family remaining in this country. *White v. Greathead*, 15 Ves. 2.

6. Motion that the plaintiff (in equity) should give security for costs, on affidavit that he was about to leave the kingdom, refused. *Adams v. Colethurst*, 2 Anst. 552.

7. Plaintiff consul abroad, not to give security for costs. *Colebrook v. Jones*, Dick. 154.

8. The master ordered to settle what security the plaintiff, a foreign merchant, was to give to answer costs. *Odwyer v. Salvador*, Dick. 372.

3. *Where one of the plaintiffs reside in England.*

1. Security not given for costs where one of the plaintiffs lives in England. *Winthorp v. Royal Exchange Assurance*, Dick. 282.

2. No order, that a plaintiff residing abroad shall give security for costs, where there are co-plaintiffs residing in England. *Walker v. Easterby*, 6 Ves. 612.

4. *From one under the protection of a foreign ambassador.*

The plaintiff, under the protection of a foreign ambassador, ordered to give security to answer costs. *Adderly v. Smith*, Dick. 355.

5. *From plaintiff made a bankrupt.*

A plaintiff (in equity) becoming bankrupt, will not be compelled to give security for costs. *Anon.* 2 Anst. 407.

6. *From insolvent plaintiff residing elsewhere than described in the bill.*

An insolvent plaintiff, not residing where he is described by the bill, will be compelled by the court to give a note of his residence, or security for costs. *James v. Gilladam*, 2 Anst. 552.

7. *After steps taken by defendant.*

1. At law, if the defendant has taken any step, he cannot have security for costs. 10 Ves. 287.

2. If the plaintiff states in the bill that he lives abroad, and the defendant obtains an order for time to answer, the court will not order the plaintiff to give security to answer costs. *Migliorucci v. Migliorucci*, Dick. 147.

3. Defendant after an order for time cannot have security for costs from a plaintiff, living out of the jurisdiction. *Anon.* 10 Ves. 287.

4. Security for costs refused, an answer being (owing to mistake) filed after the defendant knew that the plaintiff has gone abroad. *Dyott v. Dyott*, 1 Mad. 107.

5. A plaintiff resident in England was ordered to give security for costs after appearance, but before answer. *Stackpoole v. O'Callaghan*, 1 B. & B. 566.

6. Application that the plaintiff living in Ireland should give security for costs, must be before answer. *Craig v. Bolton*, 2 B. C. C. 609.



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2. Writ of assistance, when granted. *Ibid.* 1 Cox, 101.

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## 6. Opening and invalidating of, by other modes.

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Decree *pro confesso* not opened without a strong ground: therefore not upon a general affidavit of derangement by the party himself; evidence more satisfactory, and extending to the whole period, being required. *Knight v. Young*, 2 Ves. & Beam. 184.

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1. A decree drawn up in a manner not warranted by the minutes on hearing, set aside, with costs, on motion. *Loftus v. Smith*, 2 Sch. & Lef. 642.

2. Decree by surprise; application to discharge it. *Price v. Solly*, Dick. 21.

3. Decretal order cannot be discharged upon motion, though made by consent, and surprise alleged. *Anon.* 1 Ves. 93.

4. A decree by default having been made absolute, the proper course, to set it aside, is by presenting a petition for a re-hearing. A motion to discharge the order to make absolute, and for a day to show cause, refused accordingly. *Attorney-general v. Brooke*, 3 Mer. 698.

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## 7. Court of delegates.

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Upon an application for a commission of delegates, the chancellor will not decide whether the appeal be in time, but will leave that question to the court of delegates. *Head v. Harris*, 2 Sch. & Lef. 563.

## 8. Commission of review.

1. *When granted.*

1. Grounds of granting a commission of review. 8 Ves. 465.

2. A

2. Proceedings stayed until payment of costs of a former suit, by the same party, in *forma pauperis*, only upon great vexation. 2 Ves. & Beam. 112.

3. The practice at law, which in its general application is confined to ejectment and the action for mesne profits, to stay proceedings until payment of the costs of a former action between the same parties, which has been followed in equity, even where the former suit was in another court of equity for the same matter, not applied to a former suit at law, an ejectment by the heir, and a suit in the spiritual court by some of the next of kin, disputing as paupers, a will on the ground of incapacity; the plaintiff in equity being another of the next of kin. *Wild v. Hobson*, *Ibid.* 105.

4. The plaintiff filed a bill in chancery and dismissed it after answer; he then filed another bill in the exchequer for the same matters: the court stopped his proceeding till the costs in chancery were paid. *Baldwyn v. Malo*, 3 Anst. 835.

7. *By restoring bill after a regular dismissal.*

A bill which has been regularly dismissed will not be restored for the mere purpose of agitating the question of costs. *Hannam v. South London Waterworks*, 2 Mer. 63.

8. *By sale of estate out of which they were decreed.*

Costs directed to be paid out of an estate vested in defendant, who refusing to pay them, sufficient of the estate was ordered to be sold for payment. *Cannon v. Beely*, Dick. 115.

9. *Against one of two parties liable.*

Under a joint order for costs, one party absconded; and was never served. A proceeding against the other good. *Ex parte Bishop*, 8 Ves. 333.

10. *Against one made plaintiff against his consent.*

Although the name of one of the plaintiffs was made use of without his authority, yet he must remain liable to the costs of the suit, and must recover from the solicitor any expence he may be put to on that account. *Dundas v. Dutens*, 2 Cox, 235.

11. *After decree passed.*

After a decree passed, the court will not, on a petition, give the costs of the suit to a defendant, although a mere trustee, and as such entitled to them, if asked for on the hearing. *Colman v. Sarell*, Cox, 206.

12. *Payment of postponed.*

Costs given; and the fund being in court, ordered to remain till the account; the costs to come out of the balance, if any due to the party, as far as it would go. 1 Ves. 221.

8. Refunding of.

Demurrer overruled; on re-argument allowed; plaintiff ordered to refund the costs he had received. *Oats v. Chapman*, Dick. 148.

9. Discharge from.

1. *On discovering a mistake after decree.*

Bill to redeem; decree, referring it to the master to take the account, and to take costs, &c. The report finds the mortgagee over-paid; it is too late to object to his having his costs. *Gilbert v. Golding*, 2 Anst. 442.

2. *By acceptance of answer.*

By accepting the answer, the immediate right to costs, under the process of contempt, waived. *Smith v. Blofield*, 2 Ves. & Beam. 100.

3. *By*

2. *From plaintiff resident abroad.*

1. To obtain security for costs, it must appear the plaintiff is resident abroad. *Green v. Charnock*, 3 B. C. C. 371.

2. To entitle defendant to security for costs, it is not sufficient that plaintiff appears by the bill to be out of the jurisdiction: he must appear to be resident abroad; then it is of course. *Green v. Charnock*, 1 Ves. 396.

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1. Security not given for costs where one of the plaintiffs lives in England. *Winthrop v. Royal Exchange Assurance*, Dick. 282.

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5. A plaintiff resident in England was ordered to give security for costs after appearance, but before answer. *Stackpoole v. O'Callaghan*, 1 B. & B. 566.

6. Application that the plaintiff living in Ireland should give security for costs, must be before answer. *Craig v. Bolton*, 2 B. C. C. 609.

2. Proceedings stayed until payment of costs of a former suit, by the same party, in *forma pauperis*, only upon great vexation. 2 Ves. & Beam. 112.

3. The practice at law, which in its general application is confined to ejectment and the action for mesne profits, to stay proceedings until payment of the costs of a former action between the same parties, which has been followed in equity, even where the former suit was in another court of equity for the same matter, not applied to a former suit at law, an ejectment by the heir, and a suit in the spiritual court by some of the next of kin, disputing as paupers, a will on the ground of incapacity; the plaintiff in equity being another of the next of kin. *Wild v. Hobson*, *Ibid.* 105.

4. The plaintiff filed a bill in chancery and dismissed it after answer; he then filed another bill in the exchequer for the same matters: the court stopped his proceeding till the costs in chancery were paid. *Baldwyn v. Malo*, 3 Anst. 835.

7. *By restoring bill after a regular dismissal.*

A bill which has been regularly dismissed will not be restored for the mere purpose of agitating the question of costs. *Hannam v. South London Waterworks*, 2 Mer. 63.

8. *By sale of estate out of which they were decreed.*

Costs directed to be paid out of an estate vested in defendant, who refusing to pay them, sufficient of the estate was ordered to be sold for payment. *Cannon v. Beely*, *Dick.* 115.

9. *Against one of two parties liable.*

Under a joint order for costs, one party absconded; and was never served. A proceeding against the other good. *Ex parte Bishop*, 8 Ves. 333.

10. *Against one made plaintiff against his consent.*

Although the name of one of the plaintiffs was made use of without his authority, yet he must remain liable to the costs of the suit, and must recover from the solicitor any expence he may be put to on that account. *Dundas v. Dutens*, 2 Cox, 235.

11. *After decree passed.*

After a decree passed, the court will not, on a petition, give the costs of the suit to a defendant, although a mere trustee, and as such entitled to them, if asked for on the hearing. *Colman v. Sarell*, *Cox*, 206.

12. *Payment of postponed.*

Costs given; and the fund being in court, ordered to remain till the account; the costs to come out of the balance, if any due to the party, as far as it would go. 1 Ves. 221.

8. Refunding of.

Demurrer overruled; on re-argument allowed; plaintiff ordered to refund the costs he had received. *Oats v. Chapman*, *Dick.* 148.

9. Discharge from.

1. *On discovering a mistake after decree.*

Bill to redeem; decree, referring it to the master to take the account, and to take costs, &c. The report finds the mortgagee over-paid; it is too late to object to his having his costs. *Gilbert v. Golding*, 2 Anst. 442.

2. *By acceptance of answer.*

By accepting the answer, the immediate right to costs, under the process of contempt, waived. *Smith v. Blofield*, 2 Ves. & Beam. 100.

3. *By*

3. *By excepting to answer.*

When defendant is in custody for a contempt for not putting in an answer, and he puts in an answer, to which the plaintiff excepts, he cannot recover his costs under the process of contempt; and it seems he loses them. *Const v. Ebers*, 1 Mad. 530.

4. *By act of indemnity.*

Costs for scandal in a bill taxed at 100*l.*, reduced on exceptions to 50*l.*; an act of indemnity held not to exempt the plaintiff from paying them. *Emmerson v. Dallison*, Dick. 7.; 1 Carey, 194.

5. *On the ground of previous insolvency.*

Plaintiff not relieved from costs decreed against him, on the ground of his being insolvent before the cause was heard. *Smith v. Fry*, Dick. 288.

10. *Set-off.*1. *Of reciprocal costs in the same cause.*

When different demands arise in a cause, the costs should be arranged as the equities between the parties require. *Shine v. Gough*, 2 B. & P. 34.

2. *Of reciprocal costs at law and in equity.*

1. Costs, at law, and in equity, between the same parties, set-off, after decree omitting such a provision. *Shine v. Gough*, Ibid. 33.

2. Where there are costs in equity and at law, due from the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter. *Smith v. Brocklesby*, 1 Anst. 61.

3. A bill was dismissed, with costs, against one of the defendants. At that time, the plaintiff had recovered a verdict at law, and entered up judgment against the defendant for a much larger sum, and he now applied that these costs might be deducted out of the money due on this judgment, on affidavit of the insolvency of the defendant; but the court refused to make any order. *Holworthy v. Mortlock*, Cox, 202.

11. *Against defendants contesting the mode of taking accounts.*

Where a defendant or creditor contests the mode of taking accounts, and fails, knowing a balance to be against him, he is liable to pay costs. 1 B. & B. 435.

12. *To agents, receivers, and trustees, accounting fairly.*

Costs, of course, out of the fund, to agents, receivers, and trustees, who have accounted fairly, and paid money into court. 1 Ves. 246.

13. *Of amended bill.*

1. Three pounds additional costs for long amendments of a bill. *Rowe v. Stuart*, Dick. 58.

2. The plaintiff ordered to pay the defendant 7*l.* extra the 20*s.* for the length of the amendment. *Freke v. Culpepper*, Ibid. 284.

3. Plaintiff amended his bill three times on payment of 20*s.* costs, and obtained a fourth order for that purpose. The amendments being frivolous, the court gave the defendant taxed costs of the former amendment. *Bennet v. Green*, 1 Cox, 253.

4. The cause, at hearing, went off for want of parties, with liberty for the plaintiff to amend; the plaintiff, under the order, struck out many charges in the bill which the defendant had answered; ordered, on application, to be restored, that the court might give the defendant the costs of such part of the bill as the plaintiff had waived. *Bullock v. Perkins*, Dick. 110.

## 14. Of long answer.

5l. costs ordered to be paid for the length of an answer. *Dent v. Wardell*, Dick. 339.

## 15. Of answer held insufficient upon exceptions to report.

Costs of an answer reported sufficient, which, on exceptions to the report, is held insufficient. *Knightly v. Deacon*, Dick. 82.

## 16. Of insufficient answer.

The costs of insufficient answers are provided for by a general rule. *Const. v. Ebers*, 1 Mad. 530.

## 17. Of answer referred as, but reported not, impertinent.

Answer being referred for impertinence and reported not impertinent, order, upon motion of course, to refer it to the master to tax the defendant's costs. *Tyrrell v. Redifer*, 1 Mer. 132.

## 18. On a voluntary appearance.

Costs allowed to a defendant who appeared voluntarily. *Bowhee v. Grills*, Dick. 38.

## 19. Apportionment of, between parties whose claims have entailed different degrees of expense.

Where several parties are entitled to share in a fund, and the shares of some are encumbered so as to render inquiries or other proceedings necessary with respect to them which are not wanted as to the others, the costs will be apportioned. *Basevi v. Serra*, 3 Mer. 676.

## 20. Against an arbitrator combining.

Arbitrator combining shall pay costs, 2 Ves. 453.

## 21. To bank of England made parties for security of legacy.

The costs of the bank, paid out of the capital of a legacy, for the security of which they were made parties. *Hammond v. Neame*, Swanst. 38.

## 22. To bank of England resisting a transfer of stock.

Specific bequest of stock to the executrix for life, and after her death, to her daughter absolutely at twenty-one. The bank, resisting a transfer, according to an agreement to relinquish the life-interest, without the direction of the court, are entitled to costs. *Austin v. the bank of England*, 8 Ves. 522.

## 23. Against bank of England resisting a transfer of stock.

A. by will bequeathed 200l. long annuities to B. for life, and after his death to C. absolutely, and made B. sole executor. Afterwards C. sold his reversionary interest to B., and B. and C. joined in a power of attorney for the transfer of the stock to B.; but the bank refused to permit the transfer. B. and C. then filed a bill, praying that the bank might be decreed to permit the transfer to be made, and might pay the costs of the suit. But the court would not give plaintiffs their costs. *Pearson v. Bank of England*, 2 Cox, 175.

## 24. To bank of England made parties unnecessarily, from 39 &amp; 40 Geo. 3.

If the bank of England are unnecessarily made parties to a suit, the relief against them being obtained under the statute 39 & 40 Geo. 3. the bill will be dismissed against them with costs, to be personally paid by the plaintiffs. *Edridge v. Edridge*, 3 Mad. 336.

## 25. In the case of a fraudulent bankruptcy.

Costs as between attorney and client, against parties to a fraudulent bankruptcy,

bankruptcy, except those who discovered and gave evidence; and the attorney deprived of the office of master-extraordinary, and committed. *Ex parte Thorp*, 1 Ves. 394.

26. On application to put creditor in bankruptcy to election.

No costs on application to put party to election, proceed at law, or come in under a commission of bankruptcy. 2 Ves. 11.

27. To commissioners in bankruptcy unnecessarily made parties to petition.

Costs to commissioners in bankruptcy, made parties to a petition without sufficient grounds, viz. for refusing to admit the affidavit of an absent creditor, proceeding at law; not permitting the examination of petitioning creditor by a person who had not proved a debt; and admitting the full proof of a creditor, claiming a lien on papers in his hands, as agent in town for the bankrupt, an attorney. *Ex parte Steele*, 16 Ves. 161.

28. Awarded in bankruptcy, remedy for.

The persons to whom costs were awarded in the matter of a bankrupt, brought an action at law, founded on a written undertaking to pay these costs, recovered judgment, and levied the money. The court ordered satisfaction to be acknowledged on the judgment, that the money should be refunded, and costs paid to the defendant at law, with the costs of this application. *In re Dillon*, 2 Sch. & Lef. 110.

29. On opening biddings.

1. A person, who by opening the biddings has occasioned a re-sale at a considerable advance, though not himself the purchaser, is not entitled to costs. *Rigby v. M'Namara*, 6 Ves. 466.

2. A person, who opened biddings, but was not the purchaser, the estate upon the re-sale going considerably higher, cannot on that ground have his costs. *Earl of Macclesfield v. Blake*, 8 Ves. 214.

3. A re-sale on opening biddings, producing a considerable increase of price, no ground for costs to the person who opened the biddings. *Trefusis v. Clinton*, 1 Ves. & Beam. 361.

4. A person who opened biddings, but was not the purchaser, allowed his costs on the special circumstances; having opened them not on his own account, but for the benefit of the family. *Owen v. Foulks*, 9 Ves. 348.

5. A person, who opened biddings, not being the purchaser, allowed his expences on the circumstances, against the general rule; having interposed at the instance and for the benefit of the family. *West v. Vincent*, 12 Ves. 6.

30. On a caveat.

No costs where the caveat was not unreasonable. *Ex parte Fox*, 1 Ves. & Beam. 67.

31. In charity causes.

In an information for a charity, where there are any directions to be given for a charity, the relator shall not pay costs. *The Attorney-general v. Bolton*, 3 Anst. 820.

32. To a college.

Cannot be given to a college individually, nor as a corporation, unless proved so. 1 Ves. 246.

33. Against a creditor decreed to re-convey.

A creditor being decreed to re-convey, on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to the payment of money into court. *Lord Cranstoun v. Johnston*, 5 Ves. 277.



## 34. For proof under a creditor's bill.

Costs of proving a debt before the master, under the usual decree upon a creditor's bill, not allowed. *Abell v. Screech*, 10 Ves. 335.

## 35. Of a cross bill.

Cross bill, being for a mere legal title, dismissed with costs, though the original bill was dismissed. 1 Ves. 213.

## 36. Of a demurrer.

1. Demurrer filed, held on argument not good, and a demurrer at bar, good; the defendant is not to have costs. *Wood v. Thomson*, Dick. 510.

2. On demurrer to the whole bill being allowed, the bill shall be dismissed, and costs shall be taxed as upon a dismissal; except the costs upon the demurrer, which shall be allowed as heretofore. Sch. & Lef. 304.

3. Full costs may be given on the allowance on demurrer, though an application for the same is not made until three weeks after such allowance. *Wood v. Dyneley*, 1 Mad. 32.

4. The usual form of the order when full costs are given on the allowance of a demurrer. *Pilkington v. Wignall*, 2 Mad. 348.

5. A demurrer, set down for argument, being submitted to, and the bill amended, 5*l.* costs were allowed. *Anon.* 9 Ves. 221.

6. Demurrer of witness overruled, and he ordered to pay 5*l.* costs. *Wardel v. Dent*, Dick. 334.

## 37. Of a bill of discovery.

1. Plaintiff pays the costs upon a bill of discovery. 4 Ves. 742.

2. Plaintiff in a bill for discovery pays the costs. 15 Ves. 361.

3. The rule as to costs on bills of discovery, and the reason upon which it proceeds. *London Assurance Company v. Hankey*, 1 Anst. 9.

4. Rule, that plaintiff, on bill of discovery, shall pay costs in all cases, is too general; he ought only where he files a bill in the first instance, not where compelled to it by defendant's refusal. 1 Ves. 423.

5. Defendant to a bill of discovery is entitled to the costs of the discovery immediately on putting in a full answer; and his right to these costs is not waived by his subsequently accepting the costs of amendment, nor by his neglecting to serve the plaintiff with the order for costs of discovery until after he has himself been served with the order to amend. *Coventry v. Bentley*, 3 Mer. 677.

6. The proper time to move for costs of the discovery is after the commission returned. *Banbury v. —*, 9 Ves. 103.

7. The plaintiff, in a bill of discovery, must pay all the expences of the defendant, occasioned by resisting motions made in the cause of the plaintiff. *Noble v. Garland*, 1 Mad. 344.

8. If the defendant to a bill for discovery and a commission, examines in chief, instead of confining himself to cross-examination, he shall not have costs. 8 Ves. 70.

9. The bill praying discovery and a commission; the defendant cannot have the costs of discovery till the return of the commission. *Anon.* 8 Ves. 69.

10. Abatement by the marriage of a female plaintiff in a bill of discovery after answer; the defendant cannot have the costs. *Dodson v. Juda*, 10 Ves. 31.

## 38. On plaintiff dismissing his own bill.

1. Bill cannot be dismissed without costs on the plaintiff's motion, unless by consent at the bar. *Fidele v. Evans*, 1 B. C. C. 267.

2. Plaintiff cannot, on motion, dismiss his bill without costs, on the ground that the court would have decreed according to it, unless consent. *Anon.* 1 Ves. 140.

3. Plain-

3. Plaintiff can in no case dismiss his bill without costs; with costs it is of course; but after motion to dismiss without costs refused, consent is necessary. *Dixon v. Parks*, 1 Ves. 402.

4. Order made on the motion of the plaintiff to dismiss his bill without costs, the defendant having, by his own act, rendered the suit useless. *Knox v. Brown*, 1 Cox, 359.

5. Plaintiff permitted to dismiss his own bill without costs, the defendant having destroyed the subject of the suit, and absconding, unless defendant shall find security for costs. *Knox v. Brown*, 2 B. C. C. 136.

### 39. On dismissal of bill at hearing.

1. Bill dismissed with full costs, though the plaintiff had not replied, under an order of court by Lord Hardwicke for that purpose. *Mansel v. Bowles*, Dick. 646.

2. Bill may be dismissed with costs from the coming in of the answer, where that answer contains a good defence. *Hodgson v. Daud*, 3 B. C. C. 475.

3. Where a bill was dismissed to which the defendant might have demurred, but did not; held, that he was not entitled to costs. *Anon.* 3 Mad. 62. n.

4. The bill being dismissed, costs to the plaintiff on account of the difficulty and novelty of the case, refused. *Wykham v. Wykham*, 18 Ves. jun. 395.

5. To prevent litigation, a bill may be dismissed without costs, upon the plaintiff waiving any action at law; otherwise with costs. *Harnet v. Yeilding*, 2 Sch. & Lef. 549.

6. Bill dismissed on hearing the cause; with costs to be taxed as to one defendant, and the plaintiff to pay 100*l.* costs to the rest of the defendants. *Guest v. Harris*, Dick. 684.

40. Decree to one defendant on dismissal of bill, given over against the other.

Bill dismissed with costs as to one defendant; those costs given over against the others. 1 Ves. 426.

### 41. In a bill of dower.

1. On an assignment of dower by commissioners, the dowress shall have no costs, unless other questions are raised in which the party are litigious. *Lucas v. Calcraft*, 1 B. C. C. 194.

2. Though by analogy to law, costs do not follow a decree for dower merely, they were given upon vexatious resistance. *Worgdu v. Ryder*, 1 Ves. & Beam. 20.

### 42. In a writ of dower.

No costs to plaintiff in a writ of dower. 2 Ves. 128.

### 43. In bills to recover estates.

In all bills for the recovery of an estate, the question arises upon the construction of some instrument, and the parties litigate at the peril of costs. *Hampson v. Brandwood*, 1 Mad. 394.

### 44. Of insufficient examination to interrogatories.

The master reported that the plaintiff had put in an insufficient examination to interrogatories. Held, on motion, that defendant was entitled to a reference to tax the costs in respect of such insufficient examination. *Hubbard v. Hewlett*, 2 Mad. 469.

### 45. Of defendant's examination reported insufficient.

Costs of defendant's examination reported insufficient. *Lync v. Ably*, Dick. 143.

46. Of

## 46. Of exceptions.

1. Exceptant ordered to pay costs of frivolous exceptions. *Read v. Ward*, Dick. 110.

2. Exception overruled with costs. *Barnaby v. Griffin*, 3 Ves. 266.

3. As to excepting for costs. *Holbecke v. Sylvester*, 6 Ves. 417.

## 47. For an executor.

1. An executor who ought to have been plaintiff was made a defendant; he shall have his costs. *Blout v. Burrow*, 3 B. C. C. 90.

2. It is a settled rule, that the executors of an insolvent shall not have costs. 1 Sch. & Lef. 280.

## 48. Against an executor.

1. Costs of course against executors, who are decreed to pay interest on account of a breach of trust. *Seers v. Hind*, 1 Ves. 294.

2. Executor having put the next of kin to prove their relationship, shall pay the costs of so doing. *Lowson v. Copeland*, 2 B. C. C. 156.

## 49. A defendant fraudulently conducting himself, will be deprived of costs.

A defendant fraudulently conducting himself will be deprived of his costs in equity, though considered as mortgagee in possession. *Morony v. O'Dea, Ball & Beatty*, 109.

## 50. Upon a groundless imputation of fraud.

Costs upon a groundless imputation of fraud. *Mayor and Commonalty of Colchester v. Lowten*, 1 Ves. & Beam. 226.

## 51. For or against an heir in general.

1. Where an heir at law is defendant, he shall have his costs; but when he is plaintiff, and vexatious, he shall pay them. *Seal v. Brown-ton*, 3 B. C. C. 214.

2. Costs to trustees, but none for or against heir at law defendant, who raised a point and failed. 1 Ves. 205.

## 52. For an heir in a charity cause.

1. Where an heir is brought before the court in a charity cause, though it is determined that there is no resulting trust for him, he shall have his costs. *Attorney-general v. Haberdashers' Company & Tonna*, 4 B. C. C. 178.

2. In a charity cause, costs, as between attorney and client, to the heir, making no improper point. *Currie v. Pye*, 17 Ves. jun. 462.

## 53. For the heir of a mortgagee in a bill of foreclosure by devisee.

The devisee of a mortgagee filed his bill against the heir and executor of the mortgagor, for a foreclosure, and also made the heir of the mortgagee a party, in order to establish the will against him. The latter party cannot have his costs out of the estate. *Skipp v. Wyatt, Cox*, 353.

## 54. For an heir in a bill of revivor.

Bill against ancestor revived against heir, and dismissed. Heir not entitled to costs expended by ancestor. *Lloyd v. Powis*, Dick. 16.

## 55. To infant defendant, charged upon his own share.

Costs of the unsuccessful defence of an infant, charged, not upon the general fund, but upon his own share. *Earl of Oxford v. Churchill*, 3 Ves. & Beam. 59.

## 56. To an infant legatee.

Bill by a legatee very nearly of age to secure the legacy; the costs were given out of the estate. But that will not be done in future upon a bill to secure the legacy of an infant: as under the legacy act 36 Geo. 3. c. 61.

a. 32. the executor may pay the legacy into court, and the legatee, when of age, may petition for it. *Whopham v. Wingfield*, 4 Ves. 630.

57. To an infant trustee.

The necessary costs of an infant trustee, ordered to convey under the statute of queen Anne, allowed. *Ex parte Cant*. 10 Ves. 554.

58. To infant's *prochein amy*.

1. Bill on behalf of an infant dismissed with costs; the *prochein amy* allowed the costs he paid. *Tanner v. Ivie*, Dick. 168.

2. Bill by an infant dismissed with costs, upon a fact, which, though not known when the bill was filed, might with reasonable diligence have been known; the next friend not allowed the costs out of the infant's estate. *Pearce v. Pearce*, 9 Ves. 548.

59. Against infant defendant for a contempt.

Infant defendant pays no costs of a contempt. *Perkins v. Hamond*, Dick. 287.

60. Against infant's *prochein amy*.

1. Nothing short of a dishonest intention will be sufficient to fix a *prochein amy* personally with costs. No degree of mistake or misapprehension will be sufficient. *Whittaker v. Marljar, Cox*, 285.

2. The *prochein amy* of the plaintiff, an infant, ordered to pay the costs of an improper and unfounded application. *Buckton v. Buckton*, Dick. 794.

61. Of an injunction.

Where a defendant has not applied for an injunction in the first instance, it shall be without costs. *Hardcastle v. Chettel*, 4 B. C. C. 163.

62. Of an interpleader.

1. Plaintiff in an interpleading bill, if he conducts himself properly, shall have his costs from the defendant who succeeds, and such defendant shall have them over again from the defendant who fails in his claim, with his own costs. *Hendry v. Key*, Dick. 291.

2. Tenants filing bill of interpleader, and bringing rents into court, to be admitted to deduct their costs. *Aldrich v. Thompson*, 2 B. C. C. 149.

3. Upon a bill of interpleader, the defendant, who made it necessary, was ordered to pay all the costs; and the plaintiff has a lien for his costs upon the fund paid into court. *Aldridge v. Mesner*, 6 Ves. 418.

4. Costs as between the defendants to an interpleading bill. *Cowton v. Williams*, 9 Ves. 107.

5. The plaintiff, in a bill of interpleader, is not entitled, after replying to the answers, to move for his costs, but must set down the cause for hearing. *Jones v. Gilham, Cowp.* 49.

63. Of irregularity in proceedings.

Costs incurred by the irregularity of one party to the prejudice of another, to be paid by the author of such irregularity. *Scott v. Becher*, 4 Price, 346.

64. Of an issue tried.

1. When the material issue has been found for the party setting down the cause for further directions, he shall have the costs of the trial at law. *Blackbourne v. Gregson*, 1 B. C. C. 420.

2. Where there are several issues directed, some of which are found for the plaintiff, and some for the defendant, the parties will be allowed costs on the issues found in favour of each, and must pay them where the issues are found against him. *Prevost v. Benett*, 2 Price, 272.

3. On a bill to redeem, the mortgagee insisted that W. B. the heir at law stated in the bill to be dead, was alive. By the decree reference was made to

the merits: as at law a judgment by default is vacated on motion; not a judgment on the merits. *Charman v. Charman*, 16 Ves. 115.

#### 5. Execution of decrees.

##### 1. *Who may execute.*

Plaintiff coming in under a decree in a cause in which he is no party, in case the plaintiffs in the former cause delay prosecuting the suit, may prosecute the suit in their names, indemnifying them. *Torin v. Fowke*, Dick. 235.

##### 2. *Against a stranger.*

Writ of execution only in the case of a party. A stranger must be served, first with an order to pay the money by a given day, and in case of default, with another order to pay on another day, or stand committed. *Anon.* 14 Ves. 207.

##### 3. *Short execution.*

Reasons for granting a partial or short writ of execution of a decree. *Parkins v. Morris*, Dick. 689.

##### 4. *Suspension of.*

The court refused to suspend the execution of a decree obtained by a mortgagee, until six months after hearing an appeal; but gave six months on bringing the money into court, consenting to a receiver, and praying interests and costs, on plaintiffs undertaking to repay if the decree should be reversed. *Monkhouse v. Corporation of Bedford*, 17 Ves. jun. 380.

##### 5. *After twenty years.*

1. A decree, establishing a charge, carried into execution, though not proceeded on for forty years; there being an acknowledgment within twenty years of the subsistence of the charge. *Barrington v. O'Brien*, 1 B. & B. 173.

2. A decree, setting aside a sale, not carried into execution from the length of time that had elapsed, and from the change of circumstances by the rise in land, and proportionate depreciation of money. Therefore, a bill in 1799, to have the benefit of a decree pronounced in 1740, setting aside a sale in 1721, and directing accounts, the suit abating in 1741, by the death of the defendant, and in 1774, by the death of the plaintiff, dismissed. *Earl Egremont v. Hamilton*, 1 B. & B. 516.

#### 6. *Contempt.*

1. The practice of personal service, as a foundation for process of contempt, dispensed with, where the party must have notice; as upon a short order for execution of a decree. *Rider v. Kidder*, 12 Ves. 202.

2. A writ of execution of an order for payment of money was issued, and afterwards an attachment, upon which the defendant was taken, and he paid the money. A motion was then made for a reference to the master to tax the subsequent costs, and that the defendant might be ordered to pay such costs, but the motion refused. *Collins v. Crumpe*, 3 Mad. 390.

##### 7. *Confirming report in defendant's favour.*

A defendant may enforce a decree confirming a report in his favour. 1 B. & B. 217.

#### 8. *Writ of assistance.*

1. Course of proceeding to be observed, previous to an application for a writ of assistance. *Dove v. Dove*, Dick. 617.

2. Writ of assistance, when granted. *Ibid.* 1 Cox, 101.

3. After an order to the tenant in possession to deliver up the possession, service of a writ of execution of that order, attachment, and injunction personally served, and affidavit of the facts, a writ of assistance shall issue. *Ibid.* 1 B. C. C. 375.

6. Open-

## 6. Opening and invalidating of, by other modes.

1. *Decree pro confesso.*

Decree *pro confesso* not opened without a strong ground: therefore not upon a general affidavit of derangement by the party himself; evidence more satisfactory, and extending to the whole period, being required. *Knight v. Young*, 2 Ves. & Beam. 184.

2. *By motion.*

1. A decree drawn up in a manner not warranted by the minutes on hearing, set aside, with costs, on motion. *Loftus v. Smith*, 2 Sch. & Lef. 642.

2. Decree by surprise; application to discharge it. *Price v. Solly*, Dick. 21.

3. Decretal order cannot be discharged upon motion, though made by consent, and surprise alleged. *Anon.* 1 Ves. 93.

4. A decree by default having been made absolute, the proper course, to set it aside, is by presenting a petition for a re-hearing. A motion to discharge the order to make absolute, and for a day to show cause, refused accordingly. *Attorney-general v. Brooke*, 3 Mer. 698.

3. *By petition.*

1. Decree, though obtained by fraud, shall not be set aside on petition. *Mussel v. Morgan*, 3 B. C. C. 74.

2. Irregular to set aside a decree upon petition to the court, assigning errors in the decree. *Bennet v. Hamill*, 2 Sch. & Lef. 566. 574.

4. *On new person or interest being brought before the court.*

Where a new person or interest is brought before the court, it is open to the parties to make any objection to the decree, which they might have made at the first hearing. *Hill v. Chapman*, 3 B. C. C. 391.

5. *By new plaintiff by supplemental bill.*

New plaintiff by supplemental bill may impeach a decree upon re-hearing, on petition of former parties. *Hill v. Chapman*, 1 Ves. 405.

6. *In a collateral cause.*

1. A decree cannot be impeached collaterally in another cause. *Lord Clinton v. Lord Robert Seymour*, 4 Ves. 440.

2. A decree, taken *pro confesso*, in the ordinary course, after appearance, not under the statute 5 Geo. 2. c. 25. can be impeached, as any other decree, only directly, by a bill of review, or a bill to set it aside for fraud; not collaterally, by an original suit, seeking a decree inconsistent with it. Such a bill therefore dismissed, with costs. *Ogilvie v. Herne*, 13 Ves. 563.

7. *By plea of fraud.*

A decree obtained by fraud and imposition shall have no effect. *Kennedy v. Daly*, 1 Sch. & Lef. 355. 375.

8. *By another suit for the same cause.*

Practice, after a decision by one court, instead of re-hearing or appealing, to institute a suit in another court for the same object, disapproved. *Reynolds v. Pitt*, 19 Ves. 134.

## 7. Court of delegates.

1. *Preliminaries to the appointment of.*

Upon an application for a commission of delegates, the chancellor will not decide whether the appeal be in time, but will leave that question to the court of delegates. *Head v. Harris*, 2 Sch. & Lef. 563.

## 8. Commission of review.

1. *When granted.*

1. Grounds of granting a commission of review. 8 Ves. 465.

the merits: as at law a judgment by default is vacated on motion; not a judgment on the merits. *Charman v. Charman*, 16 Ves. 118.

#### 5. Execution of decrees.

##### 1. *Who may execute.*

Plaintiff coming in under a decree in a cause in which he is no party, in case the plaintiffs in the former cause delay prosecuting the suit, may prosecute the suit in their names, indemnifying them. *Torin v. Fowke*, Dick. 235.

##### 2. *Against a stranger.*

Writ of execution only in the case of a party. A stranger must be served, first with an order to pay the money by a given day, and in case of default, with another order to pay on another day, or stand committed. *Anon.* 14 Ves. 207.

##### 3. *Short execution.*

Reasons for granting a partial or short writ of execution of a decree. *Parkins v. Morris*, Dick. 689.

##### 4. *Suspension of.*

The court refused to suspend the execution of a decree obtained by a mortgagee, until six months after hearing an appeal; but gave six months on bringing the money into court, consenting to a receiver, and praying interests and costs, on plaintiffs undertaking to repay if the decree should be reversed. *Monkhouse v. Corporation of Bedford*, 17 Ves. jun. 380.

##### 5. *After twenty years.*

1. A decree, establishing a charge, carried into execution, though not proceeded on for forty years; there being an acknowledgment within twenty years of the subsistence of the charge. *Barrington v. O'Brien*, 1 B. & B. 173.

2. A decree, setting aside a sale, not carried into execution from the length of time that had elapsed, and from the change of circumstances by the rise in land, and proportionate depreciation of money. Therefore, a bill in 1799, to have the benefit of a decree pronounced in 1740, setting aside a sale in 1721, and directing accounts, the suit abating in 1741, by the death of the defendant, and in 1774, by the death of the plaintiff, dismissed. *Earl Egremont v. Hamilton*, 1 B. & B. 516.

#### 6. *Contempt.*

1. The practice of personal service, as a foundation for process of contempt, dispensed with, where the party must have notice; as upon a short order for execution of a decree. *Rider v. Kidder*, 12 Ves. 202.

2. A writ of execution of an order for payment of money was issued, and afterwards an attachment, upon which the defendant was taken, and he paid the money. A motion was then made for a reference to the master to tax the subsequent costs, and that the defendant might be ordered to pay such costs, but the motion refused. *Collins v. Crumpe*, 3 Mad. 390.

#### 7. *Confirming report in defendant's favour.*

A defendant may enforce a decree confirming a report in his favour. 1 B. & B. 217.

#### 8. *Writ of assistance.*

1. Course of proceeding to be observed, previous to an application for a writ of assistance. *Dove v. Dove*, Dick. 617.

2. Writ of assistance, when granted. *Ibid.* 1 Cox, 101.

3. After an order to the tenant in possession to deliver up the possession, service of a writ of execution of that order, attachment, and injunction personally served, and affidavit of the facts, a writ of assistance shall issue. *Ibid.* 1 B. C. C. 375.

6. Open-

## 6. Opening and invalidating of, by other modes.

1. *Decree pro confesso.*

Decree *pro confesso* not opened without a strong ground: therefore not upon a general affidavit of derangement by the party himself; evidence more satisfactory, and extending to the whole period, being required. *Knight v. Young*, 2 Ves. & Beam. 184.

2. *By motion.*

1. A decree drawn up in a manner not warranted by the minutes on hearing, set aside, with costs, on motion. *Loftus v. Smith*, 2 Sch. & Lef. 642.

2. Decree by surprize; application to discharge it. *Price v. Solly*, Dick. 21.

3. Decreeal order cannot be discharged upon motion, though made by consent, and surprize alleged. *Anon.* 1 Ves. 93.

4. A decree by default having been made absolute, the proper course, to set it aside, is by presenting a petition for a re-hearing. A motion to discharge the order to make absolute, and for a day to show cause, refused accordingly. *Attorney-general v. Brooke*, 3 Mer. 698.

3. *By petition.*

1. Decree, though obtained by fraud, shall not be set aside on petition. *Musel v. Morgan*, 3 B. C. C. 74.

2. Irregular to set aside a decree upon petition to the court, assigning errors in the decree. *Bennet v. Hamill*, 2 Sch. & Lef. 566. 574.

4. *On new person or interest being brought before the court.*

Where a new person or interest is brought before the court, it is open to the parties to make any objection to the decree, which they might have made at the first hearing. *Hill v. Chapman*, 3 B. C. C. 391.

5. *By new plaintiff by supplemental bill.*

New plaintiff by supplemental bill may impeach a decree upon re-hearing, on petition of former parties. *Hill v. Chapman*, 1 Ves. 405.

6. *In a collateral cause.*

1. A decree cannot be impeached collaterally in another cause. *Lord Clinton v. Lord Robert Seymour*, 4 Ves. 440.

2. A decree, taken *pro confesso*, in the ordinary course, after appearance, not under the statute 5 Geo. 2. c. 25. can be impeached, as any other decree, only directly, by a bill of review, or a bill to set it aside for fraud; not collaterally, by an original suit, seeking a decree inconsistent with it. Such a bill therefore dismissed, with costs. *Ogilvie v. Herne*, 13 Ves. 563.

7. *By plea of fraud.*

A decree obtained by fraud and imposition shall have no effect. *Kennedy v. Daly*, 1 Sch. & Lef. 355. 375.

8. *By another suit for the same cause.*

Practice, after a decision by one court, instead of re-hearing or appealing, to institute a suit in another court for the same object, disapproved. *Reynolds v. Pitt*, 19 Ves. 134.

## 7. Court of delegates.

1. *Preliminaries to the appointment of.*

Upon an application for a commission of delegates, the chancellor will not decide whether the appeal be in time, but will leave that question to the court of delegates. *Head v. Harris*, 2 Sch. & Lef. 563.

## 8. Commission of review.

1. *When granted.*

1. Grounds of granting a commission of review. 8 Ves. 465.

2. A



## 97. On re-hearing.

Undertaking upon a re-hearing, under a general order, to pay such costs as the court shall think proper. 11 Ves. 173.

## 98. On withdrawing replication.

Order to withdraw replication, on payment of 20s. costs, of course; the general order, 27th April 1748, giving a discretion to exceed 40s. costs, in case of dismissal on bill and answer. *Cowdell v. Tadlock*, 3 Ves. & Beam. 19.

## 99. Of report of regularity of proceedings, held otherwise on exceptions.

Costs of a report, certifying proceedings to be regular, which, on exceptions to the report, were held to be irregular. *Stevens v. Long*, Dick. 282.

## 100. On bill of review.

Costs, of course, upon a bill of review for error, where no error in the decree. *Bolger v. Mackell*, 5 Ves.

## 101. Of sales.

Charges of a sale to be taxed under the head of just allowances, not, of costs. *Crump v. Baker*, 18 Ves. jun. 285.

## • 102. Of scandal and impertinence.

Counsel and agent liable to costs for scandal and impertinence. 16 Ves. 234.

## 103. Of sequestration.

Where an order *nisi* for sequestration is obtained against a privileged person, he is not in contempt unless he neglects to obey an order *nisi*. *Smallbrook v. Lord Donegal*, 3 Anst. 647.

## 104. In a suit by a tenant for a renewal rendered doubtful by his conduct.

A tenant having by his conduct made his title to a renewal doubtful, and thereby rendered a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs. *Barrett v. Pearson*, 2 B. & B. 189.

## 105. Of perpetuating testimony.

1. A defendant to a bill to perpetuate testimony, there being no examination of witnesses, is entitled to the costs of answering. *Lecky v. Murray*, 1 B. & B. 391.

2. Costs of perpetuating the testimony of a will allowed to a purchaser. *Mackrell v. Hunt*, 2 Mad. 37.

3. Defendant to a bill to perpetuate testimony, entitled to his costs immediately after the commission executed, upon the allegation that he did not examine any witnesses. *Foulds v. Midgley*, 1 Ves. & Beam. 138.

## 106. In tithe causes.

1. Answer stating a tender of tithes before bill filed, but not proved, will not save costs. *Milnes v. Davison*, 3 Mad. 374.

2. Bill of a rector claiming tithe of seeds against a vicar, expressly endowed of small tithes generally, except hay, on the ground of perception against non-perception, dismissed with costs. *Dorman v. Curry*, 4 Price, 109.

3. Costs not allowed to land-occupiers failing in a defence of composition real to a rector's bill for tithes, for want of evidence of the existence of a grant, although it was proved that the money-payment had been paid to the rector from 150 years before the 10 Ann. (and consequently before the restraining statute) when the then rector first agreed with the parishioners to receive such payment in lieu of tithes. *Bennett v. Skeffington*, 4 Price, 143. But the landlords of such occupiers having been made defendants, they were allowed their costs. *Ibid*.

## 4. Where

4. Where a modus was ill laid for want of sufficient description of the lands alleged to be covered by it, costs were refused on an account being decreed for plaintiff. *Gillibrand v. Scotson*, 4 Price, 267.

#### 107. To a trustee.

1. A trustee is entitled to his costs unless he acts from motives of obstinacy and caprice. *Taylor v. Glanville*, 3 Mad. 176.

2. No costs to a trustee, whose neglect occasioned the suit. *O'Callaghan v. Cooper*, 5 Ves. 117.

3. Trustee not deprived of costs for slight misconduct, in respect of which he is charged with interest. *Sammes v. Rickman*, 2 Ves. 36.

4. Costs refused to a trustee setting up a trust different from what it really was; but general misconduct, &c. is not a sufficient ground. *Ball v. Montgomery*, 2 Ves. 192.

5. Costs to trustees and executors brought into court, though they made a claim and failed, if merely by way of submission. 1 Ves. 205.

6. Costs to trustees; but none for or against heir-at-law, defendant, who raised a point, and failed. 1 Ves. 205.

7. No costs to any party claiming under a contract not meritorious, even though recovered upon; not even to a trustee. 1 Ves. 55.<sup>a</sup>

8. Costs to defendant a mere trustee, by consignment of goods, as to plaintiff in bill of interpleader, not as between attorney and client, but according to the course of the court as between party and party. *Dunlop v. Hubbard*, 19 Ves. 205.

9. A trustee not appearing at the hearing of the cause, a decree was made against him, with liberty to shew cause against it. Under this order he set down the cause again, and prayed his costs, which were given to him on paying the costs of the day on the former hearing. *Norris v. Norris*, 1 Cox, 183.

10. Bill being dismissed without costs as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff; but left to their remedy against their principal: otherwise perhaps, if plaintiff had prevailed; because then those costs might have been given over against other defendants. *Brodie v. St. Paul*, 1 Ves. 326.

#### 108. Against a trustee.

1. Trustee ordered to pay costs on misconduct. *Dawson v. Parrot*, 3 B.C.C. 236.

2. A bill for a specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance; the court being of opinion that the trustee ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants, (although he had a decree against them), and recover over the whole costs from the defendant, the trustee. *Jones v. Lewis*, Cox, 199.

#### 109. In suits between vendor and vendee.

1. Vendor not making a title when bill filed, pays the costs up to the report of a good title. *Harford v. Purrier*, 1 Mad. 532.

2. Vendor not making a good title, ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*, Cooper, 40.

3. Costs to a purchaser: the vendor having established his title before the master, after contest, upon a different ground from that in the abstract delivered. *Fielder v. Higginson*, 3 Ves. & Beam. 142.

4. Decree for specific performance, without costs to the plaintiff, the vendor: the title, though established before the master, not being clear upon the abstract. — *v. Collinge*, 3 Ves. & Beam. 143.

5. In a suit, to be relieved against the purchaser of a contingency, in fact destroyed at the time of the bargain between the parties, though without

the knowledge of either, no costs given on either side. *Hitchcock v. Giddings*, 4 Price, 135.

6. Costs in equity in the discretion of the court, upon the circumstances: not following the event by a positive rule, as at law; though *prima facie* that is the course; and circumstances must be brought forward by the party who fails. In this instance, a bill by a vendor for a specific performance, the report being against the title, the bill was dismissed with costs, upon the circumstances; the purchaser having taken possession at the instance of the vendor, representing the title to be perfect; though possession taken, generally is of weight as to costs. *Vancouver v. Bliss*, 11 Ves. 458.

#### 110. In suits to establish or invalidate a will.

##### 1. General rules.

1. Where a suit is occasioned by a difficulty arising from the will of the testator, the costs are to be paid out of the general fund. *Pearson v. Pearson*, 1 Sch. & Lef. 12.

2. Where a testator expresses himself so ambiguously as to make a suit here necessary, the costs shall be paid out of his general assets. *Jolliffe v. East*, 3 B. C. C. 25.; *Bough v. Reed*, *Ibid.* 192.

##### 2. For or against the heir at law.

1. Costs, where the heir at law brings a bill to dispute a will; or a bill is brought against him to establish a will. *Blinkehorne v. Feast*, *Dick.* 153.

2. If an heir at law bring a bill to dispute a will, and the will is established, he shall pay costs at law, and in equity; otherwise, if he be a defendant. *Gough v. Boterel*, *Dick.* 386.

3. Heir at law, defendant, contesting the will, and failing, but establishing a claim as creditor, against the testator's estate, charged with the payment of his debts, is entitled to his costs. *Burne v. Breen*, 1 B. & B. 308.

4. Heir at law, defendant, desiring an issue upon a will, in which he failed, entitled to his costs in equity. No costs on either side as to the issue; ordered to pay costs of a groundless motion, for a new trial. *White v. Wilson*, 13 Ves. 87.

5. Heir at law files a bill to set aside a will, which upon an issue is established; ordered to pay costs in this court and at law; but on a bill by the devisee to establish the will, no costs given on either side. *Johnson v. Gardiner*, *Dick.* 313.

6. Bill by devisee against the heir at law to establish the will and execute the trusts, but praying nothing more; no account was directed, and the plaintiff ordered to pay defendant his costs. *Boson v. Boson*, *Dick.* 300.

##### 3. Miscellaneous.

A. made a will, giving his personal estate to his five infant children by his first wife. He afterwards married a second wife, by whom he had one child, who died soon after his birth. On the death of A. the executors attempted to prove the will, but were opposed by the widow, on the ground that the will was revoked by the second marriage. A deed was then executed, by which the wife agreed, on certain considerations, to permit the will to be proved. The widow having married a second husband, they filed their bill in this court to set aside the deed, as having been obtained by fraud or surprise, and to have the assets administered as in the case of an intestacy. The court directed the parties to proceed in the prerogative court, and reserved further directions. The prerogative court decided in favour of the will. The plaintiff appealed to the delegates, but afterwards agreed to abandon the appeal, on payment of 300*l.* This court then directed the accounts of the personal estate, &c. Notwithstanding the plaintiffs failed in setting aside the will, yet, as in any case, it was necessary that the accounts should be taken in this court, the plaintiffs had their costs out of the fund. *Thomson v. Shepherd*, 2 Cox, 161.

## 111. Of examination of witness abroad.

Commission for the examination of witnesses in Sweden; costs of the solicitor attending the execution of the commission, not allowed. *Hamond v. Wordsworth*, Dick. 381.

## XII. Miscellaneous doctrines relating either to practice in general, or to particular courts, persons, proceedings, or situations.

## 1. Proceedings in the petty bag.

1. *Demurrer*.

Demurrer in the petty bag made a *consilium*, and ordered to be argued and afterwards overruled. *Ballard v. Hobbs*, Dick. 333.

2. *Motion for new trial, where made*.

An action having been commenced on the petty bag side of the court of chancery, but tried in K. B., and application for a new trial, must be made in K. B. and not in the court of chancery. *Ex parte Barker*, 1 Cox, 418.

3. *Motion to discharge, for not charging in execution, where made*.

After verdict in an action in the petty bag, an application to discharge the defendant for not having been charged in execution within two terms, must be made to the king's bench; but the court, to remove any difficulty, made a collateral order. *Fraser v. Lloyd*, Cowper, 187.

## 2. Doctrines relating to practice in general.

1. *Usage, without an order, establishes a rule*.

The constant and undisturbed practice of the court is binding, as the law of the court, without positive order. *Brown v. Bruce*, 2 Mer. 1.

2. *And even supersedes an order*.

1. Effect of continued practice against an order of court. 1 Ves. & Beam. 327.

2. Repeated decisions forming a series of practice, may amount to the reversal of an order. 1 Ves. & Beam. 328.

## 3. Inflexibility of general rules.

General rule not broken through on account of inconvenience. 1 Ves. 324.

## 4. Relative to parties.

1. One man not bound by the defence of another. 1 Ves. 8.

2. Motion by defendants to a bill for a partnership account, for a production of the accounts before answer, refused. *Pickering v. Rigby*, 18 Ves. jun. 484.

## 5. Account.

1. *Reference to master before answer*.

Defendant to a bill for an account, cannot upon motion immediately after answer, have a reference to the master, by analogy to the case of a mortgage, by statute 7 Geo. 2. c. 20.; and the case of specific performance, according to the practice settled; though the reason of it is unquestionable. *Eldridge v. Porter*, 14 Ves. 339.

2. *Production of accounts before answer*.

Motion by defendants to a bill for a partnership account, for a production of the accounts before answer, refused. *Pickering v. Rigby*, 18 Ves. 484.

3. *Opening of, surcharging, and falsifying*.

To a bill for an account, a settled account was suggested by the answer, but not proved. Liberty given to surcharge and falsify, if the master should find any settled account. *Kinsman v. Barker*, 14 Ves. 579.

#### 4. *Subjects of — illegal items.*

Contract to be jointly concerned in ship insurances is void by stat. 6 Geo. 1 c. 18. s. 12. though the policies are subscribed by the underwriters in their separate names; but though the contract could not be executed, the court would not exclude the result of it in decreeing a general account. *Watts v. Brooks*, 3 Ves. 612.

#### 6. Interlocutory applications in miscellaneous cases.

##### *Amendment of submission bond.*

Application to amend mistake in a bond of submission, an order of court to an award. *Ex parte Ross*, Dick. 133.

#### 7. Privilege from arrest or detainer.

##### 1. *Ambassador's servant.*

Arresting the servant of a foreign minister, though not lodging in his house, held to be a breach of privilege within the 7 Ann. *In re Count Haslang*. Dick. 274.

##### 2. *Bankrupt during his examination.*

1. The privilege of a bankrupt from arrests during his examination extends to an attachment for not paying money under an award, made a rule of court. *Ex parte Parker*, 3 Ves. 554.

2. A bankrupt's privilege from arrest extends to the end of the 42d day. Ordered that the plaintiff in the action should discharge him; and the officer having acted without instructions, was ordered to pay the costs. *Ex parte Donlevy*. 7 Ves. 317.

3. Whether a deviation by a bankrupt, returning from examination, for the purpose of leaving his books at the house of the assignee, will deprive him of his privilege, *quære*. Ibid.

4. Though the form of the process be criminal, yet if it issue to compel payment of a debt, it is an arrest under the stat. 11 & 12 Geo. 3. c. 8. s. 28. 1 Sch. & Lef. 169.

##### 3. *Bankrupt, attending commissioners, independent of the statute.*

Bankrupt's privilege from arrest in attending the commissioners, independent of the stat. 5 Geo. 2. 7 Ves. 314.

##### 4. *Creditor attending bankrupt commissioners.*

A person arrested on his return from proving a debt under a commission, discharged, and ordered to be paid the costs of the application. *Ex parte Bryant*, 1 Mad. 49.

##### 5. *Suitor attending the cause.*

1. Party attending his own suit privileged from arrest. 7 Ves. 314.

2. Plaintiff in his return from attending a motion against him in the cause, was arrested, and a detainer lodged against him in another action; he was discharged from both; the court examined the parties personally, not by affidavit. *Bromley v. Holland*, 5 Ves. 2.

3. Order, that the plaintiffs in an action and detainers discharge the defendant, arrested when returning home from his examination before the master. Though necessary deviations are allowed, the question always is upon the *bond fides*; especially where the examination is not finished. *Sidgier v. Birch*, 9 Ves. 69.

4. A defendant who had been attending with his solicitor a warrant before the master to produce papers, and was arrested on leaving the master's office, discharged from the arrest. *Franklyn v. Colquhoun*, 1 Mad. 580.

##### 6. *Solicitor attending the cause.*

1. Solicitor arrested in his return from attending the master, discharged in

in the original action and subsequent detainers. The proper course, is an order upon all the plaintiffs to discharge him. *Ex parte Ledwich*, 8 Ves. 598.

2. A solicitor, arrested upon his return direct from attending his client's business in Lincoln's Inn hall to his own house, without delay or deviation, discharged upon examination *viva voce* of him and the officer, taken, and the oath administered, personally by the lord chancellor, sitting in bankruptcy; the register, therefore, not present. *Gascoyne's case*, 14 Ves. 183.

3. A solicitor, arrested on his way from his residence to Lincoln's Inn hall, without deviation, for the purpose of attending a bankrupt petition, as solicitor, discharged on personal examination by the lord chancellor; the oath administered by the register; but to be entitled in the bankruptcy. *Castle's case*, 16 Ves. 412.

#### 7. *Party attending an arbitration.*

1. Arresting a party going to attend, or returning from attending, an arbitration, and being summoned for the purpose, held a breach of privilege, and he was ordered to be discharged. *Moore v. Aylet*, Dick. 780.

2. A party attending an arbitrator under an order of the court, is privileged from arrest. *Moor v. Booth*, 3 Ves. 350.

#### 8. *Witness attending the cause.*

Privilege of a witness from arrest, as a person going to make an affidavit before a master. 2 Ves. & Beam. 394.

#### 9. *Witness attending an arbitration.*

Witness attending arbitrators upon an arbitration under an order of court, protected from arrest. 2 Ves. & Beam. 395.

#### 10. *Witness attending bankrupt commissioners.*

A person attending under a summons of commissioners of bankrupt privileged from arrest. Ordered, that the parties arresting, and who had lodged detainers, having notice, should discharge him. The attorney having undertaken to indemnify the officers, and they having acted under that, guilty of a contempt, and ordered to pay all costs out of pocket. The lord chancellor also intimated, that a creditor attending to prove his debt, though not under a summons, is entitled to privilege. *Ex parte King*, 7 Ves. 312.

#### 11. *On invalidating original proceeding.*

1. A detainer, before the defendant could be discharged from an illegal arrest, as where he was returning from his examination under a commission of bankruptcy against him, cannot be supported. *Ex parte Hawkins*, 4 Ves. 691.

2. Discharge from a commitment for a supposed contempt in bankruptcy; which failed, with the proceeding on which it was founded. Subsequent detainers stand, according to the practice of law. *Ex parte Dumbell*, 10 Ves. 328.

#### 12. *Duration of privilege.*

Protection from arrest during attendance through an interval of adjournment to another period of the same day at the same place. 2 Ves. & Beam. 395.

#### 13. *Discharge from, application for, to whom made.*

The application to discharge from arrest must be to the court of which the proceeding is a contempt. 2 Ves. & Beam. 374.

### 8. Bankruptcy.

#### 1. *Reference to master, to examine on interrogatories.*

On a reference to a master in bankruptcy, with liberty for him to examine parties

parties on interrogatories, if he should think fit, it seems that if the master should decline to examine any party when required so to do, he should state the ground on which he declined to do so. *Ex parte Charter*, 2 Cox, 168.

## 2. Notice to dispute commission.

1. Defendant permitted to withdraw rejoinder, and rejoin *de novo*, giving notice of his intention to dispute the bankruptcy, but subject to costs. *Brickwood v. Miller*, 2 Rose, 216.

2. Order, that the defendant might be at liberty to rejoin *de novo*, giving notice of his intention to dispute the bankruptcy, allowed to be retained only on his consenting to admit as evidence the depositions of a deceased witness as being necessary to prove the bankruptcy. *Ibid.* 1 Mer. 4.

3. Order to withdraw rejoinder, and rejoin *de novo*; for the purpose of giving notice of intention to dispute an act of bankruptcy, under the stat. 49 Geo. 3. c. 121.; by analogy to the practice at law to permit a plan to be withdrawn; requiring, according to the practice in the exchequer, the affidavit to state the deponent's information and belief, that it is essential to the justice of the case. *Berks v. Wigan*, 1 Ves. & Beam. 220.

4. Order, after several witnesses had been examined, to withdraw rejoinder, and rejoin *de novo*, for the purpose of giving notice under stat. 49 Geo. 3. c. 121. s. 11. of the intention to dispute act of bankruptcy, and petitioning creditor's debt; but upon the terms of undertaking to pay such costs as the court might afterwards direct. *Brickwood v. Miller*, Cooper, 270.

## 9. Charity.

### 1. Petition in case of abuse of.

1. Charity regulated upon petition instead of an information, under the act of parliament 52 Geo. 3. c. 101. *Ex parte Berkhamstead Free School*, 2 Ves. & Beam. 134.

2. Relief for charities by petition, instead of information, under the stat. 52 Geo. 3. c. 101., being limited to questions of abuse of trust as between the trustees and the objects of the charity, not applicable to an adverse claim to land, as having formerly belonged to the charity. *Ex parte Rees*, 3 Ves. & Beam. 10.

3. The jurisdiction under the stat. 52 Geo. 3. c. 101. substituting petition for information in cases of abuse of trusts for charity, and 40 Geo. 3. c. 56., as to money entailed, discretionary. 3 Ves. & Beam. 11.

4. Petition under stat. 52 Geo. 3. c. 101. must have the signature of the attorney-general, or if no attorney-general at the time, then of the solicitor-general, and such signature should not be affixed without the same deliberation as in the case of an information regularly filed. *Ex parte Skinner*, 2 Mer. 453.

5. Under the act providing a summary remedy in cases of charity, after one order on petition, the subsequent orders may be obtained on motion. *Slewing's Charity*, 3 Mer. 707.

6. An information having been filed on petition, presented with the same objects, it is not for the court to separate these objects, and to give relief upon the petition as to such as are regularly within its limits, leaving the rest to be disposed of on the information. *Ex parte Skinner*, 2 Mer. 453.

7. Under the act of parliament giving jurisdiction upon a petition in charity-cases, the trustees not appearing, ordered to show cause why the order prayed should not be made. *Ex parte Seagears*, 1 Ves. & Beam. 496.

### 2. Reference of petition relating to abuse of.

On a reference in a petition under stat. 52 Geo. 3. c. 101. the master may receive affidavits in evidence. *Ex parte Greenhouse*, Swanst. 40.

## 10. Con-

## 10. Contempt in general.

*Aggravated by immorality.*

Immorality, as such, not punished in equity ; but considered in punishing contempt. 1 Ves. & Beam. 298.

## 11. Extraordinary contempt.

1. *By proceeding at law after suit attached in equity.*

It is a contempt to proceed at law after the subject of the suit has been attached in court. *Mocher v. Reed*, 1 B. & B. 318.

2. *Publication of proceedings, or relative thereto.*

Two printers committed to the prison of the Fleet, for publishing a letter touching the proceedings of this court in causes. *Roach v. Garvan*, 1 Dick. 794.

3. *Writing letter to chancellor.*

The lord chancellor declared, that in future, if he should receive a private letter on the subject of a cause, he would consider whether the writer should not be committed. 8 Ves. 467.

4. *Marrying ward of court.*

1. Upon the marriage of a ward of the court, under flagrant circumstances, the clergyman and clerk were ordered to attend ; the husband was committed ; and the lord chancellor directed the proceedings to be laid before the attorney-general ; expressing his opinion, that contriving a marriage without a due publication of banns is a conspiracy at common law. *Priestley v. Lamb*, 6 Ves. 421.

2. There must be a reference to the master for a proper settlement, before contempt for marrying a ward of court can be cleared. In such case, settlement of her personal property to husband for life, then to wife for life, then to children according to appointment of survivor, varied, so as to vest a moiety in the children at her death, if before his ; but still subject to his appointment. *Stevens v. Savage*, 1 Ves. 154.

## 12. Bill of discovery.

1. *Affidavit.*

A bill for discovery of the contents of a lost deed, and to have a new one executed, must be accompanied by an affidavit of the loss of the former. *Roatham v. Dawson*, 3 Anst. 859.

2. *Search in furtherance of.*

The court will not grant an application made on the coming in of the defendant's answer to a bill for discovery, to search the boxes of an absent individual (which have been left in the hands of the defendant as a depository) for the purpose of ascertaining whether the property of the applicant be there, on a bill filed for that purpose, to aid by such discovery ; an information in the nature of an action of detinue, unless good reason be shown, through the medium of facts disclosed by affidavit, for the supposition that the identical thing sought be there, and that the party applying has an interest in the object of search. *Attorney-general v. Elliott*, 1 Price, 377.

## 13. In action of ejectment.

Abuse in ejectment by delivering a particular, specifying a breach of every covenant. 3 Ves. & Beam. 90.

## 14. Under ejectment statutes.

It is not necessary to serve any but those deriving legal interests under a lease, with an ejectment for non-payment of rent, under the ejectment statutes.



tutes, otherwise the landlord must file a bill to discover who had equitable claims upon it. *Blennerhassett v. Day*, 2 B. & B. 124.

#### 15. Election of Scotch representative peers.

A suit under 6 Ann. c. 23. to certify that a Scotch peer had taken the oaths in chancery, does not require a teste; and if the teste is repugnant, and impossible, it shall not vitiate. In the matter of the Duke of Leeds, 1 Anst. 143.

#### 16. In case of election between jointure and bequest.

##### *Preliminaries to.*

Party having right of election, may file a bill to have property cleared in order to elect to advantage. 1 Ves. 172.

#### 17. In case of election against an heir.

##### *What instruments may be read.*

1. Question whether an instrument of any given nature or form is to be read against an heir for the purpose of election, as belonging to the law of real property, determined by the statute regulating devises of land. 2 Ves. & Beam. 192.

2. Effect of that, where the land is in Scotland; and where the domicile is in Scotland, the estate in England, and an English will imperfectly executed. As to the soundness of the principle, *quære*. Ibid.

#### 18. Writ of error.

1. Writ of error generally stays execution in civil cases; not in criminal. *Huguenin v. Baseley*, 15 Ves. 180.

2. Application to quash writ of error in exchequer in *qui tam* actions in the king's bench. *Lloyd v. Scott*, Dick. 575.

3. Attachment by the plaintiffs in the lord mayor's court, on property of the defendant in the hands of a garnishee. Defendant residing at Ham-  
burgh, is not summoned, and a verdict is obtained by the plaintiffs, by virtue of which the money is paid them, on their giving security to restore the same in case the defendant shall, within a year and a day, appear and give bail to answer, &c. according to the custom. Defendant appears, and pleads to the jurisdiction. Plaintiffs reply; and defendant joins issue as to part, and demurs to the other parts of the replication; and obtains judgment both on the argument of the demurrer, and afterwards on trial of the issue. In the interval between the two payments, plaintiffs present a petition to the lord chancellor for a commission and writ of error, which are granted. Defendant now moves to supersede both the commission and writ; and the same are accordingly superseded upon the ground of misrepresentation in the petition on which they issued; by which it was alleged, first, that the defendant had been summoned when no summons had issued; secondly, that the validity of the defendant's plea had been argued on a demurrer to the replication; making no mention of the defendant having joined issue as to part, which issue had not been tried at the time of presenting the petition, and other misrepresentations. The motion was further supported on the ground of the commission and writ having been sued out merely for delay, as was manifest from the plaintiffs not having proceeded therein; it being also contended that if the court would not supersede them, the defendant ought to be at liberty to take out execution, notwithstanding such proceedings not amounting to a *cesset executio*, as to which, *quære*. *Traub v. Schmidt*, 3 Mer. 632.

#### 19. In relation to executors.

1. *Right of to account, notwithstanding admission by mistake of assets.*

Notwithstanding an admission of assets by mistake, the court will, upon a strong and clear case, permit an account. 9 Ves. 365.

2. *Mode*

2. *Mode of obtaining payment of.*

1. To obtain payment to the representative, the mere production of the probate is not sufficient. Proof of the death is now required; and that the testator was the party in the cause. 10 Ves. 289.

2. Arrears of annuity ordered to be paid to widow and executrix, although no report of debts had been made, it being stated by her answer that there was no deficiency of assets. *Skinner v. Sweet, Cooper, 54.*

3. *Mode of securing testator's rights.*

Executor directed not to derive any advantage from keeping money in his hands without accounting for legal interest, and to accumulate for the *cestui que trust*. Decree, directing a computation of interest at 5l per cent. on all sums received by him, while in his hands; "and that the master do, in such computation, make half-yearly rests." The object of that direction is to charge compound interest; and the decree, though, perhaps, going farther than usual, was held under the circumstances, the executor having kept the whole property in his hands, properly executed by a computation of interest upon each receipt from the day it was received; the balance of receipts, with the interest so calculated, and payments, being struck at the end of the half-year; and that balance, so composed of principal and interest, being carried forward as an item in the account, producing interest. Affirmed on rehearing. *Raphael v. Boehm, 13 Ves. 407.*

4. *Mode of securing legatees' rights.*

In a bill by legatees against the executor, if he admits on his examination a balance due, and claims no interest, the court will order him to pay it before the report. *Cargenven v. Peters, 3 Anst. 751.*

5. *Miscellaneous.*

Application for the attorney of an executor in contempt for not appearing, to pay money received for the use of the executor, refused. *Vanhathen v. Shuman, Dick. 135.*

## 20. Extent in chief.

*When appropriate.*

Where the debt to the crown is not of a public nature, the crown process should not issue, as the form of the security does not alter the nature of the debt. 1 B. & B. 199.

## 21. Extent in aid.

*When appropriate.*

There is no equity for a person, against whom an extent in aid has issued, to be reimbursed by his creditor, on the ground that he has property sufficient to satisfy his debt to the crown without having recourse to the extent in aid. *Phillips v. Shaw, 8 Ves. 241.*

## 22. Friendly society act.

After one order upon petition under the friendly society act, the subsequent orders may be obtained on motion. *Ex parte a Friendly Society, 10 Ves. 287.*

## 23. Habeas corpus.

The lord chancellor can issue the common-law writ of *habeas corpus* in the vacation time. *Crowley's case, 1 Buck. 264.*

## 24. Heir.

1. *Parol demurrer.*

Testator devised an estate to his heir at law, charged with two legacies, and afterwards died indebted on specialty, leaving his heir an infant. In this case the parol shall not demur. *Mould v. Williamson, 2 Cox, 386.*

2. *Keep-*

2. *Keeping heir before the court.*

It is the practice in equity to keep an heir at law before the court, even though he admit the will. *Semble* for the purpose of giving more complete effect to any decree which the court may make, and which might require his concurrence. *Jackson v. Radford*, 4 Price, 274.

25. *Homine replegiando.*

*Writ de homine replegiando*, and *de withernam*. *Ex parte Ashton*, Dick. 23.; *ex parte Saunders*, Ibid. 137.

26. *Infant.*1. *Service of process against.*

1. Service of a *subpoena* on an infant personally, not good. *Freeman v. Charnock*, Dick. 439.

2. A father ordered to discover where the infant was, that he might be served with a *subpoena*. *Hockley v. Lukin*, Dick. 353.

3. Service of *subpoena* on the mother of infants, to appear and answer, they being secreted, deemed good service on the infants. *Baker v. Holmes*, Dick. 18.; *Garnum v. Marshall*, Ibid. 77.

4. An infant having a day to show cause against a decree of foreclosure, after he attained twenty-one, having attained that age, and having left the kingdom before he was served, to avoid his creditors; application to serve his clerk in court with the *subpoena*; Lord Thurlow thought it must be personal service, but it being again moved, upon strong affidavit, it was granted. *Elcock v. Glegg*, Dick. 764.

2. *Form of his petition.*

The court will act for the benefit of an infant, without regard to the prayer of the petition. 10 Ves. 59.

3. *Form of motion by, to answer by guardian.*

A motion for leave to answer by guardian must name the guardian. *Brassington v. Brassington*, 2 Anst. 369.

4. *Appointment of guardian to, on plaintiff's motion.*

Order, appointing a guardian for an infant defendant, on the motion of the plaintiff. *Williams v. Wynn*, 10 Ves. 159.

5. *Amendment by, of answer.*

An infant defendant may, before he attains twenty-one, amend his answer, and go into a new defence. *Savage v. Carroll*, 1 B. & B. 548.

6. *His answer cannot be read against him.*

An infant's answer cannot be read against him; nor excepted to; and may be amended when he comes of age. 1 B. & B. 553.

7. *Fresh answer by, on coming of age.*

Instances in which the court hath given leave to a defendant, late an infant, to put in a new answer on attaining the age of twenty-one. *Bennet v. Leigh*, Dick. 89.; *Tancred v. Annison*, Ibid.; *Ernth v. Lord Baltimore*, Ibid.

8. *Course after attachment against, for want of answer.*

1. After an attachment against an infant for want of an answer, the proper course is, a messenger to bring the infant into court, to have a guardian assigned. 9 Ves. 12.

2. Defendant brought to the bar of the court for contempt in not putting in his answer, being an infant; the court, on suggestion of his infancy, will assign him a guardian, and discharge him. *Wilson v. Bott*, 1 Price, 62.

9. *Form of decree against.*

A decree, omitting to give an infant six months to show cause against it, erroneous. 1 B. & B. 531.

10. *Invalidating by decree on coming of age.*

Infant devisee of the equity of redemption of a copyhold decreed to join in a sale, allowed to show cause against the decree, when he came of age. *Adams v. Gould*, Dick. 443.

11. *Bound by laches.*

Infant suitor bound by laches. 13 Ves. 396.

12. *Re-hearing for after dismissal through neglect of solicitor.*

The solicitor of the plaintiff, an infant, having suffered the bill to be dismissed for want of appearing at the hearing, and the order of dismissal to be enrolled, the enrolment was set aside, after the plaintiff had attained twenty-one, and he was held at liberty to re-hear the cause. *Kemp v. Squire*, Dick. 191.

13. *Reference relative to his interests.*

1. Where two suits are instituted in the name of an infant by different persons, acting as his next friends, it is of course to refer it to the master, to see what is most for the infant's profit, upon the mere allegation of the counsel, that both suits are for the same purpose; it being at the risk of the party moving, in case the allegation should prove untrue, to have the order for reference discharged with costs, upon the special application of the other party. Upon such a reference, the master is at liberty to suggest any improvement in the frame of the suit, and to report any special circumstances that may be for the infant's benefit. *Sullivan v. Sullivan*, 2 Mer. 40.

2. Reference to the master to inquire which of two suits, brought in the name of an infant, was most proper to be proceeded in. *Owen v. Owen*, Dick. 310.

3. No reference upon an application by the next friend of an infant, to see whether a suit which he himself has instituted, is for the infant's benefit. *Jones v. Powell*, 2 Mer. 141.

4. Where the bill was to establish a will, and the infant heir set up insanity in the testator, but the evidence in the cause clearly proved him insane, the counsel for the infant act properly in declining an issue. *Levy v. Levy*, 3 Mad. 245.

5. Master to inquire whether an infant was so within the act of 29th of Geo. 2; and if he were, whether it was for his benefit to surrender old leases, or to take a new lease. *Ex parte Swann*, Dick. 749.

6. The order under the statute 7 Ann. c. 19. for the reference to the master, as well as that for the infant to convey, must be on petition, not on a motion. *Evelyn v. Forster*, 8 Ves. 96.

7. Motion to commit the mother, for not permitting infant trustee to convey, not a proper mode of taking the opinion of the court. *Ex parte Cant*, 10 Ves. 554.

27. *Infant mortgagee.*

The mortgage money of infant mortgagee within the statute of 7 Ann. ordered to be paid into the bank on his account. *Ex parte Winde*, Dick. 276.

28. *Inquisition.**Traverse of.*

1. Application for leave to traverse an injunction, refused; no evidence being produced, except the oath of the applicant, to invalidate the injunction. *In re Sadler*, 1 Mad. 581.

2. A mere trustee is not, it seems, allowed to traverse an injunction. *Ibid.*

29. *Lunacy.**Master's report after death of lunatic.*

Where there is a reference to the master in a case of lunacy, he may make his report though the lunatic be dead. *Ex parte Armstrong*, 3 B. C. C. 238.

30. *Mortgage.*

## 30. Mortgage.

1. *In relation to 5 Geo. 2. c. 25.*

Time enlarged for appearance to a bill of foreclosure, under statute 5 Geo. 2. c. 25: notice in the parish church having been prevented while under repair. *Knowles v. Broome*, 1 Ves. & Beam. 305.

2. *In relation to 7 Geo. 2. c. 25.*

1. The jurisdiction under the statute 7 Geo. 2. c. 20. s. 2. giving the effect of a decree of foreclosure by a short order, is the same as if the cause was brought to a hearing. The time for payment may therefore be enlarged on the usual terms. *Wakerell v. Delight*, 9 Ves. 36.

2. Mortgagor, defendant to a bill of foreclosure, being in contempt, cannot obtain the reference on motion under the statute. *Hewitt v. McCartney*, 13 Ves. 560.

3. A reference under the statute 7 G. 2. c. 20. must proceed upon admission of the principal and interest due upon the mortgage; and the master cannot admit evidence. *Huson v. Hewson*, 4 Ves. 105.

4. A decree of foreclosure, though pronounced on motion (under 7 Geo. 2. c. 20.) cannot be discharged on motion. *Cadle v. Fowle*, 1 B. C. C. 515.

5. Mortgagor applying for time, after having obtained the order under, 7 Geo. 2. c. 20., need not have his money ready, as at law. *Wakerell v. Delight*, Cooper 27.

3. *Inquiries relative to.*

A debtor claiming as mortgagee, and by his answer denying notice of the plaintiff's title, which was neither alleged by the bill, nor proved; an inquiry for the purpose of affecting him with notice was refused, first, upon a petition to vary the minutes; and again, upon a re-hearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Hardy v. Reeves*, 5 Ves. 426.

4. *Setting down bill for foreclosure as a short cause.*

A bill for a foreclosure cannot be set down as a short cause, unless by consent. *Rashleigh v. Dayman*, 2 Mad. 147.

5. *Extension of time of sale.*

The slightest ground will induce a court of equity to extend the time of sale in a foreclosure cause. *Jessop v. King*, 2 B. & B. 97.

6. *Dismissal of bill for redemption, on non-payment at the time appointed.*

Upon a bill to redeem, and nonpayment at the time appointed, it is a motion of course to dismiss the bill. *Stewart v. Worral*, 1 B. C. C. 581.

## 31. Officer executing process.

1. Where an order for a messenger has been issued against a sheriff for contempt, in not returning an attachment against a defendant for not putting in his answer, (other attachments having been issued before) it is peremptory; and the court will not stay the order, although it go to affect a sheriff not in office at the time of the alleged original neglect; nor will they consent to enlarge the time allowed by the order. The previous order to the high sheriff to return the process may be served on his under-sheriff, and such service will be good. Nor will the court enlarge the time limited by the order in such a case. *Thomas v. Matthias*, 2 Price; 32.

2. The sheriff of Chester refusing to make any return to the mandate of the chamberlain of Chester, upon an attachment issued out of chancery against the defendant to be executed, ordered to do it by a given time. *Clough v. Cross*, Dick. 555.

3. The mayor of Coventry committed for not obeying an order of the court. *Attorney-general v. Mayor of Coventry*, Dick. 781.

## 32. Original

## 32. Original writ.

1. Cursitor to make out an original in trespass, *quare clausum fregit*, and the party not to apply to the filazer. *Ex parte Ingman*, Dick. 221.

2. Judgment having been signed in error, for want of an original writ; there having been a petition and order for one, but the order not served, the defendants ordered to consent to set it aside; but a commitment for contempt in entering it up, refused. *Pengree v. Jonas*, 2 B. C. C. 141.

## 33. Partition.

*Examination of witnesses.*

Examination of witnesses on a commission of partition. *Meers v. Lord Stourton*, Dick. 21.

## 34. Writ of restitution.

A writ of restitution will not be granted to put into possession a person not a party to the cause, who had been turned out by an injunction, though he had a legal title; he having obtained such possession under a grant from the defendant pending the suit. *Gaskell v. Durdin*, 2 B. & B. 167.

## 35. Records, supplying loss of.

Records of bill, and answer being stolen or lost, new engrossments from the office copies ordered, and to be deposited in the office. *Williams v. Floyer*, Dick. 324.

36. *Scire facias* to repeal a patent.*Changing venue.*

In a *scire facias* to repeal a patent, the *venue* cannot be changed from Middlesex to any other county. *Ker v. Haine*, 2 Cox, 235.

## 37. Solicitor and client.

1. *Bill of—taxation of.*

1. Proceedings before the lord chancellor, as exercising the visitatorial power upon a royal foundation, not within the statute for taxing bills of costs. *Ex parte Dann*, 9 Ves. 547.

2. Bills of costs examined after a long period, and even after payments made. 2 Ves. 203.

3. Where an attorney has been seven years without getting his bills taxed after an order so to do, and they are lost in the mean time in the master's office, the court will not allow it to go again to the master. *Yea v. Yea*, 2 Anst. 494.

4. Several bills of costs were delivered in, settled and paid, in the course of a long cause, and a receipt in full given. At the end of the cause, the client moved to refer them all for taxation. The order was discharged. *Prior v. Dunbar*, 1 Anst. 186.

2. *Bill of—costs of taxation of.*

1. On taxation of costs, the court cannot make the attorney pay the costs of the taxation unless a sixth is taken off. *Yea v. Yea*, 2 Anst. 494.

2. Where a solicitor has been guilty of great delay in bringing in his bills, the court will not give him the costs of taxation, although less than one-sixth is taken off. *Yea v. Yea*, 2 Anst. 589.

3. The solicitor delivered in a bill of costs, including an item of 90*l.* which, though fairly due, could not be allowed on taxation. He delivered a second without that item. On referring the latter for taxation, less than a sixth was taken off. The court would not give costs on either side. *Webb v. Stone*, 1 Anst. 260.

38. *Supplicavit.*

A defendant against whom a *supplicavit* had issued, complaining that the articles

articles to ground it were not sufficient, and producing a certificate of his good behaviour, the court referred it to the two next justices of the peace in the neighbourhood, to inquire into it. *Snelling v. Flatman*, Dick. 6.

### 39. In relation to 40 Geo. 3. c. 56.

1. Under the statute 40 Geo. 3. c. 56., authorizing payment of money, to be laid out in land to be settled to the tenant in tail, the order was thus qualified; in case he should be living on the second day of the ensuing term; and an inquiry as to encumbrances was directed. *Ex parte Bennet*, 6 Ves. 116.

2. The court refused upon an *ex parte* petition to order money to be paid under the statute 40 Geo. 3. c. 56.; the subject involving a doubtful question, viz. the construction of a trust of an estate for lives, to permit two sisters to receive the rents for their lives; remainder to the heirs of their bodies; and in case they should die without issue, from and after their decease, over. *Ex parte Sterne*, 6 Ves. 166.

3. No order can be made under Lord Eldon's act, 40 Geo. 3. c. 56., authorizing the payment of money in trust to be laid out in land, to be settled to the tenant in tail, without a previous inquiry as to encumbrances. *Ex parte Hodges*, 6 Ves. 576.

4. Under the statute, enabling tenant in tail of land to be purchased to take the money, the court takes care that the fund is clear. To obtain the order under that act in term, the application must be made in time sufficient to admit of a recovery. *Ex parte Frith*, 8 Ves. 609.

### 40. Tithe causes.

#### 1. Issue — barren land.

Where the defendant set up to a bill for tithes, a claim of exemption under 2d and 3d Edward 6th, c. 13., and produced much evidence of the land in question requiring to be cleared and levelled, and that it gave more than usual trouble in ploughing, and cost more than the customary expense in manuring it with lime; the court ordered an issue, to try whether the lands of which the tithes "were demanded were of such a nature as (exclusive of the labour and expense of clearing the same from furze or whins, and preparing the same for ploughing), necessarily required extraordinary expense of liming and manuring, or labour to bring them into a proper state of cultivation." *Kingsmill v. Billingsley*, 3 Price, 465.

#### 2. Issue — composition real.

The court will not direct an issue to try a composition real where the defendant has by his answer only alleged a *modus*. *Bennet v. Neal and others*, Wightw. 324.

#### 3. Issue — exemption from.

1. Where an exemption from payment of tithes is claimed for a grange formerly belonging to a privileged order, the court will direct an issue to try the exemption, and also to ascertain the extent of such grange, if doubtful, from the depositions in the cause. *Byam v. Booth and others*, 2 Price, 231.

2. The court will not direct an issue in favour of a rector where a defendant sets up an opposite title, which he proves to the satisfaction of the court. *Wilmot v. Kellaby*, 1 Dan. 116.

#### 4. Issue — grant or endowment.

1. Where an endowment was produced, but there had been no perception of tithes under it, but a small salary in lieu of them, the court directed an issue to try the title to the tithes. *Carr v. Henton*, 1 Anst. 313. n.

2. The vicar proved that he was entitled to some tithes in kind, but the particular species could not be ascertained through the negligence of all the parties. The court directed an issue to try whether he was endowed of any and what tithes. *Potts v. Durant*, 3 Anst. 797.

3. A rector is not entitled to an issue where the defendant sets up a grant of a portion, and constant payment of tithes, which defence is not impeached by the plaintiff. *Barker v. Baker*, Wightw. 397.

4. The court will not make a decree in favour of a rector claiming tithes in kind in lands *not within his parish*, for which he has for many years received a money payment by way of composition, which the defendant does not pretend to insist on as a modus; nor will they grant a commission to ascertain the boundaries of such lands, without a previous inquiry whether the plaintiff is entitled to any and what tithes on such lands, by a trial at law on issue; because such a claim is not within the recognized common-law right of a rector. *Sanders v. Longden*, 4 Price, 117.

5. The court will not grant an issue to a rector defending a suit for tithe of hay, against a vicar who has constantly proved *perception*, notwithstanding his endowment contains an *exception* of that tithe as due to the rector where the latter *cannot* show perception. *Parsons v. Bellamy*, 4 Price, 190.

#### 5. Issue — modus.

1. The court will not decree against a farm modus on the ground of rankness. *Atkyns v. Lord Willoughby*, 2 Anst. 397.

2. Where the value of a vicarage, as estimated by the usual ancient documents, is inconsistent with the probability of the money payments set up as moduses, being so old as legal memory, such inconsistency is not sufficient to enable the court to dispense with an issue, because those documents are not evidence so *conclusive* as to warrant a decree in the absence of other evidence. *Jee v. Hockley*, 4 Price, 87.

3. The amount of money payments laid as moduses, in answer to a vicar's claim, being totally inconsistent with the value of the vicarage, as estimated by the ancient documents usually put in evidence, is not sufficient (where the payments have been uniform and uninterrupted) to induce the court to dispense with an issue. *Jee v. Hockley*, 4 Price, 87.

4. An issue will not be granted to try the character of money payments set up as moduses, where the witnesses state that such payments were apportioned by reference to the poor's rates. *Walter v. Holman*, 4 Price, 171.

5. An issue will not be granted to try part of a custom, as where a payment has been pleaded by way of modus, and it be proved to be liable to certain modifications not stated to belong to it. *Leathes v. Newitt*, 4 Price, 370.

6. An issue refused under the circumstances: 1st, mis-pleading; the defendants not stating customary payments by their answer; but adopting *ore tenus* payments, disclosed by the answer to their cross bill, instead of moving for leave to file a supplemental answer; 2dly, the improbability of establishing those payments after two unsuccessful trials at bar in another cause. *The Warden and Minor Canons of St. Paul's v. Kettle*, 2 Ves. & Beam. 1.

#### 6. Issue — general rule as to rector's right to.

A rector is entitled to an issue as matter of right in cases where he sues only, not where he is defendant. *Williams v. Price*, 4 Price, 156.

#### 7. Evidence.

1. The answer to a bill for an account of tithes having insisted upon what was equivalent to a prescription in *non decimando*, and the evidence going to the same point, the court will not permit the evidence to be read to support a different defence, viz. a presumption that the tithes had been granted to the owner. *Nash v. Thorn*, 2 Cox, 198.

2. The court allowed the defendant in a suit for tithes, after publication, to prove an old paper found in the parish registry. *Clarke v. Jennings*, 1 Anst. 173.

#### 8. Pay-



8. *Payment of money into court.*

1. Suit for tithes. The answer insisting on a modus. Motion to pay up the arrears of the modus, and the plaintiff to proceed at his peril. Refused; for that is only done where the thing demanded is offered. But the court afterwards considered the tender in the costs. *Dean of Bristol v. Donnes-  
thorpe*, 1 Anst. 272.

2. In a suit for account of tithes, the defendant cannot pay money into court before answer. *Hull v. Matthews*, 3 Anst. 444.

## 41. Vendor and purchaser.

*Reference to the master.*

1. The bill praying an inquiry into the title, and a specific performance, on the defendant's motion after answer, an inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient; but the court would not decide upon any matter of relief. *Moss v. Mat-  
thews*, 3 Ves. 279. See *Wright v. Bond*, 2 Ves. 39.

2. The court refused to make an order under an act of parliament for the sale of estates upon the opinion of a conveyancer, approving a conveyance, without a reference to the master. *Ex parte the Duchess of Newcastle*, 6 Ves. 454.

3. After answer, submitting to perform the contract, if a good title can be made, reference directed on motion, whether a good title can be made; and whether it appears upon the abstract. *Wright v. Bond*, 11 Ves. 39.

4. Upon a question of title, as to specific performance, further evidence may be produced on both sides before the master. *Vancouver v. Bliss*, *Ibid.*

5. The practice to direct a reference upon the title on motion after answer limited to the case where the title only is disputed. *Gompertz v. ———*, 12 Ves. 17.

6. Specific performance decreed against a purchaser, without a reference as to the title; upon possession, and no objection made to the abstract. *Fleetwood v. Green*, 15 Ves. 594.

7. On reference to a master to see whether a good title can be made, the master proceeds on the abstract only, unless the purchaser requires the production of the deeds themselves; and if he omits to make such requisition, he cannot except to the report on the ground of the deeds not having been produced before the master. *Poole v. Shergold*, 1 Cox, 160.

8. Reference of title before decree, where title alone is disputed, refused; therefore, where the purchaser on other grounds resisted performance. *Blyth v. Elmherst*, 1 Ves. & Beam. 1.

9. Reference of title before answer; plaintiff, the vendor, undertaking to do all such acts for the purpose of executing what the court thinks right, as if the answer was in, and the cause brought to hearing. *Balmanno v. Lum-  
ley*, *Ibid.* 228.

10. Direction, if the report shall be against the title, for compensation; refused as to indemnity. *Ibid.*

11. Reference of title, before decree, refused, where the purchaser on other grounds resists a performance of the contract. *Paton v. Rogers*, 1 Ves. & Beam. 351.

12. Inquiry at what time a title could be made, the subject of further directions after the report upon the title; and not to be combined with the reference of title. *Gibson v. Clarke*, *Ibid.* 103.

13. The exchequer will not (on a bill for a specific performance) make an interlocutory order to refer a title, the validity of which is denied by the answer, and depends upon facts, to the deputy remembrancer, until the cause is brought to a hearing, without consent. *Bowyer v. Bright*, 3 Price, 300.

14. Reference of title, before decree, refused, where the purchaser, besides objecting to the title, claimed compensation for defect of quantity; even though he submitted to complete his agreement. *Lowe v. Manners*, 1 Mer. 19.

15. No reference of title upon a question whether the estate was tithe-free, having been sold as such. *Wallenger v. Hilbert*, 1 Mer. 104.

16. Decree for a reference as to title. The cause coming on for further directions after a report approving the title, the defendant is entitled to have an inquiry at what time a title could have been made. *Daly v. Osborne*, *Ibid.* 382.

17. There can be no reference of title, except where the title only is in dispute. *Morgan v. Shaw*, 2 Mer. 138.

18. On a reference of title on a bill for a specific performance, the reference may extend to all that concerns the title, but not to other matters; it may be extended therefore to inquire, whether it appeared by the abstract in the pleadings mentioned, that a good title could be made. *Jennings v. Hopton*, 1 Mad. 211.

19. After a report, which was confirmed in favour of a title by one master, another master, in another proceeding, made a report, by which the title was affected. On motion to refer the title back to the master, who had reported that there was a good title, an order was made for that purpose. *Jewdine v. Alcock*, 1 Mad. 597.

20. Upon a reference to see whether A. can make good a title, the master's report that a good title can be made by A. with the concurrence of B., is an excess of his authority. *Lewis v. Loxham*, 1 Mer. 179.

21. Exceptions to the master's report in favour of the title of the vendor of a bishop's lease, on the ground of the non-production of the bishop's title, overruled. *Fane v. Spencer*, 2 Mad. 438.

#### 42. *Writ de ventre inspiciendo*.

1. A writ *de ventre inspiciendo*, on the application of an *hæres factus*. *Ex parte Wallup*, Dick. 767.

2. The cursitor was ordered to make out a writ *de ventre inspiciendo*. *Ex parte Billet*, Dick. 781.

3. Writ *de ventre inspiciendo* against a married woman (whose husband had been near ten years abroad) on the application of a devisee in a will. *Wallop ex parte*, 4 B. C. C. 90.

#### 43. Will.

##### *Establishment of.*

1. Though witness to a will is not to be found, no impediment to the establishing of the will. *Stedmore v. Padmore*, Dick. 589.

2. A will having been destroyed by the brother of the disinherited heir, the devisee was decreed to hold and enjoy, and a trial was denied. *Hayne v. Hayne*, Dick. 18. *Vide Ibid.* 11.

3. A will destroyed, on strong proof, taken as set out in the bill. *Hampden v. Hampden*, Dick. 26.

4. Will destroyed by heir; he was directed to convey to the devisee. *Woodroffe v. Wood*, Dick. 32. *Vide Ibid.* 11. 18.

5. A will, admitted in the answer, under which the defendant claims, and where nothing turns upon it, may be read from the bill, although the answer refers to the will for certainty. *Owen v. Jones*, 2 Anst. 505.

6. All wills to be proved shall be produced in the custody of the proper officer, and delivered to the examiner or commissioners, and by them re-delivered to the same officer after examination closed. 1 Sch. & Lef. 1. 114.

7. A bill merely to establish a will, and to execute the trusts, without

praying any thing more, is not to be brought to hearing, and if brought to hearing, will be dismissed with costs. *Marlar v. Whitaker*, Dick. 805.

8. In this case the court gave leave to the relators to exhibit interrogatories to prove an old will; although the cause stood at the head of the paper for hearing, and the defendants did not consent. *Attorney-general v. Thurnall*, 2 Cox, 2.

9. Will proved, defendant the heir at law, being an infant, having made default. *Webb v. Litcott*, Dick. 88.

10. Will cannot be declared to be well proved in the absence of the heir at law, but the real estate may be directed to be sold. *French v. Baron*, Ibid. 138.

11. Will established on a bill by the heir at law, the equity of redemption being in the plaintiff, and some of the defendants. In default of redeeming, the bill was to be dismissed as to the defendant; the mortgagee and other defendants were to stand foreclosed. *Aynsly v. Reed*, Ibid. 249.

12. Will established on the admission of the heir at law. Ibid. Dick. 250.

13. Heir at law not being the sole plaintiff, brings a bill to establish the will; the court declared it well proved, and established the same. *Penny v. Penny*, Ibid. 520.

14. In this cause the heir at law could not be found, but the will having been proved *per testes*, the court upon consideration, declared it well proved. *Banister v. Way*, Ibid. 599.

15. If an adult heir at law refuse an issue on the hearing of the cause, the court will establish the will against him, though he does not admit it. *Jackson v. Barry*, 2 Cox, 225.

16. Decree made establishing a will; some of the residuary legatees, though abroad, apply to have the benefit of the decree, and submitting to be bound by it; ordered, that they might enter their appearance by their clerks in court, and that they should have the like benefit of the decree, as if they had put in an answer, and had appeared at the hearing of the cause. *Banister v. Way*, Dick. 686.

## CHARGE.

### I. Creation and implication of a charge.

1. Of the ceremonial requisite to create a charge by will.
2. Under a covenant that lands "are" charged, and under one that they "shall be" charged.
3. Under a contract in general terms to grant a mortgage, in addition to personal security.
4. Renewal fine paid by tenant for life, when a charge upon the estate.
5. Renewal fine paid by lessee, when a charge upon the estate of the sub-lessee.
6. Purchase-money paid by heir in completion of ancestor's contract, when a charge upon the estate.

### II. Construction of instruments creating charges.

1. The term "charge on estates in equal proportions" defined.
2. The term "coming into possession" defined.
3. The term "if the reversion should never fall to the testator" defined.

### III. *Charges*

**III. Who, and what estates, are bound by a charge.**

1. Lands not specified by name in a deed creating the charge.
2. An estate conveyed to the incumbrancer in consideration of the settlements of the estate charged.
3. Remainder-man when bound by a contract, to make a charge.
4. Whether copyholds are included in a general devise for payment of debts.
5. Whether an estate devised for payment of debts, is charged with a mortgage purchased by testator.
6. In the case of a church-lease devised subject to a charge, and a bond given by the owner of the lease also renewed.

**IV. Contribution to a charge.**

1. Where different estates, subject to a general charge, are given to different persons.
2. Contribution in favour of a remainder-man of an estate tail by the tenant in tail.
3. Contribution by tenant for life to a renewal fine.
4. Contribution between lessee and under-tenant to a renewal fine.

**V. Mode of raising a charge.**

Whether by sale or mortgage.

**VI. In relation to exoneration and discharge.**

1. Exoneration of an estate in spite of the misapplication of the fund raised.
2. By merger.
3. By the death of a legatee, for whom, &c.
4. Exoneration of an estate from arrears of interest by the creditor's acceptance of a personal security.
5. Obligation of tenant for life to keep down interest, or pay off principal.
6. Obligation of tenant for life, under the words of a devise, to pay renewal fines.
7. Equity of a tenant for life paying off an incumbrance.
8. Tenant for life exonerated by the assets of the preceding tenant, who received the mortgage-money.
9. Obligation of tenant in tail to keep down interest.
10. Equity of tenant in tail paying off an incumbrance.
11. Equity of tenant in tail, restrained from alienating, paying off portions without taking an assignment.

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**I. Creation and implication of a charge.**

1. Of the ceremonial requisite to create a charge by will.

Distinction between legacies charged on the land as an auxiliary fund, and a portion of the land, or its produce, when directed to be sold. An unattested paper has effect in the former case; not in the latter. 18 Ves. jun. 167.

2. Under a covenant that lands "are" charged, and under one that they "shall be" charged.

Distinction between a covenant that all the estates of the covenantor *are* charged with a sum of money; and that he *will* charge his estates; the former is a charge upon all covenantor's lands, the latter is not. *Falkner v. O'Brien*, 2 B. & B. 223.

3. Under a contract in general terms to grant a mortgage, in addition to a personal security.

A. borrowed 300*l.* and by his note of hand promised to pay the same on demand, and to give a security by mortgage of lands for the same when required. A. died in the month following. At the time of giving this note, and at the time of his death, he had a small real estate. The debt is not a charge on the land. *Williams v. Lucas*, 2 Cox, 160.

4. Renewal fine paid by tenant for life, when a charge upon the estate.

1. Money paid as a fine by the last life in a lease, for a renewal, ordered to be a charge on the estate. *Adderley v. Clavering*, 2 Cox, 192.

2. Where a leasehold estate for lives was settled upon the husband for life; remainder to the wife for life; with remainders to the children: the husband having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine and charges of renewal. *Lawrence v. Maggs*, 1 Eden, 453.

3. Bill by devisee in remainder to him and his heirs male of a lease for lives against tenant for life, also entitled in reversion to him and his heirs, to compel him to procure a renewal, one life having dropped: the construction of the will being, that the lease should be kept full, and that 500*l.* and no more should be charged thereon for that purpose upon the dropping of each life, decreed, that if the plaintiff chose to pay the excess, the lease should be renewed; in trust to secure the 500*l.* and, subject thereto, for the defendant for life; after his decease, to raise the farther sum advanced by the plaintiff for renewal and the expence of the suit, with compound interest at 4 per cent. during the life of defendant, and subject thereto for plaintiff in tail male; remainder to defendant and his heirs: the defendant was not allowed to charge the estate with 500*l.* towards a fine paid by him upon a former renewal without consent of the remainder-man. *White v. White*, 4 Ves. 24. Vide 2 B. C. C. 659.

5. Renewal fine paid by lessee, when a charge upon the estate of the sub-lessee.

Vide 2 B. & B. 280.

6. Purchase-money paid by heir in completion of ancestor's contract, when a charge upon the estate.

Money laid out by an heir in completing a contract, entered into by his ancestor, but not binding on him, a charge on the purchased lands. *Savage v. Carroll*, 1 Ball & Beatty, 265.

## II. Construction of instruments creating charges.

1. The term "charge on estates in equal proportions" defined.

Charge on estates in equal proportions means *pro rata* on the value. *Wardell v. Wardell*, 3 B. C. C. 286.

2. The term "coming into possession" defined.

A charge was made raiseable when A. or his issue, should come into possession; a jointress who had an estate for life, conveyed to a trustee, in order to enable A. (who was tenant in tail in remainder) to suffer a recovery, which he did: having such an interest as enabled him to suffer a recovery; held

held, coming into possession within the terms of the deed, and to make the charge raiseable. *Hill v. Broughton*, 3 B. C. C. 180.

3. The term "if the reversion should never fall to the testator" defined.

Construction of a charge by will, if the reversion should never fall to the testator; viz. if it should not come to him personally, in his life: the charge therefore effectual, though the reversion came to his heir. *Stackhouse v. Barnston*. 10 Ves. 453.

### III. ~~Who~~, and what estates, are bound by a charge.

1. Lands not specified by name in a deed creating the charge.

A covenant, "that notwithstanding any former grant of 1500*l.* charged upon the whole estate of the covenantor, that the lands of Blackacre and Whiteacre shall stand exonerated therefrom, and that all his other lands and estates shall stand charged therewith," creates a charge on the lands of which he was then seised, though not specified by name. *Falkner v. O'Brien*, 2 B. & B. 214.

2. An estate conveyed to the incumbrancer in consideration of the settlements of the estate charged.

A. seized of Blackacre in fee, and of Whiteacre for life, with remainder to his first son in tail, confesses judgments and settles Blackacre in consideration of a re-settlement by which he acquires the fee of Whiteacre. Whiteacre is subject to an equity to disencumber Blackacre; and it binds a purchaser with notice of the instruments. *Hamilton v. Royse*, 2 Sch. & Lef. 315.

3. Remainder-men when bound by a contract, to make a charge.

1. Contracts for jointures, though made only in pursuance of a jointuring power, shall bind the remainder-man; so, contracts for valuable consideration to execute a power; so, where there has been an imperfect execution, but upon a meritorious consideration. 1 Sch. & Lef. 60.

2. Power to a son to make a jointure; father and son covenant (on an intended marriage) to do so out of lands in Yorkshire. By the death of the father, lands in Yorkshire descend to the son, who dies without making a settlement: the lands are bound in the hands of the remainder-man. *Jackson v. Jackson*, 4 B. C. C. 462.

4. Whether copyholds are included in a general devise for payment of debts.

Under a general charge, copyhold is liable as well as freehold. *Coombes v. Gibson*, 1 B. C. C. 273.

5. Whether an estate devised for payment of debts, is charged with a mortgage purchased by testator.

Where a man buys an equity of redemption, the purchased estate shall pay the debt, notwithstanding there be a term created for payment of debts. *Ancaster v. Mayer*, 1 B. C. C. 454.

6. In the case of a church-lease devised subject to a charge, and a bond given by the owner of the lease also renewed.

A sum of money being charged upon a church-lease, though the old lease was gone by renewals, and all the lives at the time of the charge expired, and a bond had been given by the owner of the lease, continues a charge upon the estate, not a personal debt of the obligor in the bond. *Billinghurst v. Walker*, 2 B. C. C. 604.

#### IV. Contribution to a charge.

1. Where different estates, subject to a general charge, are given to different persons.

An estate being settled to A. for life; then, as to part to B. for life; remainder, as to the whole, to uses under which the defendant takes as tenant for life, with power to A. to charge (but not encumber B.'s estate for life); the estate given in, remainder falls in during B.'s life, and the interest of the charge exhausts the rents and profits; upon B.'s life estate falling in, the rents and profits of that estate shall go to pay the arrears, which shall be a charge upon the inheritance. *Tracy v. Lady Hereford*, 2 B. C. C. 128.

2. Contribution in favour of a remainder-man of an estate tail by the tenant in tail.

No contribution to an incumbrance in respect of an estate sold by a prior tenant in tail, in favour of a remainder-man who might have been barred, especially if the sale was under a decree. *Lloyd v. Johnes*, 9 Ves. 37.

3. Contribution by tenant for life to a renewal fine.

1. The rule, that tenant for life of an estate for lives shall pay one-third of the expence of renewal, was unreasonable, and does not now prevail: the fair proportion is, that he shall keep down the interest, like the devisee of a mortgaged estate. 4 Ves. 33.

2. Tenant for life of an estate for lives, being himself one of the lives, it is not competent to the remainder-man to compel him to contribute to the expence of renewal, if it is a legal estate. Q. If a trust. 4 Ves. 33.

3. Upon appeal, the lord chancellor held, that though the old rule, throwing one-third of the fine for renewal upon the tenant for life, does not now prevail, the tenant for life in general cases must contribute beyond the interest, in proportion to the benefit he takes: but in this case the testator having provided a fund for renewal, the tenant for life might put in his own life; and was not under an obligation to renew farther than to permit a mortgage for raising that fund. The decree was therefore affirmed; inserting expressly, that the tenant for life ought to have kept down the interest. *White v. White*, 9 Ves. 554.

4. Contribution of tenant for life to the fine on renewal in proportion to his enjoyment; not as formerly, one-third; nor, as upon a mortgage, confined to keeping down the interest. *Allan v. Backhouse*, 2 Ves. & Beam. 65.

4. Contribution between lessee and under-tenant to a renewal fine.

Renewal decreed against a tenant under a bishop's lease, without any contribution from his sub-lessee, he having covenanted, that as often as the bishop should renew, he would renew, without fine with his sub-lessee. *Revell v. Hussey*, 2 B. & B. 280. The tenant and his lessor are necessary parties, the sub-lessee deriving his title from their covenants. *Ibid*.

#### V. Mode of raising a charge.

Whether by sale or mortgage.

Charges upon an estate more than sufficient to answer them, directed to be raised by mortgages of different parts. *Mosley v. Mosley*, 5 Ves. 248.

#### VI. In relation to exoneration and discharge.

1. Exoneration of an estate in spite of the misapplication of the fund raised.

An estate having once borne a charge in favour of legatees or creditors, is discharged; though the fund is misapplied by the trustees. 5 Ves. 736.

2. By

## 2. By merger.

1. Where a person is entitled to a sum of money charged upon an estate, and secured by a term of years, and afterwards becomes entitled to the fee-simple of the estate, a court of equity extinguishes the equitable lien, except in the case of creditors, or of infancy. *Donisthorpe v. Porter*, 2 Eden, 162.

2. A. devises certain premises, (subject to a mortgage of 3500*l.*) to his three daughters, to be divided equally; one dies; mortgagee bequeaths to the two survivors all the money due on the mortgage and the interest, so that it does not altogether exceed 4000*l.*, and if it do not amount to 4000*l.*, then to be made up. The other daughter dies, leaving all her real and personal estate to the third. The charge is merged in the inheritance. *Price v. Gibson*, 2 Eden, 115.

3. A person becoming entitled to an estate, subject to a charge for his own benefit, may keep up the charge. Distinction upon this subject in law and equity; the latter sometimes holding a charge extinguished, where it would submit at law; and sometimes preserving it, where, at law, it would be merged; depending on the intention, actual or presumed, of the person in whom the interests are united. Where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge upon his own estate, it will sink without some act by him to keep it on foot. 18 Ves. jun. 390.

4. Owner of a charge is not, as a condition of keeping it up, called on to repudiate the estate: his election is, not to take the charge or the estate, but whether, taking the estate, he means the charge to sink, or continue distinct. 18 Ves. jun. 391.

5. It is not necessary for a tenant for life, in order to keep alive a charge on the estate, which he had put off, to take an assignment from the creditors of their securities. 1 Ball & Beatty, 142.

6. In all cases of a charge merging, it was perfectly indifferent to the party, in whom the interests had united, whether the charge should, or should not, subsist. 18 Ves. jun. 395.

## 3. By the death of the legatee, for whom, &amp;c.

Legacy charged upon land, payable at a certain time; the legatee dies before that time; but being charged, and the estate devised subject to that charge, the devisee must take it *cum onere*, and the legacy shall be raised. *Clark v. Ross*, Dick. 529.

## 4. Exoneration of an estate from arrears of interest by the creditor's acceptance of a personal security.

S. tenant for life, owed an arrear of interest to a creditor of the estate, for which the creditor took the bonds of the tenant for life, and stipulated that he would give time for the payment thereof. Held, that the creditor could not retain his demand against the estate for that arrear, having notice that S. was tenant for life, and therefore bound to keep down the interest. *Loftus v. Swift*, 2 Sch. & Lef. 642.

## 5. Obligation of tenant for life to keep down interest, or pay off principal.

1. Tenant for life is only to keep down the interest of an incumbrance, but not to be charged with any part of the principal. 1 Ves. 234.

2. The old rule, imposing upon the tenant for life a gross sum part of the capital of incumbrances, is at an end: but he takes subject to all the interest. 5 Ves. 107.



6. Obligation of tenant for life, under the words of a devise, to pay renewal fines.

A leasehold estate renewable, being bequeathed with limitations in the nature of a strict settlement, the habit being to renew annually and to underlet, the decree declared, that the fines upon renewal ought to be paid out of the rents and profits; and that the person entitled for life, undertaking to pay those fines out of the rents and profits, was entitled to the fines on renewal of the under-leases; and a renewal of such of the under-tenants as should be desirous of it was directed. *Milles v. Milles*, 6 Ves. 761.

7. Equity of a tenant for life paying off an incumbrance.

1. When a tenant for life pays off a charge (although he take no assignment), he becomes a creditor for the amount of it; but when tenant in tail pays off a charge, he does it in exoneration of the estate, unless he shews his intention to be otherwise. *Jones v. Morgan*, 1 B. C. C. 206.

2. If tenant for life, paying off an incumbrance, in that transaction merges the security by taking an assignment, connecting it with the legal estate of inheritance, upon that transaction *prima facie* there is no charge. In the case of tenant in tail, as he represents the inheritance, the presumption is, that, whether he takes an assignment or not, the debt is gone; unless there is evidence of an intention to continue it a charge. 15 Ves. 173.

3. The true ground of inference for tenant for life paying off incumbrance, is the scantiness of his estate; as *prima facie* he cannot be intended to discharge the estate of another; and it arises as much where the estate goes unalienably in one direction, as when alienable. 1 Ves. 234.

4. The presumption that a tenant for life did not mean, by paying off debts, to exonerate the estate, may be rebutted and disproved. *Ball & Beatty*, 142.

5. It will not, from a tenant for life paying off a charge, be presumed he meant to exonerate the estate. 1 *Ball & Beatty*, 141.

8. Tenant for life exonerated by the assets of the preceding tenant, who received the mortgage money.

Tenant for life exonerated by the assets of a preceding tenant, who received the money upon a mortgage in which they joined. *Finch v. Finch*, 1 Ves. 535.

9. Obligation of tenant in tail to keep down interest.

1. A tenant in tail is not obliged to keep down the interest on a charge affecting the estate; but should he do so, his personal representative will not be allowed it out of the estate. 1 *Ball & Beatty*, 143.

2. On a bill by infant tenant in tail, a receiver was appointed with an order to keep down the interest of incumbrances out of the rents. He kept down accordingly the interest of all but one mortgage, the interest of which (belonging to infants) was never applied for, except a small portion for maintenance, the residue of the rents being paid into court to the credit of the cause. Tenant in tail coming of age, suffers a recovery, and resettles the estate, and afterwards dies. The master, by his report, having certified that the deceased was not bound, while tenant in tail, to keep down the interest of the incumbrances, and consequently that the rents paid into court, during that time, belonged to his personal representatives; the party claiming to be entitled to the estate under the settlement, petitioned for leave to except to the report, on the following grounds: 1st, That in the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of the rents. 2dly, That the direction to the receiver to keep down the interest, amounted to an appropriation of so much of the rents to that purpose. 3dly, That the deceased by not claiming the fund when of age, showed an

an intention that it should be so appropriated. But it was held, 1st, That the general question could only arise in favour of a remainder-man or reversioner, and all such rights were in this case barred by the recovery. 2dly, That the order was not meant to vary the rights of real and personal representatives, but to prevent the incumbrancers from being prejudiced by the court taking the estate into its custody, and also to protect the estate from hostile proceedings on the part of the creditors, and did not amount to an appropriation; and lastly, that there was nothing in the circumstances to alter the character of the property, which consisting of rents paid into court, and neither applied in payment of interest, nor appropriated for such payment, was personal estate, and to be dealt with as such. *Bertie v. Earl of Abingdon*, 3 Mer. 560.

10. Equity of tenant in tail paying off an incumbrance.

Vide 1 B. C. C. 206.; 15 Ves. 173.; 1 B. & B. 143.

11. Equity of tenant in tail, restrained from alienating, paying off portions without taking an assignment.

Tenant in tail restrained from alienating, pays off portions charged upon the estate without taking an assignment; he shall be a creditor for the sums paid, which shall be raised for his administration. \* *Countess of Shrewsbury v. Earl of Shrewsbury*, 3 B. C. C. 120.; 1 Ves. 227.

## CHATTEL, PERSONAL.

In relation to the title.

Possession the criterion of title to a personal chattel. The property therefore changed by sale in market overt. That rule adopted by the bankrupt law. Distinction as to land; possession not even *prima facie* evidence. 13 Ves. 122.

## CHESTER.

Whether affected by the custom of York.

Chester not having been within the province of York at the time of H. 8. is not within the custom. 9 Ves. 338.

## CHOSE IN ACTION.

I. ~~What is, or is not, a chose in action.~~

A pension after assignment.

II. ~~Of the nature and properties of choses in action.~~

They cannot be affected by legal or equitable process.

III. ~~On the assignment of choses in action.~~

1. The assignee's rights and equities are co-extensive only with the assignor's.

2. Effect of the assignee's forbearing the debtor.

I. ~~What is, or is not, a chose in action.~~

A pension after assignment.

A pension to A. and his assigns, is, when assigned, a grant, and not a chose in action. 1 Ball & Beatty, 390.

II. ~~Of~~

## II. Of the nature and properties of choses in action.

They cannot be affected by legal or equitable process.

1. Choses in action, viz. stock, debts, &c. are not liable to creditors: they cannot be taken on a *levari facias*: and cannot be touched in equity. *Dundas v. Dutens*, 1 Ves. 196.

2. A chose in action is neither subject to an execution at law, nor to be attached in equity by creditors in the life-time of the debtor. *Grogan v. Cooke*, 2 B. & B. 233.

## III. On the assignment of choses in action.

1. The assignee's rights and equities are co-extensive only with the assignor's.

The assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the original grantee. *Priddy v. Rose*, 3 Mer. 86.

2. Effect of the assignee's forbearing the debtor.

Where a bond is assigned by the obligee towards satisfaction of a debt owing from him to another person, the assignee is chargeable for wilful default in forbearing the obligor, to the amount of any loss incurred by such forbearance. *Ex parte Mure*, 2 Cox, 63.

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## CHURCHWARDEN.

Bill for reimbursement of expences by a former churchwarden.

Bill by a former churchwarden against the parish officers, trustees for an estate for the poor of the parish, and forty inhabitants, to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed, and an order made for payment. Upon demurrer, the lord chancellor expressed a strong opinion against such a bill; and, as it appeared not to be signed by counsel, ordered it to be taken off the file, and the plaintiff to pay the costs. *French v. Dear*, 5 Ves. 547.

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## CLERGY.

### I. In relation to clergymen.

1. Their duties with respect to registers.
2. With respect to farming.

### II. In relation to benefices.

1. Donatives.
2. Whether assets by descent.
3. Retrospective operation of stat. 7 Ann. c. 18.

### III. Of presenting to a benefice.

1. Of the jurisdiction of courts of equity in relation to.
2. In the case of an executory contract for the purchase of an advowson.
3. In the case of parceners.
4. In the case of mortgage.
5. In the case of a chapel built upon another's land.
6. To chapels of ease.

7. In

7. In the case of Flint chapel.
8. With respect to qualification.
9. Whether assessment, without payment, gives parishioners the right.
10. The term "chief and most discreet of the parishioners" defined.

#### IV. *Of resigning a benefice.*

1. Of the requisite formalities.
2. Nature of the bishop's act of acceptance.

#### V. *Of resignation bonds.*

1. General.
2. Particular.

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### I. *In relation to clergymen.*

1. Their duties with respect to registers.

By the canon law the clergy are required weekly to form and sign the registers, and annually to transmit a duplicate to the ordinary. The duplicate is evidence. 16 Ves. 63.

2. With respect to farming.

1. An agreement in 1800, for a lease of a farm to a clergyman for the purpose of occupation is void, under the statute 21 Hen. 8. c. 13. *Morris v. Preston*, 7 Ves. 547.

2. Whether a clergyman buying a lease, as property, or taking it by devolution of law, as next of kin, &c. is within the statute 21 Hen. 8. c. 13. *Quere*, 7 Ves. 556.

### II. *In relation to benefices.*

1. Donatives.

Qualities of a donative. 3 Ves. 80.

2. Whether assets by descent.

Advowson in gross, assets by descent at common law for specialty debts. 7 Ves. 447.

3. Retrospective operation of stat. 7 Ann. c. 18.

Vide 5 Ves. 828.

### III. *Of presenting to a benefice.*

1. Of the jurisdiction of courts of equity in relation to.

Jurisdiction as to the right of election of the minister of a congregation generally by *mandamus*; but if no ground for that, may be in equity, 3 Ves. & Beam. 155.

2. In the case of an executory contract for the purchase of an advowson.

A party having contracted with a person, since deceased, for the purchase of an advowson, took no steps in the life-time of the vendor, and for a considerable time after his death, to enforce the contract; (objecting to the title on the ground of outstanding judgments, and pendency of a creditor's bill): held, that he was not entitled as against a devisee to present, on a vacancy occurring

occurring in the mean time, though he had not renounced the contract, but insisted upon its completion. And, if in consequence of his insisting on such right, a bill become necessary to ascertain the true claim to the next presentation, which is thereby put in danger of lapse, a decree, in favour of the plaintiff, will carry costs as far as his claim came in question, although it be part of the decree, that, subject to the next presentation, he be permitted to complete his contract. *Wyvill v. the Bishop of Exeter and others*, 1 Price, 292.

### 3. In the case of parceners.

Coparceners seized of an advowson. Bill for a partition; the mode by presenting alternately. *Matthews v. Bishop of Bath and Wells*, Dick. 652.

### 4. In the case of mortgage.

When the mortgage merely of an advowson is become absolute in the mortgagee, he may present. *Dyer v. Lord Craven*, Dick. 662.

### 5. In the case of a chapel built upon another's land.

A person building a chapel on lands of which he had a lease, and the owner standing by, and seeing it built, without obstructing it, does not give the former a right to the chapel or to nominate. *Attorney-general v. Foley*, Dick. 363.

### 6. To chapels of ease.

The incumbent of the mother-church has the right of nominating to chapels of ease, and can only lose that right by agreement between patron, parson, and ordinary; and on a compensation made to him. Hence, where a chapel was erected and endowed by a grant of lands from the lord and freeholders of a manor, and the right of nomination was given by the archbishop in his deed of consecration to the inhabitants, and the vicar of the mother-church declared that he had no right to nominate, and the inhabitants had repaired and nominated for ninety years; yet it was held, that the vicar was entitled to nominate. *Dixon v. Metcalfe*, 2 Eden, 360.; Amb. 528.

### 7. In the case of Flint chapel.

Flint chapel. — In whom the right of nomination of a curate, whether in the bishop, who is sinecure rector, or in the vicar? Held to be in the vicar, without power of removing. *Attorney-general v. Brereton*, Dick. 783.

### 8. With respect to qualification.

Qualification in the grant of a living, that the person, to be presented, should not at such time as the church should be void, "be presented, instituted, or inducted, into any other living," complied with by previous resignation of another living. *Heyes v. Exeter College*, 12 Ves. 336.

### 9. Whether assessment, without payment, gives parishioners the right.

1. Purchase of the impropriate rectory of Clerkenwell for the use of the parishioners and inhabitants. The nomination of the curate had been by decree declared to be in the parishioners and inhabitants, paying to church and poor. The lord chancellor expressed an opinion, that assessment gave the right; though actual payment had not been made: but an election on that principle was not disturbed, on the ground of common consent; no objection having been made at a general meeting; and the parish having no representative meeting in vestry for this purpose. *Attorney-general v. Forster*, 10 Ves. 355.

2. Purchase of the impropriate rectory of Clerkenwell for the use of the parishioners and inhabitants. The nomination of the curate has been by decree

decree declared to be in the parishioners and inhabitants paying to church and poor. Whether that qualification is satisfied by assessment only, not followed by actual payment, or not, an election on that principle was established, upon common consent to that among other regulations; a case of strong and high probability being required for an issue or inquiry; and the court declining to give prospective directions as to the future, the information and bill was dismissed; and with costs, except as to the keeping up the number of trustees, with reference to the only proper subject of the information, the stipend of the curate: all the rest, as to the nomination, &c. being the subject of a private suit. An informality in the bill, not stating the plaintiffs as suing on behalf of all the other parishioners, might have been cured by amendment. *The Attorney-general v. Newcombe*, 14 Ves. 1.

10. The term "chief and most discreet of the parishioners" defined.

Trust of an advowson to present some fit person, such as the inhabitants and parishioners, or the major part of the chiefest and discreetest of them should nominate. The right of election in the inhabitants, paying the church and poor-rates, above the age of twenty-one. A popular election by a majority of such voters, and others, not so qualified, was established. *Fearon v. Webb*, 14 Ves. 13.

#### IV. Of resigning a benefice.

##### 1. Of the requisite formalities.

Resignation of a living, sent by the post to the bishop, who indorsed and signed a memorandum of his acceptance, sufficient; though no public act. *Heyes v. Exeter College*, 12 Ves. 336.

##### 2. Nature of the bishop's act of acceptance.

Acceptance by the bishop of resignation not a judicial, but a domestic act. 12 Ves. 345.

#### V. Of resignation bonds.

##### 1. General.

General bond of resignation of a living, bad. 18 Ves. jun. 37.

##### 2. Particular.

As to the validity of a bond of resignation of a living in favour of a particular person and not to accept a bishopric, (the latter not directed by the will); and whether to be considered upon the principle of marriage brokerage bonds, as against public policy, or as a corrupt transaction, with reference to which the court would not act, *quære*. *Dashwood v. Peyton*, 18 Ves. jun. 27.

#### CLIVE'S (LORD) BOUNTY.

##### Whose widows are entitled to claim.

To entitle the widow of an officer in the East India Company's service to Lord Clive's bounty, the marriage must have taken place before he retired from the service. *M'Kenny v. East India Company*, 3 Ves. 203.

COMMON,

## COMMON, TENANTS IN.

## I. A tenancy in common, by what words created.

Equally.

## II. Of the reciprocal rights of tenants in common.

1. Of actions by one against the other.
2. Of injunctions by one against the other.
3. Of exacting security by one from the other for his proportion of the profits.

## I. A tenancy in common, by what words created.

Equally.

"Equally" makes a tenancy in common. 3 Ves. 260.

## II. Of the reciprocal rights of tenants in common.

1. Of actions by one against the other.

No action of trover between tenants in common. 4 Ves. 760.

2. Of injunctions by one against the other.

Injunction against waste between tenants in common, on the ground, that one was occupying tenant to the other: otherwise not, except as to destruction. Twort v. Twort, 16 Ves. 128.

3. Of exacting security by one from the other for his proportion of the profits.

A tenant in common in possession shall give the security to answer a proportion of the rent to another tenant in common, otherwise a receiver shall be appointed. Street v. Anderton, 4 B. C. C. 414.

## COMPROMISE.

## I. Of the regard which courts of equity have for compromises.

Family compromises are favoured.

## II. Of the force of a compromise.

1. Compromise founded upon misrepresentation or suppression of facts.
2. Compromise founded upon an erroneous supposition of right.
3. Compromise founded upon a doubtful conception of right.
4. Compromise proceeding upon ignorance of a forgery.
5. Compromise founded in inequality.

## I. Of the regard which courts of equity have for compromises.

Family compromises are favoured.

Family compromise favoured; if reasonable, and upon a doubtful right; even in the strongest case; as where one party was drunk at the time. 1 Ves. & Beam. 30.

## II. Of

## II. Of the force of a compromise.

### 1. Compromise founded upon misrepresentation or suppression of facts.

A compromise of rights, doubtful in point of law, but founded upon a misrepresentation or suppression of facts, in the knowledge of one of the parties only, cannot be supported. Therefore, a deed of compromise, induced by the opinion of counsel, upon a case laid before him, prepared by the defendant's agent, but mistating the tenures, under which estates the subject of the compromise were held, was set aside. *Leonard v. Leonard*, 2 B. & B. 171.

### 2. Compromise founded upon an erroneous supposition of right.

*Quere* whether, upon a mere supposition of right, proving erroneous? 1 Ves. & Beam. 30.

### 3. Compromise founded upon a doubtful conception of right.

Persons, doubting their rights, and compromising, bound by such compromise. 1 Ball & Beatty, 504.

### 4. Compromise proceeding upon ignorance of a forgery.

Bill to set aside a compromise upon the discovery of a forgery, unknown to the plaintiffs at the time of the compromise being entered into, dismissed under the circumstances. *Lloyd v. Passingham*, Cooper, 152.

### 5. Compromise founded in inequality.

1. Mere inequality is not a sufficient ground to set aside a compromise. 1 Ball & Beatty, 356.

2. So long as a right is in doubt, inequality in a compromise cannot be considered, as it is a sufficient consideration for an agreement. 1 Ball & Beatty, 354.

## CONDITION.

### I. Nature, and effect, of a condition.

At whose risk a payment upon condition shall remain.

### II. What expressions have the force of conditions : what not.

Words of restraint.

### III. What conditions are valid : what void.

1. A condition inconsistent with the gift.
2. A condition enforcing the obligations of morality.
3. A condition enforcing a separation between husband and wife.

### IV. Of the construction of conditions.

1. A condition against alienation.
2. Whether extended to a limitation over.

### V. Performance of conditions.

1. Taking possession binds to the performance.
2. The produce of a sale ordered into court to secure a reversionary devisee's interest.

### VI. Of conditions precedent.

1. Whether a case of election, or a condition precedent.
2. Licence a condition precedent in a copyhold lease.

### VII. Of



**VII. Of conditions concurrent.**

In the case of a retiring from partnership.

**VIII. Of conditions subsequent.**

In restraint of marriage.

**I. Nature, and effect, of a condition.**

At whose risk a payment upon condition shall remain.

Payment of money into a banking house to be placed to the credit of another, upon a condition; the money, in the mean time, to stand in the banker's books in the name of the party paying it in. It is at his risk, and the loss is his, if the banker fails before the condition is complied with, though the other had written to desire it to be paid in generally. *Colley v. Short*, 148.

**II. What expressions have the force of conditions: what not.**

Words of restraint.

Words of restraint, unless there is a provision for the consequence of violation, operate only as recommendation. 1 Ves. 483.

**III. What conditions are valid: what void.****1. A condition inconsistent with the gift.**

1. A condition inconsistent with the gift is void; therefore upon a bequest to A. for life; and at his decease to his heirs, executors, &c.; but if he attempts to dispose of the principal; over, he takes the absolute interest and the condition being inconsistent with it, is void. *Bradley v. Peixoto*, 3 Ves. 324.

2. Condition that tenant in fee shall not alien, or that tenant in tail shall not suffer a recovery, is void. 3 Ves. 325.

**2. A condition enforcing the obligations of morality.**

Legacy upon condition "that the legatee shall change the course of life he has too long followed and give up low company, frequenting public-houses," &c. The condition is such as a court will carry into effect; and the evidence not being conclusive, an inquiry was directed, following the words of the bequest. *Tattersall v. Howell*, 2 Mer. 26.

**3. A condition enforcing a separation between husband and wife.**

Bequest of an allowance to a feme covert, on condition she lived apart from her husband. Condition void, as being *contra bonos mores*. *Brown v. Peck*, 1 Eden, 140.

**IV. Of the construction of conditions.****1. A condition against alienation.**

A. bequeathed an annuity to B. as an unalienable provision for his personal use and support, not subject to be anticipated or alienated, or liable to his debts, control, or engagements; with a proviso, that if B. should sell, assign, transfer, or make over, devise, mortgage, charge, or otherwise attempt to alienate the said annuity; or shall do or execute any act, deed, matter, or thing, to charge, alienate, or affect the same, it should thereupon be

be suspended. *Held*, that the annuity was not forfeited by the outlawry of B. *Rex. v. Robinson and others*, Wightw. 386.

2. Whether extended to a limitation over.

Condition not to be extended to a limitation over. 3 Ves. 320.

**V. Performance of conditions.**

1. Taking possession binds to the performance.

Where an article is given upon a condition, taking possession binds to the performance, though there be a loss. *Attorney-general v. Christ's Hospital*. 3 B. C. C. 165.

2. The produce of a sale ordered into court, to secure a reversionary devisee's interest.

*Mortgagee gives the mortgage money to the mortgagor on condition that that he will give a reversionary interest in the premises to the plaintiff; the mortgagor selling the estate, shall bring the mortgage money into court, for the use of the devisees of the reversion.* *Lewis v. King*, 2 B. C. C. 600.

**VI. Of conditions precedent.**

1. Whether a case of election, or a condition precedent.

One having an estate for life, remainder to H. in tail, devises that estate together with his own estate to the trustees to the use of H. for life; but provided that his own estate should not be conveyed until H. suffers a recovery to bar remainders created by a former will, and in default to other uses. H. did acts of ownership, but never suffered a recovery. This is not a case of election, but a condition precedent, and the testator's own estate never vested in H. *Roundell v. Currey*, 2 B. C. C. 67.

2. Licence, a condition precedent in a copyhold lease.

Demise by a copyholder for one year, and at the end of that term, from year to year for the term of thirteen years more, in all fourteen years, if the lord will give licence, and so as there shall be no forfeiture; with the usual covenants in a farm lease. The licence is a condition precedent; and not being granted there is no lease at law farther than from year to year; and there is no equity upon the circumstance, that the lord purchased his tenant's interest, with notice of the demise, and an express exception of all subsisting leases, or agreements for leases. *Lufkin v. Nunn*, 11 Ves. 170.

**VII. Of conditions concurrent.**

In the case of a retiring from partnership.

A retiring partner by an agreement in writing, assigns and sells all the stock, debts, &c. to the continuing partner, who agrees to pay a debt owing by the retiring partner, and also to pay him an annuity of 100*l.* per annum, for the due payment of which the agreement recited, that the father of the continuing partner, who was not a party thereto, would be security. Held to be an executory agreement; and the father refusing to become security, the partnership, stock, &c. was not thereby transferred to the continuing partner. *Ex parte Wheeler in re Mallam*, 1 Buck. 25.

**VIII. Of conditions subsequent.**

In restraint of marriage.

The testator bequeathed to A. M. "should she survive and continue unmarried, all his goods, chattels, estate, and effects, at the time of his death, to use, occupy, and possess the same during the term of her natural life, and

from and immediately after her death" he disposed of the same. A. M. married. The condition held to be only *in terrorem*. *Marples v. Bainbridge*, 1 Mad. 590.

## CONFIRMATION.

### I. Qualities essential to a confirmation.

1. Knowledge of one's rights.
2. Freedom from influence.
3. Freedom from fraud.
4. Sufficiency of consideration.

### II. Nature and effect of a confirmation.

1. When given deliberately, and with full knowledge.
2. In relation to fraudulent transactions.

### I. Qualities essential to a confirmation.

1. Knowledge of one's rights.

To constitute a confirmation, the party confirming must be fully apprised of his rights. 1 Ball & Beatty, 339.

2. Freedom from influence.

1. A deed confirming a grant impeached by suit, and compromising the rights, the subject of the suit obtained from a person apprised of his rights, will be set aside; if he be compelled to accede to the terms from distress and poverty, occasioned by the party procuring the confirmation. *Roche v. O'Brien*, 1 Ball & Beatty, 330.

2. Bond given at full age, and not in distress, but under a notion of honour, will, if attended with money actually advanced, maintain a former bargain however disadvantageous; but is no confirmation, wherever it is not given freely, as if under distress or terror, or apprehension from the original transaction, though unfounded. 1 Ves. 220.

3. Freedom from fraud.

A deed of confirmation must be free from fraud. 1 Ball & Beatty, 340.

4. Sufficiency of consideration.

When a party *sui juris*, apprised of the circumstances connected with the execution of a former deed, voluntarily confirms it, the sufficiency of consideration cannot be questioned. 1 Ball & Beatty, 353.

### II. Nature and effect of a confirmation.

1. When given deliberately, and with full knowledge.

Equity will not relieve a party fully apprised of his rights, deliberately confirming former acts. 1 Ball & Beatty, 340.

2. In relation to fraudulent transactions.

1. No act will amount to a confirmation of an impeachable transaction, unless the party has become aware of the fraud, and is also aware that his act will have the effect of confirming it. *Murray v. Palmer*, 2 Sch. & Lef. 486.

2. Nature

2. Nature and effect of confirmation : clear evidence necessary ; if fraud has been clearly established. 12 Ves. 373.

3. Purchase and re-purchase of a legacy expectant on a death: the whole transaction set aside for fraud ; and not confirmed by a subsequent bond, and payment of interest for four years, because given under an idea that obligor was bound by the former transaction : all the deeds set aside, and account decreed. *Crowe v. Ballard*, 1 Ves. 215.

4. False representations by bankers, that they have laid out money in the funds, indictable as a conspiracy. 18 Ves. jun. 203.

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## CONSPIRACY.

### I. What acts are indictable as conspiracies.

1. Frauds in agents.
2. Fraudulent commissions of bankruptcy.

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### I. What acts are indictable as conspiracies.

1. Frauds in agents.

Vide 18 Ves. 203.

2. Fraudulent commissions of bankruptcy.

Commission of bankruptcy for the mere purpose of giving a certificate, a conspiracy liable to indictment on information. *Ex parte Cawthorne* 19 Ves. 260.

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## CONSTRUCTION.

### I. General rules of construction.

1. In relation to courts at law and equity.
2. In relation to the context.
3. In relation to the particular nature of the provisions.
4. Of limiting restrictive words to the last antecedent.
5. Its effect in qualifying a prior instrument.

### II. Rules of construction in particular cases.

The case of an inaccurate letter, the basis of a settlement:

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#### I. General rules of construction.

1. In relation to courts at law and equity.

The same construction of instruments in every court. 9 Ves. 393.

2. In relation to the context.

Instruments to be construed upon the whole context. 2 Ves. 7.

3. In relation to the particular nature of the provisions.

An instrument is to be construed without adverting to the nature of its provisions, if legal, or to what they would have been, if a particular case had been contemplated. *Mosley v. Mosley*, 5 Ves. 248.

## 4. Of limiting restrictive words to the last antecedent.

The rule, that words of restriction are to be confined to the last antecedent, does not hold even in criminal proceedings. 4 Ves. 390.

## 5. Its effect in qualifying a prior instrument.

Vide 2 S. & L. 271.

## II. Rules of construction in particular cases.

The case of an inaccurate letter, the basis of a settlement.

Vide 5 Ves. 213.

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 CONTRACT.

## I. What subjects may be made the subjects of contract.

An heir's expectancy.

## II. Essentials to the validity of contracts.

1. Certainty.
2. A consideration.
3. Quantum of the consideration.

## III. Of matters dehors affecting the validity of contracts.

1. In relation to ignorance or mistake.
2. Change of parties interested.

## IV. Construction in general.

1. Analogy between the rules of law and equity.
2. Of the rule in equity to construe joint-contracts several also.
3. In relation to the context.
4. Where the sense is doubtful.
5. Of varying the construction from the expression.
6. Where the provisions are ineffectual to the end proposed.
7. In relation to subsequent events.
8. In the case of articles.

## V. Of the construction of contracts in particular cases.

1. Reference to a deed of such a date, there being two of the same date.
2. What a provision within a contract for an annuity, until provided for.
3. Letters respecting a marriage portion.
4. A contract for payment of partnership debts.
5. Contract by the continuing to the retiring partner for an annuity until dispossessed of the premises.
6. Reference of expences.
7. A transfer of stock as a security: held a sale.

## VI. Of the specific performance of contracts.

1. Origin and grounds of the jurisdiction.
2. Analogies connected with this subject.

**VII. In what cases a specific performance will be decreed.**

1. When of course.
2. The discretion of courts of equity is subservient to established principles.
3. The rule upon the subject.
4. The contract must be complete.
5. The case must be clear of doubt.
6. The case must be clear of suspicion.
7. In relation to unreasonableness.
8. In relation to inconvenience.
9. In relation to voluntary contracts.
10. In relation to adequacy of consideration.
11. In relation to the want of interest.
12. In relation to mutual signature.
13. In relation to lapse of time.
14. In relation to deviation. [And see in deviation — In relation to compensation.]
15. In relation to compensation. [And see in deviation — In relation to deviation.]
16. In relation to the statute of frauds.
17. In relation to parol variation.
18. Of decreeing a specific performance through the medium of a different interest.
19. In relation to after events.
20. In relation to subsequent incapacity from bodily infirmity.
21. After the failure of a suit at law.
22. In relation to the case where the legal remedy has been lost through default.
23. In relation to contracts embodied in awards.
24. Building contracts.
25. Contracts to purchase debts.
26. Contracts to appropriate the produce of real estates.
27. Articles of separation.

**VIII. In what mode a specific performance will be decreed.**

1. Jurisdiction of courts of equity to modify contracts.
2. In relation to a stipulated mode of execution.
3. In relation to a failure in proof.
4. In relation to a variance in proof.
5. In relation to the decision of questions respecting time.
6. By supplying legal formalities in the securities of the opposite party.
7. Of the plaintiff's right to damages for non-performance.
8. In the case of a purchase of insolvent debtor's interest in funds.

**IX. In what cases a specific performance will be refused.**

1. The court will not execute a contract, because it would not set it aside.
2. The court will not enforce contracts merely to harass.
3. Where the interests of third persons are involved.
4. In the case of voluntary contracts.

5. In relation to mutuality.
6. In the case of insufficiency.
7. In the case of uncertainty.
8. In the case of legal incompetency to execute.
9. Where some of the parties are married women.
10. In the case of immorality.
11. In the case of unreasonableness.
12. In the case of surprise.
13. In the case of suspicion.
14. In the case of misrepresentation.
15. In the case of improper influence.
16. In the case of ignorance.
17. In the case of mistake.
18. From material omission.
19. In the case of delay injurious to the opposite party.
20. In the case of laches.
21. In the case of a single witness contradicted by the answer.
22. Contract to refer to arbitration.
23. Contract for sale, the price to be fixed by umpirage.
24. In the case where the medium of arbitration has failed in settling the terms of a contract.
25. Building contracts.
26. Contracts in husbandry.
27. A contract for a present lease by one out of possession.
28. A contract for a mortgage, under the circumstances.
29. A contract for a partnership dissoluble immediately.
30. A contract to transfer stock.

**X. Of the modes by which a contract may be discharged.**

By parol.

**XI. Of contracts of a particular description.**

1. Effect of a covenant to forbear suit.
2. Effect of a parent's agreement to leave his property among his children.

**I. What subjects may be made the subjects of contract.**

An heir's expectancy.

Expectancy of an heir, either presumptive or apparent, not an interest or possibility capable of being made the subject of contract. *Carleton v. Leighton*, 3 Mer. 667.

**II. Essentials to the validity of contracts.**

**1. Certainty.**

If an executory contract contains all that leads to future certainty, it is sufficient: therefore an agreement for rent, at a certain sum per acre, the number of acres not being expressed, is good. 1 Sch. & Lef. 73.

**2. A consideration.**

1. A voluntary agreement indorsed on a lease by one not a party to it, but only a remainder-man, not binding. *Dowling v. Mill*, 1 Mad. 541.

2. Un-

2. Undertaking by one person to pay the debt of another does not require consideration, moving between *them*. 14 Ves. 190.

3. Promissory note given by a mother to a trustee for the benefit of a child of which she is ensient, is not sufficiently *nudum pactum* for the court to allow a demurrer to a bill by the child (when born), and trustee to have it carried into execution. Seton v. Seton, 2 B. C. C. 610.

### 3. Quantum of the consideration.

Principle of the Roman law as to contracts, requiring the price to exceed half the value. 10 Ves. 475.

## III. Of matters before affecting the validity of contracts.

### 1. In relation to ignorance or mistake.

1. Effect of the common mistake of both parties to a contract; and of mistake of one, not occasioned by the other; in the former case avoiding the contract. 13 Ves. 427.

2. Any person undertaking to describe bound by the description, whether consonant or not. 1 Ves. 213.

### 2. Change of parties interested.

Deed valid in the first making continues so against other parties. Countess of Strathmore v. Bowes, 2 B. C. C. 345.

## IV. Construction in general.

### 1. Analogy between the rules of law and equity.

1. Construction of covenants the same in equity as at law: but equity will relieve against a strict performance upon equitable circumstances, and no wilful default. 3 Ves. 692.

2. A court of equity is not bound to find an equitable effect for a clause in a deed, because the construction put upon it at law would leave it imperative. Gladstone v. Birley, 2 Mer. 404.

### 2. Of the rule in equity to construe joint-contracts several also.

1. Not a principle of equity, that every joint covenant shall be considered as if it were joint and several. Sumner v. Powell, 2 Mer. 30.

2. Under a joint covenant to raise a sum of money, the whole may be recovered from either. 5 Ves. 717.

3. Under a joint and several bond, the obligee, though he might have several executions, could not bring a joint and also several actions. 1 Ves. & Beam. 65.

4. Joint bond considered as joint and several. Thomas v. Frazer, 3 Ves. 399.

5. Where a bond was in form only a joint bond, but it was suggested to have been the intention of the parties to make it joint and several; the court referred it to the master, to inquire whether this was the intention of the parties: where such intention appears on the face of the bond, the court will treat it as a joint and several bond, although it is only a joint bond in form. *Ex parte Symonds*, 1 Cox, 200.

### 3. In relation to the context.

The rule in construing a deed is, to collect the intention from the entire of the instrument, and not from any detached part. 1 Ball & Beatty, 430.

### 4. Where the sense is doubtful.

If the words of a deed are in themselves of doubtful signification, or there is no person to whom they can, in their strict sense, apply, it is a subject for inquiry, whether they may not be understood in a different sense. Cholmondeley v. Clinton, 2 Mer. 344.



5. Of varying the construction from the expression.

1. The construction of a deed cannot be varied from its expressions without some recital to justify the contract. *Doran v. Ross*, 3 B. C. C. 27.

2. Equity in construing the effect of a contract never departs from what appears on the face of the instrument to be the intention of the parties, unless contrary to some principle of law. *Pentland v. Stokes*, 2 B. & B. 73.

6. Where the provisions are ineffectual to the end proposed.

A deed is to be expounded according to the maker's intention. But the court will not new model the deed itself, or alter dispositions which are in themselves clear and unambiguous, because they happen to be ineffectual to the end proposed. *Cholmondeley v. Clinton*, 2 Mer. 343.

7. In relation to subsequent events.

Deed construed as from the moment of execution; not by subsequent events. 16 Ves. 156.

8. In the case of articles.

1. Articles are considered as heads or minutes of an agreement; and in construing them, the court is to consider what is the contract which the parties intended to enter into. *Taggart v. Taggart*, 1 Sch. & Lef. 87.; *Campbell v. Sandys*, *Ibid.* 292.

2. Articles are considered in equity as the heads of an agreement, and construed by what appears to have been the intention of the parties, rather than by the legal effect of the words. 1 B. & B. 89. 215.

**V. Of the construction of contracts in particular cases.**

1. Reference to a deed of such a date, there being two of the same date.

Construction of deeds: *First*, that a provision for payment of "the just proportion or share" of all debts owing from one partner jointly, and as a partner, referred not to the contribution as among the partners, but to what with reference to the state of the partnership fund, and the ability of the other partners, he may eventually be called on to contribute to the joint debts, so as they may be fully paid: *Secondly*, that under a provision for debts of various descriptions, no preference was intended; which must be clearly shewn: otherwise the court favours equal payment: *Thirdly*, a reference to a deed of a specified date, there being two of the same date, one executed at that time, the other subsequently, was, in the absence of positive evidence, and aided by circumstances, applied to the former. *Wadson v. Richardson*, 1 Ves. & Beam. 103.

2. What a provision within a contract for an annuity, until provided for.

A grandfather in consideration of a bond from the father to grant him an annuity of 50*l.* during his life, enters into a counter bond with the father, conditioned for payment to the son of a like annuity in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father. The son obtains through some other interest, a place in the ordnance office, with a salary exceeding the amount of the annuity. Held, that this was not a sufficient provision within the meaning of the bond, being an office only during pleasure, whereas the provision in the contemplation of the parties must have been one of a permanent nature. *Peché v. Smith*, 3 Mer. 312.

3. Letters respecting a marriage portion.

Construction of a letter; as not amounting to an absolute agreement to give a marriage portion. Another letter, subsequent to the marriage, authorising the husband to draw for interest, due on a bond, which was never executed,

executed, could not prevail as evidence of a promise; which, if subsequent to the marriage, was void, as *nudum pactum*; and a previous promise not being shewn; if that, by parol, with a written recognition after the marriage by writing, would do, within the statute of frauds. *Randall v. Morgan*, 12 Ves. 67.

4. A contract for payment of partnership debts.

Vide 1 Ves. & Beam. 103.

5. Contract by the continuing to the retiring partner for an annuity until dispossessed of the premises.

Agreement on dissolution of partnership, that the continuing partner shall, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, by bond conditioned to be void, on payment of the annuity, "or in case he should at any time after the expiration of the then existing lease, be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own." The continuing partner obtains a renewal of the lease, and afterwards becomes bankrupt; and the renewed lease passes under the assignment of his estate. This is not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease. *Holyland v. De Mendez*, 3 Mer. 184.

6. Reference of expences.

Construction of a contract; that a reference of the expences was confined to the expence of the conveyance: but the evidence of the attorney was admitted for the defendant, to prove the intention of both parties, according to verbal instances, that the plaintiff, the purchaser, should also pay the expence of making out the defendant's title. *Ramsbottom v. Gosden*, 1 Ves. & Beam. 165.

7. A transfer of stock as a security: held a sale.

Stock transferred as a security for a floating balance, and under an agreement to continue it transferred and re-transferred by the creditor by way of loan: held a sale. *Ex parte Denison*, 3 Ves. 552.

## VI. *Of the specific performance of contracts.*

1. Origin and grounds of the jurisdiction.

1. Origin of the jurisdiction to grant a specific performance. 13 Ves. 228.

2. Origin and progress of the equitable jurisdiction to enforce the specific performance of agreements. 13 Ves. 76.

3. Principle of specific performance, that the legal remedy is inadequate or defective. 8 Ves. 163.

4. Principle of specific performance, that the contract may be performed in substance; though the terms are not strictly complied with; so as to give the right at law. 13 Ves. 289.

5. The origin of decrees for specific execution is, that damages at law would not put the plaintiff in a situation as beneficial to him as if the agreement were specifically performed. 2 Sch. & Lef. 553.

6. Nor, where it is doubtful whether the party meant to contract to the extent that he is sought to be charged. 2 Sch. & Lef. 553.

7. *Aliter, semble*. If the instrument would be merely nugatory, unless it were held to give what was contended for. 2 Sch. & Lef. 557.

2. Analogies connected with this subject.

Distinction between carrying an agreement into execution and disturbing it when executed: also as to decreeing it to be delivered up, or leaving the party to make the most of it at law. 16 Ves. 86.

## VII. In what cases a specific performance will be decreed.

### 1. When of course.

Specific performance of a contract by a competent party, and its nature and circumstances unobjectionable, as much of course as damages at law. 9 Ves. 608.

### 2. The discretion of courts of equity is subservient to established principles.

The discretion of the court in granting or refusing a specific execution, is regulated by established principles. *Revell v. Hussey*, 2 B. & B. 288.

### 3. The rule upon the subject.

1. Rule as to enforcing agreements. 4 Ves. 849.

2. Specific execution of agreements decreed, where damages would not answer the intention in making the contract, and a specific performance is therefore essential to justice. *Davis v. Hone*, 2 Sch. & Lef. 341.

3. But equity will not decree specific performance of a covenant, where, from circumstances, it has become unconscientious strictly to enforce performance of it. 2 Sch. & Lef. 341.

4. But on the terms of plaintiff's submitting to a conscientious modification of the covenant, equity will grant specific performance subject to such modification: especially where the conduct of both parties for a great length of time, has caused the covenant so to be acted upon, as to make it unconscionable to refuse a specific performance. 2 Sch. & Lef. 348.

### 4. The contract must be complete.

1. Equity has jurisdiction to compel the specific performance of a *complete* contract, but cannot supply any term not agreed upon. *Lord Ormond v. Anderson*, 2 B. & B. 369.

2. Decrees founded upon letters, not intended at the time to be a complete final agreement. 9 Ves. 355.

3. No specific performance of an agreement by letters, unless upon a fair interpretation concluded; if doubtful, whether more than treaty, to be left to law. 11 Ves. 591.

4. In order to form a contract by letter, of which the court will decree a specific performance, nothing more is necessary than that the amount and nature of the consideration to be paid on one side, and received on the other, should be ascertained, together with a reasonable description of the subject matter of the contract. It is the clearly established doctrine, that the court will carry into execution an agreement so constituted. It is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence. *Kennedy v. Lee*, 3 Mer. 441.

### 5. The case must be clear of doubt.

To obtain a specific performance, the case should be clear of doubt. *Flood v. Finlay*, 2 B. & B. 16.

### 6. The case must be clear of suspicion.

Unless it appear, that the party seeking a specific execution of an agreement, has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere. *O'Rourke v. Percival*, 2 B. & B. 62.

### 7. In relation to unreasonableness.

1. If a person contracts to do a thing which he may do himself, or has the means of compelling others to do, equity will compel him to do it, unless it be highly unreasonable, in which case the other party shall not be held to the contract. *Costigan v. Hastler*, 2 Sch. & Lef. 166.

2. If

2. If in that case the other party refuses to give up the contract, equity will not enforce a specific execution, but leave him to recover damages at law. 2 Sch. & Lef. 166.

8. In relation to inconvenience.

On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a degree of inconvenience and absurdity, so great as to afford judicial proof that such could not be the meaning of the parties. *Prebble v. Boghurst*, Swanst. 329.

9. In relation to voluntary contracts.

1. Distinction as to volunteers: The assistance of the court cannot be had without consideration to constitute a party *cestui que trust*; as, upon a voluntary covenant to transfer stock, &c. But if the legal conveyance is actually made, constituting the relation of trustee and *cestui que trust*, as if the stock is actually transferred, &c. though without consideration, the equitable interest will be enforced. *Ellison v. Ellison*, 6 Ves. 656.

2. Distinction between a mere voluntary promise, *nudum pactum*, that will not maintain an action and a promise, upon the faith of which another does some act; as entering into engagements, or paying money; forming a consideration, that will support an action; and therefore establish a debt against assets. *Crosbie v. McDoual*, 13 Ves. 148.

10. In relation to adequacy of consideration.

1. Mere difference in value, though considerable, not of itself a sufficient ground for refusing a specific performance. 8 Ves. 517.

2. Inadequacy of price, unless amounting in itself to conclusive and decisive evidence of fraud, is not in itself a sufficient ground for refusing a specific performance. 9 Ves. 246.

3. Contract executed, though the consideration was inadequate; not amounting to fraud; but without costs. *Burrowes v. Lock*, 10 Ves. 470.

4. An undertaking contained in a letter from A. devisee of a real estate, to B. a legatee, to pay interest upon her legacy, which was charged upon the estate, according to the rate fixed by an order of court, provided B. would join in a sale; held to be upon sufficient consideration, it appearing that several expensive suits, in which A. was engaged, would thereby be terminated, and the estate bettered; and such undertaking not being waived, by no notice having been taken of it in a subsequent agreement to sell, a specific performance was decreed. *Griffith v. Sheffield*, 1 Eden, 79.

5. The court will support contracts entered into to preserve the peace of families; and, therefore, where a son upon his marriage joined with his father in re-settling the estate, and by a memorandum executed at the same time, agreed to secure 500*l.* to each of his sisters; held, that there was sufficient consideration for the court to decree a specific performance of this agreement; an attempt to shew that it had been obtained by an undue exercise of parental influence having failed. *Wycherley v. Wycherley*, 2 Eden, 175.

11. In relation to the want of interest.

1. Objection to the execution of an agreement for want of interest cannot prevail in an early stage of the suit; as the interest may be acquired. 14 Ves. 412.

2. Where a person contracts to grant a certain interest, which it afterwards appears he cannot carry into execution to the extent agreed on, yet the grant shall be available as far as his interest will permit. *O'Rourke v. Percival*, 2 B. & B. 64.

12. In

## 12. In relation to mutual signature.

Whether the court will perform a contract, signed by one party, not by the other, and nothing done upon it, *quære*. 11 Ves. 592.

## 13. In relation to lapse of time.

1. The time at which a contract is to be performed, is not essential in equity, as at law. The relief against the lapse of time is in the discretion of the court upon the circumstances; as if the contract is abandoned. *Radcliffe v. Warrington*, 12 Ves. 326.

2. Lapse of time, if not an essential object of a contract, is no objection to a specific performance. Injunction upon that, combined, with other circumstances. *Hearne v. Tenant*, 13 Ves. 287.

3. When time is not of the substance of a contract, a specific performance will be decreed, though the period for its completion have elapsed. *Jessop v. King*, 2 B. & B. 94.

4. The time for performance of a contract is material. 5 Ves. 736.

5. Time, with reference to the performance of a contract, not immaterial. 13 Ves. 228.

6. Time, as of the essence of the contract, waived by a protracted treaty. *Wood v. Bernal*, 19 Ves. 220.

7. Time, where by the terms of an auction, the sale is to be completed by a certain day; yet, if neither party takes any step to quicken the other, the time is waived, and equity will interfere to prevent the purchaser from taking advantage of it at law. *Jones v. Price*, 3 Anst. 924.

## 14. In relation to deviation.

1. Small deviations from a plan agreed upon for building not material; otherwise, if obstinate or corrupt. *Craven v. Tickell*, 1 Ves. 60.

2. Small mistakes or inaccuracies in a contract are the subject of compensation; but that has been extended to a great length. 10 Ves. 306.

3. Compensation for deviations from an agreement. 14 Ves. 413.

4. Specific performance upon the principle of compensation and indemnity: not if the effect is a substantial deviation from the contract. *Halsey v. Grant*, 13 Ves. 73.

5. Specific performance upon the principle of compensation and indemnity: the effect not being a substantial deviation from the contract. *Hornblow v. Shirley*, 13 Ves. 81.

## 15. In relation to compensation.

The doctrine of compensation has been carried too far. It is not to prevail, unless the party will substantially have that for which he contracted. 13 Ves. 228.

## 16. In relation to the statute of frauds.

Specific performance of a parol agreement as to land: the effect of a family compromise of doubtful rights; with part-performance by possession, and improvements; and acquiescence near 19 years: a third person being permitted to act upon his conception of the rights, not questioned at the time by the defendant, who cannot object that he acquiesced under expectations from that person, which were in part disappointed. *Stockley v. Stockley*, 1 Ves. & Beam. 23.

## 17. In relation to parol variation.

1. Specific performance of a written agreement with a variation by writing; not with a variation by parol. 7 Ves. 133.

2. Specific performance of an agreement in writing for a lease for sixty years, refused upon parol evidence of an alteration, stipulated for at the same time; and upon the faith of which the party executed. Distinction between

the case of a defendant refusing, and a plaintiff seeking, the execution of an agreement under such circumstances. *Clarke v. Grant*, 14 Ves. 519.

3. Though a parol waiver of a written contract, amounting to a complete abandonment, and clearly proved, would bar a specific performance, or even parol variation, so acted upon, that the original agreement could no longer be enforced without injury to one party; variations verbally agreed upon, are not sufficient to prevent the execution of a written agreement; the situation of the parties in all other respects remaining the same. In this case the variations were all for the advantage of the defendant, by gratuitous covenants of the plaintiff. *Price v. Dyer*, 17 Ves. jun. 356.

4. C. being about to marry, applied to A. his landlord, and requested him to change a *cestui que vie* in his lease, by inserting, in place of an old life, the name of his intended wife; which A. by letter promised to do; and upon the faith of such promise the marriage was had, and the demised premises settled upon the wife. Upon a bill by the wife (C. being dead), it was held, that she would have been entitled to a specific execution against A.: and the estate of A. having been sold to O., who was deemed under the circumstances to have had notice of the agreement, he was decreed specifically to perform it. *Crofton v. Ormsby*, 2 Sch. & Lef. 183.

18. Of decreeing a specific performance through the medium of a different interest.

Contract by trustees under a power of sale, though by subsequent events it cannot be executed by the power, shall be made good in equity by the effects of the interest acquired in the estate bound by the contract. 10 Ves. 315.

19. In relation to after events.

1. Subsequent events will not in equity vary a contract fairly entered into. *Revell v. Hussey*, 2 B. & B. 287.

2. Vide 2 S. & L. 341. 348.

20. In relation to subsequent incapacity from bodily infirmity.

A bill for specific performance of an agreement for a lease from plaintiff to defendants, A. and B. B. had become incapable of doing any act in consequence of a paralytic stroke. Ordered, that A. should execute the counterpart, and also B. when he should be capable of doing so. *Pegge v. Skynner*, 1 Cox, 23.

21. After the failure of a suit at law.

A bill for a specific performance of an agreement, after an action at law had failed, not multifarious. *M'Namara v. Arthur*, 2 B. & B. 353.

22. In relation to the case where the legal remedy has been lost through default.

Equity will decree specific performance, where it is conscientious that the agreement should be performed, though the party seeking performance has lost his remedy at law by his own default. 2 Sch. & Lef. 347.

23. In relation to contracts embodied in awards.

1. If the terms of an agreement are to be ascertained by an award, being so ascertained, it shall be specifically performed, if any thing is to be done in specie; conveyances, &c.; not, if the acts done towards executing it by an award, are not valid at law, as to the time, manner, or other circumstances; unless there has been acquiescence notwithstanding the variation of circumstances, or part-performance. 17 Ves. jun. 241.

2. In enforcing the performance of an agreement embodied in an award, the court proceeds on peculiar principles. *Wood v. Griffith*, Swanst. 58.

24. Building

## 24. Building contracts.

Specific performance of an agreement to build may be decreed, if sufficiently certain; but a general covenant to lay out a certain sum in a building of a certain value, cannot be so executed. *Mosely v. Virgin*, 3 Ves. 184.

## 25. Contracts to purchase debts.

1. Specific performance decreed of a contract for the purchase of a debt. *Wright v. Bell*, 1 Dan. 95.

2. W., landlord to P., having the power to distrain for rent in arrear, and having actually distrained for part, and being a creditor of P. for money lent, as well as for rent in arrear, upon P.'s representing to him, that he is also indebted to G. to the amount of about 900*l.* for which he is in fear of arrest, and about to leave the country, undertakes that, if P. will give up to him the farm, and execute an assignment of all his property, he will pay G.'s debt in the first instance, out of the proceeds, and apply the residue in satisfaction of his own demand, and pay the surplus (if any) to P., who executes a bill of sale to W. accordingly, on the faith of such undertaking. Upon the bill of G. and P. this agreement was enforced against W. to the extent of 900*l.*, the alleged amount of G.'s debt, but no farther; the actual debt having proved to exceed that amount; and not prevented from having effect, either by the circumstance that P.'s property fell short of the estimated amount, or of P.'s being at the time indebted to other persons besides G. and W., which formed no part of the consideration for the agreement, although noticed in W.'s undertaking as having been represented otherwise. The engagement to pay G. in the first instance, not being made directly to G., but through the medium of P., by whom also the consideration was furnished, P. held in a court of equity, to be a trustee for G. But *quære*, if the plaintiffs could recover at law upon such an agreement. *Gregory v. Williams*, 3 Mer. 582.

## 26. Contracts to appropriate the produce of real estates.

A covenant to appropriate one-third of the produce of real estates to raise a sum of money, is not a mere personal contract, suable at law, but creates a lien upon the land, and the covenantees have a right to have it specifically performed. *Legard v. Hodges*, 3 B. C. C. 531.

## 27. Articles of separation.

Specific performance decreed of articles of separation in a suit by the wife, though the husband offered by answer, to receive her back again. *Guth v. Guth*, 3 C. C. C. 614. See tit. *BARON & FEME*.

## VIII. In what mode a specific performance will be decreed.

## 1. Jurisdiction of courts of equity to modify contracts.

1. Courts of equity have no power to alter the contracts of parties, from an eventual change not contemplated at the time. *Revell v. Hussey*, 2 B. & B. 288.

2. Specific performance cannot be decreed of an agreement with a variation made in it by the court. *Jordan v. Sawkins*, 4 B. C. C. 477.

3. The court has modified particular, subordinate, parts of an agreement; but the cases of that sort have gone too far; and are not to be extended. 14 Ves. 407.

## 2. In relation to a stipulated mode of execution.

The mode agreed on to carry a contract into effect is as much binding on the parties, as the contract itself. Therefore where a lessor agreed to demise for a longer term than he was possessed of, and to carry it into effect, he covenanted that he would endeavour to procure such renewals as would

would enable him to renew for the full term agreed on, the lessee paying a proportion of the renewal fine; an agreement was implied, that lessee would take such renewal, though no express covenant by him for that purpose. *Lord Frankfort v. Thorpe*, 2 B. & B. 372. — The lessor having renewed, has a right to call upon lessee to declare whether he will renew or not. But whether the lessee, by refusing to renew as often as the lessor renewed, forfeited all benefit of renewal, *quære*. *Lord Frankfort v. Thorpe*, 2 B. & B. 372.

### 3. In relation to a failure in proof.

Where the terms of a contract, sought to be carried into execution, are not, on the hearing of the cause, sufficiently proved, a reference or an issue will not be directed to ascertain them. *Savage v. Carroll*, 1 Ball & Beatty, 265.

### 4. In relation to a variance in proof.

1. Defendant to a bill for specific performance, proving an agreement different from that insisted on by the plaintiff, may have a decree upon his answer, submitting to perform. A cross bill therefore, though formerly the course, being unnecessary, would be dismissed with costs. *Fife v. Clayton*, 13 Ves. 546.

2. Though a defendant to a bill for specific performance of a contract, may have a decree for performance according to his construction, if adopted by the court, without a cross bill, the decision being, not according to his construction, but only that he had contracted under a mistake, created by the plaintiff, the bill was merely dismissed. *Higginson v. Clowes*, 15 Ves. 516.

### 5. In relation to the decision of questions respecting time.

On a bill for specific performance, the questions whether time was originally of the essence of the contract, and whether being so, the defendant has done any act whereby he has waived it as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing. *Levy v. Lindo*, 3 Mer. 81.

### 6. By supplying legal formalities in the securities of the opposite party.

Where the plaintiff had received a promissory note without a stamp, the court directed the proper note to be made according to the agreement, before the defendant should have execution of the other parts of the contract. *Aylet v. Bennet*, 1 Anst. 45.

### 7. Of the plaintiff's right to damages for non-performance.

1. Plaintiff in a bill for specific performance of a contract, is not entitled, generally, to satisfaction by way of damages, for the non-performance, to be ascertained by an issue, or a reference to the master. Distinction as to the case of compensation; as for a part subject to tithes, though represented as tithe free; giving the purchaser, if he chooses to take the purchase, a right to compensation, but not to compel the vendor to purchase the tithes. *Todd v. Gee*, 17 Ves. jun., 273.

2. On a bill for a specific performance of an agreement for the sale of a house, the plaintiff made out his case; but it appeared that the defendant had actually sold the house to another person for a valuable consideration, and without notice. The court directed the master to inquire what damages the plaintiff had sustained by the non-performance of the agreement; and that such damages, together with the costs of the suit, should be paid by defendant. *Denton v. Stewart*, 1 Cox, 258.

### 8. In the case of a purchase of insolvent debtor's interest in funds.

Before the court will decree a specific performance of a purchase of an insolvent



insolvent debtor's interest in funds, it will inquire into the value. *Collett v. Wollaston*, 3 B. C. C. 128.

### IX. In what cases a specific performance will be refused.

1. The court will not execute a contract because it would not set it aside.

1. A court of equity will exercise its discretion in cases of bills for specific performance, by dismissing them (and with costs), although the same circumstances would not induce the court to make a decree to cancel the agreement on a bill filed for that purpose. *Davis v. Symonds*, 1 Cox, 402.

2. The court is not bound to decree a specific performance in every case, where it will not set aside the contract; nor to set aside every contract, that it will not specifically perform. Under circumstances that would have amounted to a breach of trust, inadequacy of consideration, arising from gross negligence of the agent, and a want of due authority, the bill was dismissed; though the plaintiff was unimpeached; without prejudice to his remedy at law. *Mortlock v. Buller*, 10 Ves. 292.

2. The court will not enforce contracts merely to harass.

The court of chancery will not decree contracts to be carried into execution merely for the purpose of harassing parties. *Smith v. Morris*, Dick. 697.

3. Where the interests of third persons are involved.

The interest which a third party may have against the specific performance of a contract, may preclude the execution of it; as, between trustee, and *cestui que* trust; as, where an insolvent tenant made over his lease to another; who treated for a renewal under a secret agreement in trust for the original tenant. That agreement not executed against the landlord; and the principle, that a trustee shall derive no benefit from his trust, should fail, rather than be executed against a third party, so imposed upon; though, except for that interest, it would have been executed as between the other parties. 17 Ves. jun. 313.

4. In the case of voluntary contracts.

1. A court of equity will not carry into execution a voluntary deed, without either valuable or meritorious consideration. *Colman v. Sarel*, 3 B. C. C. 12.

2. Where deed is not sufficient to pass the estate, but party must come into equity, court never executes a voluntary agreement. 1 Ves. 54.

5. In relation to mutuality.

1. The want of mutuality in a contract, a sufficient ground upon which to resist a specific performance. *Howell v. George*, 1 Mad. 12.

2. Where nothing has been done in pursuance of an agreement, the court ought not to decree a specific performance, except where the right to compel is mutual. *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

6. In the case of insufficiency.

Where a mother, who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage. Bill for a specific performance, by decreeing a strict settlement, dismissed. And even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having asserted their rights, the court would not have interfered. *Howorth v. Deem*, 1 Eden, 351.

1. If

7. In the case of uncertainty.

1. If there be uncertainty as to the terms of an agreement, it cannot be carried into execution, even though reduced to writing. *Lindsay v. Lynch*, 2 Sch. & Lef. 7.

2. Equity will not decree a specific execution upon a contract, the terms of which are uncertain as to its extent. *Harnett v. Yielding*, 2 Sch. & Lef. 549.

3. Therefore, where Y., tenant for life, with power to make leases for twenty-one years at the best improved rent, made a lease to H., and thereby covenanted "for the term of his life, to renew said lease to H., his executors, administrators, and assigns, by giving them a lease for twenty-one years, when applied to:" H. surrendered the lease under a clause empowering him to do so; afterwards, upon a new agreement, Y. indorsed on the back of the old lease, "I promise and agree to perfect a fresh lease to H. at any time he shall demand the same, at 5*l.* a-year less than the within-mentioned rent." It being uncertain whether the agreement was for more than one term of twenty-one years, and an agreement for a further lease (even if clear) being in fraud of the power, a bill for a renewal of the lease for a second term of twenty-one years, was dismissed. 2 Sch. & Lef. 549.

4. Specific performance cannot be decreed of an agreement to sell at a price to be fixed by arbitrators (already appointed to settle other matters in dispute between the parties), where the defendant (the vendor) had refused to execute the arbitration bond, and it was therefore uncertain that any award would ever be made. *Wilks v. Davis*, 3 Mer. 507.

5. Specific performance of an agreement to purchase the business of an attorney, refused upon the bill of the vendor, there being no express stipulations by which the court might carry it into effect, on his part, in return for the defendant's purchase-money; and there being no conditions generally applicable to transactions of this nature, so as to come within the description of "usual clauses," to be inserted in an instrument to be drawn up in pursuance of the agreement. *Boyon v. Farlow*, 1 Mer. 459.

6. *Quære*, whether such an agreement is void at law upon the ground either of morality or of public policy. *Ibid.*

7. *Quære*, if legally a valid agreement, whether it is of such a nature as is capable of being enforced in equity. *Ibid.*

8. Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain, and unintelligible. *Franks v. Martin*, 1 Eden, 309.; 5 Toml. P. C. 151.

8. In the case of legal incompetency to execute.

Equity will not decree specific execution against a party not lawfully competent to execute the contract. *Harnett v. Yielding*, 2 Sch. & Lef. 549.

9. Where some of the parties are married women.

1. Though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake, yet, upon such an agreement, where some of the persons to be bound were married women, of whom also one had not executed, the court refused a specific performance; and dismissed the bill, leaving the plaintiff to law. *Emery v. Wase*, 5 Ves. 846.

2. Upon appeal, the decree affirmed upon the ground that the evidence did not prove satisfactorily, as it ought, especially in the case of married women, that the valuation was made with due attention and care. *Emery v. Wase*, 8 Ves. 505.

10. In the case of immorality.

Bill against an executrix to enforce a parol agreement by her testator, when single, to settle an annuity upon the plaintiff, a married woman, separated.

rated from her husband, who lived with the testator; general demurrer allowed. *Matthews v. ———*, 1 Mad. 558.

11. In the case of unreasonableness.

When the contract is unreasonable at the time of its being entered into, it will not be enforced. *Revell v. Hussey*, 2 B. & B. 287.

12. In the case of surprise.

Agreement no specific performance, if any surprise, making it not fair and honest to call for it; the plaintiff left to law. 10 Ves. 305.

13. In the case of suspicion.

A bill for specific performance of an agreement for a lease, signed by the grantor only, and contrary to his leasing power, of which the plaintiff had notice, afterwards amended; praying an execution of the agreement for the life of the grantor, without requiring compensation for the difference of interest, dismissed: the case proved for the plaintiff, creating doubts and suspicions of the fairness of the transaction. *O'Rourke v. Percival*, 2 B. & B. 58.

14. In the case of misrepresentation.

Misrepresentation, though in a slight degree, is an objection to a specific performance. Distinction upon a bill to rescind the contract. *Cadman v. Homer*, 18 Ves. jun. 10.

15. In the case of improper influence.

Notwithstanding two private acts of parliament, reducing younger children's portions in proportion to the other interests, the court would not enforce an agreement entered into by one of the younger children, in execution of the private acts, thereby consenting to accept a stated sum on satisfaction; such agreement being inserted by the plaintiff's solicitor in a receipt from her, on paying her a small sum of money, and she being in great distress and embarrassment at the time. *Kemys v. Hansard*, Cooper, 125.

16. In the case of ignorance.

A deed, executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor, not enforced, it appearing on the face of the deed, that the parties did not understand their rights, or the nature of the transaction, and that the heir surrendered an unimpeachable title without consideration, and evidence being given of his gross ignorance, habitual intoxication, liability or imposition, and want of professional advice; in the absence of direct proof of fraud or undue influence, and after an acquiescence of five years. *Dunnage v. White*, Swanst. 197.

17. In the case of mistake.

1. Specific performance of an agreement the subject of discretion: refused, therefore, in the case of mistake, though no fraud. *Mason v. Armistage*, 19 Ves. 25.

2. Specific performance refused upon mistake. 19 Ves. 135.

3. Bill by a husband to have his wife's portion, part of which was invested in stock, made up money, on the ground, either of express contract, or representation, upon which the marriage took place, dismissed: the description by the articles, though generally "the sum of 4000*l.*," referring to that sum as in settlement; and the representation under circumstances not amounting to a warranty; and proceeding upon a common mistake. *Ainslie v. Medlycott*, 9 Ves. 13.

18. From material omission.

Where a material ingredient in the terms of a contract has been omitted, equity considering it as only resting in treaty, will not decree a specific execution.

cution. Therefore where a tenant in possession, under an article impeached by his landlord, proposed to pay an increased rent, a bill by the landlord for a specific execution of the proposal, was dismissed; the period when the increased rent should commence not being agreed on. *Lord Ormond v. Anderson*, 2 B. & B. 363.

19. In the case of delay injurious to the opposite party.

When the object of one of the contracting parties would be defeated by delay in the execution of it; if the other party delay, he shall not afterwards be allowed to insist on performance. *Crofton v. Ormsby*, 2 Sch. & Lef. 604. So, if the delay were injurious to one of the parties. *Ibid.*

20. In the case of laches.

A bill for a specific performance of an agreement, is an application to the discretion, or rather to the extraordinary jurisdiction of the court, which cannot be exercised in favor of persons, who have slept on their rights, or have acquiesced for a long time, in a title and possession adverse to their title. 1 Ball & Beatty, 69.

21. In the case of a single witness contradicted by the answer.

Vide 1 B. & B. 402.

22. Contract to refer to arbitration.

Bill for specific performance of an agreement to refer to arbitration does not lie. 6 Ves. 818.

23. Contract for sale, the price to be fixed by umpirage.

Agreement for sale according to the valuation of two persons, one chosen by each party, or of an umpire, to be appointed by those two in case of disagreement. Bill for a specific performance, praying that the court will appoint a person to make the valuation, or otherwise ascertain it; dismissed. *Milnes v. Gery*, 14 Ves. 400.

24. In the case where the medium of arbitration has failed in settling the terms of a contract.

No instance where the medium of arbitration for settling the terms of a contract having failed, the court of chancery has assumed jurisdiction to determine, that there is a contract, though not at law, in equity; which, though the parties never agreed to it, shall be specifically executed. 17 Ves. jun. 243.

25. Building contracts.

A bill will not lie to compel the performance of an agreement to build a house; but it will to compel a conveyance of land, because there is a thing certain to be conveyed. *Errington v. Aynsley*, Dick. 692.

26. Contracts in husbandry.

1. Demurrer to a bill by a landlord for a specific performance of covenants, contained in a lease which had expired, to repair hedges and mansionhouse, and also for an account of loppings and dung, cut or removed by the tenant, allowed. Common covenants in husbandry not being the subject of equitable jurisdiction. *Rayner v. Stone*, 2 Eden, 128.

2. No specific performance of a covenant to repair. 16 Ves. 405.

3. Specific performance of a covenant to make good a gravel pit, refused. *Fint v. Brandon*. 8 Ves. 159.

27. A contract for a present lease by one out of possession.

A contract for a present demise by a person out of possession, not enforced in equity. Therefore a lessee, apprized at the time of the demise, that lessor had no means of putting him in possession, except by a suit, not assisted

assisted in equity to obtain the possession, the transaction being considered as a dealing for a suit in equity, and from the situation of the property, the full value could not be obtained. *Bayly v. Tyrrell*, 2 B. & B. 358.

28. A contract for a mortgage, under the circumstances.

Bill for specific performance of an alleged agreement for a mortgage entered into by the defendant's testator, for securing money advanced to him on the faith of such agreement (and other debts); *semble*, not maintainable under the circumstances stated in the case. *Jackson v. Radford*, 4 Price, 274.

29. A contract for a partnership dissoluble immediately.

No specific execution of an agreement for a partnership which might be dissolved immediately afterwards. *Hercy v. Birch*, 9 Ves. 357.

30. A contract to transfer stock.

1. No specific performance of an agreement for a transfer of stock. 10 Ves. 161.

2. No specific performance of an agreement to transfer stock. 13 Ves. 37.

X. Of the modes by which a contract may be discharged.

By parol.

1. Agreement in writing may be waived by parol. *Inge v. Lippingwell*, Dick. 469.

2. A parol agreement may be discharged by parol. 4 Ves. 848.

3. Contract in writing may be dissolved by parol. 9 Ves. 250.

4. There may be waiver without any specific contract, as in cases of carriers, partners, &c. *Ogilvie v. Foljambe*, 3 Mer. 53.

XI. Of contracts of a particular description.

1. Effect of a covenant to forbear suit.

As to the effect of a covenant to forbear suit, *quære*. 6 Ves. 821.

2. Effect of a parent's agreement to leave his property among his children.

1. Covenant by a father to give or leave by his will all his personal estate equally among his children, does not deprive him of the right of unlimited expence, and of any fair application, even by gift, if absolute and *bonâ fide*: but a disposition for the purpose of defeating the covenant cannot stand: therefore transfers of stock to one of the children by the father were upon the circumstance of a reservation of the dividends for his life, and other evidence of a partial intention to elude the covenant, set aside. *Jones v. Martin*, 5 Ves. 266. n.

2. Vide 19 Ves. 67.

## CONTRACT BETWEEN VENDOR AND PURCHASER.

I. Of sales by auction and private contract.

1. Of puffing.

2. Of the particulars and conditions of sale—a specific price essential to a contract of sale.

3. Of the particulars and conditions of sale—in relation to ambiguity of expression.

4. Of

4. Of the particulars and conditions of sale — whether variable: by parol declarations.
5. Of the particulars and conditions of sale — force of an indefinite representation.
6. Of the particulars and conditions of sale — import of the term “a price clear of all expences.”
7. Of the particulars and conditions of sale — import of the term “ground rents.”
8. Of the particulars and conditions of sale — invalidity of a warranty against an apparent defect.
9. Of the particulars and conditions of sale — covenant of indemnity by purchaser of leasehold.
10. Of the particulars and conditions of sale — sale of goodwill.
11. Of the particulars and conditions of sale — miscellaneous.
12. Of the deposit — at whose risk it lies.
13. Of the deposit — improvement in value of deposit by investment, who entitled to.
14. Of the deposit — who shall be the loser by the depository's failure.
15. Of the deposit — relief against forfeiture of.

## II. Of sales under the authority of courts of equity.

1. Of the proceedings from the advertisement to the conveyance — general obligation of purchaser in regard to the title.
2. Of the proceedings from the advertisement to the conveyance, of the period from which the purchaser is entitled to possession, with the consequences.
3. Of the proceedings from the advertisement to the conveyance — of incumbrances.
4. Of the proceedings from the advertisement to the conveyance — substitution of one purchaser for another.
5. Of opening the biddings, and reseinding the contract. Vide in tit. CHANCERY PRACTICE.

## III. Of parol agreements.

Of the form and signature of the agreement.

## IV. Of the consequences of the contract.

1. Of the rule in equity, that the purchaser is entitled to the estate from the time of the contract.
2. Of specific performance — general rules.
3. Of specific performance — with respect to the vendor and his acts.
4. Of specific performance — with respect to the agreement itself.
5. Of specific performance — reference as to title.
6. Of specific performance — practice connected therewith.
7. Of the remedies for a breach of contract — action at law.
8. Of the remedies for a breach of contract — bill in equity.
9. Of the remedies for a breach of contract — compensation by setting an occupation rent.

10. Of the remedies for a breach of contract — effect of taking possession.
11. Of the remedies for a breach of contract — waiver of defects in title.

**V. Of the consideration.**

1. Of unreasonable and inadequate considerations — of unreasonable considerations.
2. Of inadequate considerations.
3. Of the failure of the consideration before the conveyance — of loss by fire, &c.
4. Of the failure of the consideration before the conveyance — of the death of a person, for an annuity upon whose life the estate was sold.

**VI. Of the partial execution of a contract where a vendor has not the interest which he pretended to sell; and of defects in the quantity and quality of the estate.**

1. Where the vendor has not the interest which he sold: in what cases the vendor may enforce a part performance.
2. Where the vendor has not the interest which he sold: in what cases the purchaser may enforce a part performance.
3. Of defects in quality of the estate.
4. Of defects in quantity of the estate.

**VII. Of the title which a purchaser may require.**

1. Of the root of the title.
2. Of the production of the lessor's title.
3. Of equitable and doubtful titles — of equitable titles.
4. Of equitable and doubtful titles — of doubtful titles.

**VIII. Of the time allowed to complete the contract.**

1. Of delays occasioned by the neglect of either party.
2. Of delays occasioned by the state of the title.

**IX. Of the abstract and conveyance; the assignment of terms; attested copies and covenants for title to which a purchaser is entitled; of searching for incumbrances; and of relief in respect of incumbrances.**

1. Of the abstract and conveyance — abstract when complete.
2. Of the abstract and conveyance — at whose expence.
3. Of the abstract and conveyance — indemnity on loss of title-deeds.
4. Of assignment of terms.
5. Of attested copies — when the originals must be produced or forthcoming.
6. Of attested copies — at whose expence.
7. Of covenants for title.
8. Of covenants against incumbrances.
9. Of covenants running with land.

10. Of relief from incumbrances — where the purchase-money has not been paid.
11. Of relief from incumbrances — where the purchase-money has been paid.

**X. Of interest and costs.**

1. Of interest — in what cases payable.
2. Of interest — at what rate.

**XI. Of the obligation of a purchaser to see to the application of the purchase-money.**

1. Of his liability with reference to real estate.
2. Of his liability with reference to leasehold estates.

**XII. Of the vendor's lien on the estate sold for the purchase-money, if not paid.**

1. Original of.
2. In what cases raised.
3. Whether it extends to third persons.
4. Against whom it will be enforced.
5. Waiver and discharge of.

**XIII. Of the persons incapable of purchasing.**

1. Of purchases by trustees, agents, &c. and bankrupt commissioner. Vide in tit. **BANKRUPT** in the Digest.
2. Of purchases by trustees, agents, &c. — Mortgagee.
3. Of purchases by trustees, agents, &c. — Residuary legatee.

**XIV. Of the protection, and relief, afforded to purchasers by statutes, and by the rules of equity.**

1. Of fraudulent and voluntary settlements.
2. Of protection from judgments and recognizances — in the case of freehold estates.
3. Of protection from unregistered deeds, &c. — of the equitable doctrine on the acts in regard to notice.
4. Of equitable relief and protection where — the purchaser has not notice.
5. Of equitable relief and protection — effect of notice.

**XV. Of notice.**

Of constructive notice.

**XVI. Miscellaneous points relative to the sale of personalty.**

**I. Of sales by auction and private contract.**

**1. Of puffing.**

1. At a sale by auction, the seller's agent bid for the purchaser; a specific performance refused. *Twining v. Morrice*, 2 B. C. C. 326.
2. Objections by a purchaser by auction, 1st, that a way round and across a meadow was not specified; 2dly, on account of a bidding for the plaintiff; a specific performance was decreed with costs. *Oldfield Bowles v. Round*, 5 Ves. 506.



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2. Of the particulars and conditions of sale — a specific price essential to a contract of sale.

According to the Roman and the English law, as administered both in courts of law and equity, a fixed price is an essential ingredient in a contract of sale. A contract therefore that does not settle the price is valid and complete only when and if the party, to whom it is referred, shall fix it; and is otherwise totally inoperative. 14 Ves. 408.

3. Of the particulars and conditions of sale — in relation to ambiguity of expression.

1. Specific performance decreed against a purchaser at a public auction, where the representation in the particulars of sale (complained of as calculated to mislead) was so vague and indefinite, that it ought to have put the purchaser on making previous enquiry. *Trower v. Newcome*, 3 Mer. 704.

2. Upon the ambiguous terms of a contract, as including or excluding the timber, the purchaser's bill for specific performance dismissed; and having throughout insisted upon his construction, he was not permitted to compel the vendor to convey upon the terms he originally offered. *Clowes v. Higginson*, 1 Ves. & Beam. 524.

4. Of the particulars and conditions of sale — whether variable by parol declarations.

Verbal declarations of an auctioneer at the time of sale, not to be received in contradiction to the printed particulars. But *quære* as to the effect of personal information of a mistake in the particular. *Ogilvie v. Foljambe*, 3 Mer. 53.

5. Of the particulars and conditions of sale — force of an indefinite representation.

Effect of an indefinite representation by a vendor, as that a leasehold estate was nearly equal to freehold, being renewable upon a small fine; putting the purchaser upon inquiry: though connected with certain circumstances, such representation may be fraudulent, and form a ground for rescinding the contract. *Fenton v. Brown*, 14 Ves. 144.

6. Of the particulars and conditions of sale — import of the term "a price clear of all expences."

Words construed so as to have some meaning, rather than rejected: therefore vendor proposing a price, clear of all expences, construed, that the purchaser should bear the expence of making out the title; the law imposing on him the expence of the conveyance. *Stratford v. Bosworth*, 2 Ves. & Beam. 341.

7. Of the particulars and conditions of sale — import of the term "ground rents."

Construction of the word "ground rents" in a printed particular of sale according to the general acceptance. *Stewart v. Alliston*, 1 Mer. 26.

8. Of the particulars and conditions of sale — invalidity of a warranty against an apparent defect.

Warranty upon a sale against an obvious defect, not binding. 10 Ves. 507.

9. Of the particulars and conditions of sale — covenant of indemnity by purchaser of leasehold.

Under a contract for the assignment of a term, whether from the original lessee, or a mesne assignee, the purchaser must covenant for indemnity against payment of rent and performance of covenant; though he cannot have a covenant for the title from the assignor, as being an executor, and also by express stipulation. *Staines v. Morris*, 1 Ves. & Beam. 8.

10. Of

10. Of the particulars and conditions of sale — sale of good-will.

Sale of a trade with the good-will does not prevent the vendor's setting up again a similar trade without express covenant; or fraud, by representing it as a continuation of the old trade, or by conduct encouraging others to involve themselves in the confidence, that he would not trade again, &c. *Crutwell v. Lye*, 17 Ves. jun. 335.

11. Of the particulars and conditions of sale — miscellaneous.

Specific performance refused, under a contract for sale at a price to be fixed by arbitrators within a certain time, or if they should not agree to make their award within the time, by an umpire, also within a limited time; the construction of the contract requiring the delivery of the award in writing to each party, being, that, though the consequential acts, executing the conveyances, &c. might be done by representatives, it was, with reference to the terms, to be fixed by the award, personal to the parties. *Blundell v. Bretargh*, 17 Ves. jun. 232.

12. Of the deposit — at whose risk it lies.

Vide 2 Mad. 28.

13. Of the deposit — improvement in value of deposit by investment, who entitled to.

Effect of a deposit by vendee, with notice to vendor; to stop, or determine, the rate of interest: not as a tender and appropriation, transferring the risk as to the principal. Therefore, upon an investment in stock by the vendee, the title not being ready, and the vendor having notice, but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's. *Roberts v. Massey*, 19 Ves. 561.

14. Of the deposit — who shall be the loser by the depositary's failure.

Vendor, resisting an application by the purchaser for payment into court of the deposit in the hands of the vendor's agent, charged with a loss by the agent's failure. *Fenton v. Browne*, 14 Ves. 144.

15. Of the deposit — relief against forfeiture of.

Relief against forfeiture of the deposit, upon putting the other party in the same situation, as if the contract had been performed at the time agreed. *Moss v. Matthews*, 3 Ves. 39.

## II. *Of sales under the authority of courts of equity.*

1. Of the proceedings from the advertisement to the conveyance — general obligation of purchaser in regard to the title.

A purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties; and that on that investigation it has properly decreed a sale: but he ought to see that all proper parties to be bound are before the court; and that he does not take a title which can be impeached *aliunde*. 2 Sch. & Lef. 566.

2. Of the proceedings from the advertisement to the conveyance — of the period from which the purchaser is entitled to possession, with the consequences.

1. The rule, that a purchaser shall have possession as from the quarter-day preceding the sale, does not apply to a colliery; which is an article of trade, the profits accruing daily. The proper period is the month or week, in which the purchase takes place; according to the usual course of taking the account. *Wren v. Kirton*, 8 Ves. 502.

2. A manor was sold under the decree of the court as part of the real estate of the testator; and an order was made on the 13th of March, that this

this purchaser should on or before the 17th day of March pay his purchase-money into court, and be let into possession of the profits from Lady-day. Several deaths and admissions had taken place prior to Lady-day, but the fines due thereon had not been paid or assessed until after that time, no court having been holden. These fines belong to the vendors, and not to the purchaser. *Garrick v. Lord Camden*, 2 Cox, 231.

3. Of the proceedings from the advertisement to the conveyance — of incumbrances.

Not permitted to apply part of his purchase-money in discharge of a mortgage on the estate, though some of the parties consented, others being infants; and that there was such incumbrance not appearing on the report. *Quære*, could it be done, if all were competent and consented? — *v. Stretton*, 1 Ves. 266.

4. Of the proceedings from the advertisement to the conveyance — substitution of one purchaser for another.

1. The court will not discharge a purchaser and substitute another even upon paying in the money without an affidavit, that there is no under bargain. *Rigby v. Macnamara*, 6 Ves. 515.

2. One purchaser not substituted for another without affidavit, that there is no underhand bargain. *Vale v. Davenport*, 6 Ves. 615.

5. Of opening the biddings, and rescinding the contract.

Vide in tit. CHANCERY PRACTICE.

### III. Of parol agreements.

Of the form and signature of the agreement.

Contract for land by letters sufficient within the statute of frauds: not specifically executed, unless upon a fair interpretation importing a concluded agreement: and not doubtful, whether only treaty. *Stratford v. Bosworth*, 2 Ves. & Beam. 341.

### IV. Of the consequences of the contract.

1. Of the rule in equity, that the purchaser is entitled to the estate from the time of the contract.

1. From the execution of the contract, the estate is, in equity, the property of the vendee, descendible and deviseable, as such. 7 Ves. 274.

2. Where a written agreement for the purchase of an estate has been executed, the purchaser has the estate in equity; and it will pass by his will; which will not be revoked by the subsequent conveyance of the legal estate. 11 Ves. 554.

3. Purchaser before conveyance the owner in equity for almost every purpose, as to profit and loss; but before payment, may be restrained from cutting timber. As between his representatives it is real estate. 2 Ves. & Beam. 389.

4. When a purchase is completed, the vendee is entitled to the rents and profits of the estate until possession is given, and the vendor to his purchase money, with interest; and if by the neglect of the vendor, no rents and profits have been received, he will be liable for what he might have received, unless the purchaser has taken possession. *Gaisford v. Acland*, 2 Mad. 28.

5. Lessee for years, with an option at certain periods to purchase, making that option, was considered owner *ab initio*, for the benefit of the heir. 16 Ves. 253.

6. Decree upon the answer, admitting a contract, and a letter, offering to sell at a valuation, for a conveyance on payment of the purchase-money into

into the bank by the plaintiff on a certain day: in default of payment, the bill to be dismissed with costs. No binding contract until payment. The estate therefore did not pass by a previous devise; but descended to the heir. *Gaskarth v. Lord Lowther*, 12 Ves. 107.

## 2. Of specific performance — general rules.

Equitable discretion to lend or refuse aid to execute a contract for purchase, not arbitrary. 18 Ves. jun. 111.

## 3. Of specific performance — with respect to the vendor and his acts.

1. Though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake, yet, upon such an agreement, where some of the parties to be bound were married women, of whom also one had not executed, the court refused a specific performance; and dismissed the bill; leaving the plaintiff to law. *Emery v. Wase*, 5 Ves. 846.

2. On a bill by vendor for specific performance, with an allowance to the defendant, by way of compensation, for a part of the estate to which the plaintiff is unable to make a good title; the defendant having taken possession under the agreement, one of the terms of which was, "that immediate possession should be given;" and in the course of disputes which arose subsequently as to the title to this part of the estate, having been turned out of the possession so taken. Held, that the vendor, in so turning him out of possession, has abandoned his right to a specific performance; and the bill dismissed accordingly: without going into the question as to the materiality of the defective part. *Knatchbull v. Grueber*, 3 Mer. 124.

3. Bill for specific performance of an agreement to purchase against the original vendee and an assignee of his contract, dismissed as against the former; the plaintiff being held by delivery of abstract and offer to execute a conveyance, to have accepted the latter as purchaser. *Holden v. Hayn and another*, 1 Mer. 47.

4. *Quære*, if the bill had been filed against the original purchaser only. *Holden v. Hayn and another*, 1 Mer. 47.

## 4. Of specific performance — with respect to the agreement itself.

1. Agreement to sell at a fair valuation may be executed. 14 Ves. 407.

2. Bill for specific performance of an agreement to purchase, dismissed, there being a concealment on the part of the vendor. *Shirley v. Stratton*, 1 B. C. C. 440.

3. Specific performance refused of an agreement to sell an estate in fee by one who supposed he was absolute owner of the estate, when, in fact, he was only tenant for life under a settlement, with a proviso empowering him to purchase "an estate in fee simple in possession in some convenient place or places in England, of equal or better value; and to settle the same to him in lieu of the settled estate, which was then to be his own. *Howell v. George*, 1 Mad. 1.

4. Promise, by letter, to renew a lease in consideration of money already laid out by the tenant, is *nudum pactum*, and no specific performance will be decreed; nor is it varied by money having been laid out afterwards. *Robertson v. St. John*, 2 B. C. C. 140.

5. *Quære*, whether where vendee, entitled only under an agreement, sells to another, such vendee can object to a specific performance, on the ground of the statute 32 Hen. 8. c. 9. *Wall v. Stubbs*, 1 Mad. 80.

## 5. Of specific performance — reference as to title.

1. General rule, that the court will not decide upon a title without a reference to the master; unless unequivocally, and without fraud or surprise, waived; a plaintiff seeking a specific performance of a contract being entitled to the opportunity of making out a better title before the master; and the

the defendant having a right to farther enquiry beyond the objections arising on the abstract, upon the principle that the bill seeks relief beyond the law. *Jenkins v. Hiles*, 6 Ves. 646.

2. Bill for specific performance of a contract for sale of an estate upon various objections to the title, dismissed in the first instance without a reference. *Omerod v. Hardman*, 5 Ves. 722.

3. Specific performance decreed against a purchaser without a reference as to title; upon possession — a correspondence — and no objection to the title, till two years after the abstract was delivered. *Margravine of Anspach v. Noel*, 1 Mad. 310.

#### 6. Of specific performance — practice connected therewith.

Bill filed for a specific performance of an agreement to purchase, and demurred to. Order made, that on a conveyance of the estate from the plaintiff to the defendant being deposited with the master, the vendee should pay into court his purchase money; which order was complied with. Motion, that master should deliver the conveyance to the vendee, refused. *Cutler v. Broughton*, 3 Mad. 95.

#### 7. Of the remedies for a breach of contract — action at law.

1. It is incumbent on the purchaser of an estate to prepare and tender a conveyance. *Baxter v. Lewis*, *Forrest*, 61.

2. No equity upon eviction to recover purchase-money. 3 Ves. 235.

#### 8. Of the remedies for a breach of contract — bill in equity.

1. No objection to a purchaser that the defect of title appeared on the abstract, delivered before he filed his bill. *Stapylton v. Scott*, 16 Ves. 272.

2. Vendor upon objection to the title, sold to another, after notice, that she would do so, if the title was refused. Under a bill for a specific performance, or an issue, or reference, to ascertain the loss of the first purchaser, a reference was directed upon the authority of *Denton v. Stuart*. As to the principle, *quare*. *Greenaway v. Adams*, 12 Ves. 395.

3. Under a bill to have a contract delivered up, on the ground of the defective title of the defendant, the vendor, and for compensation for the injury to the plaintiff, by the failure of the contract; the decree was made for delivering up the contract without prejudice to an action; instead of an inquiry before the master. *Gwillim v. Stone*, 14 Ves. 128.

4. On a sale of an estate, part of the consideration was to be an annuity, but it was not settled how it should be secured. The court directed it to be by security on the estate as well as by bond and judgment. *Remington v. Deverall*, 2 Anst. 550.

#### 9. Of the remedies for a breach of contract — compensation by setting an occupation rent.

1. Specific performance of an agreement for the sale of an estate decreed, notwithstanding a variance from the description; with compensation for the deficiency in value; though a minute examination might have discovered the defects; as in the state of the house and the cultivation of the lands: not for a variance from the description, as lying within a ring fence; as being an object of sense; and upon the evidence the purchaser being apprised of it. The premises consisting of a leasehold farm, and three years having expired, pending the suit, interest was given to the vendor, and a rent set upon it in respect of his possession. *Dyer v. Hargrave*, 10 Ves. 505.

2. On a motion by a vendor against a vendee in possession, for a reference to set an occupation rent, the title not being completed, an order was accordingly made; and that interest at *5l. per cent.* upon the deposit, should under the circumstances, be deducted out of such rent. *Smith v. Jackson*, 1 Mad. 618.

10. Of the remedies for a breach of contract — effect of taking possession.

1. Possession taken generally amounts to a waiver even of objections to title. 12 Ves. 27.

2. As to the effect of taking away part of the property sold, and a payment on account, as waiving a breach of the condition of sale, requiring security, *quære*. *Ex parte Gwynne*, 12 Ves. 379.

11. Of the remedies for a breach of contract — waiver of defects in title.

1. The right to a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right by going on with the agreement after he has full notice, that he is not to expect a good title. This is in such case, matter of notice, and not of contract. *Ogilvie v. Foljambe*, 3 Mer. 53.

2. Approbation of counsel not a waiver of all reasonable objections to the title. 18 Ves. jun. 514.

V. Of the consideration.

1. Of unreasonable and inadequate considerations — of unreasonable considerations.

1. When a written agreement is entered into for the purchase of an estate, at a price far beyond its value, but without any circumstances of fraud or surprize, the court will not decree a specific performance of such a contract, but on the other hand, will not rescind it. *Day v. Newman*, 2 Cox, 77.

2. That the vendee bought on a speculation (if that was not consented to by the vendor), no defence to a bill for specific performance. *Adams v. Weare*, 1 B. C. C. 567.

2. Of inadequate considerations.

1. Mere inadequacy of price, where it cannot be used as evidence of fraud, is not of itself sufficient to prevent the court from decreeing a specific performance of an agreement for the purchase of land. *Collier v. Brown*, 1 Cox, 428.

2. Bill for specific performance of a purchase by auction dismissed by Lord Rosslyn with costs, merely as being a hard bargain, from inadequacy of value. Upon a re-hearing, Lord Eldon was of opinion, that was not a sufficient ground for refusing a specific performance of a purchase by auction, without something more, as fraud or surprize, &c. But the decree was not affected upon another ground; that a material witness being incompetent, the bill was not supported by evidence. *White v. Damon*, 7 Ves. 30.

3. Inadequacy of consideration no ground for resisting the execution of a contract to sell; the vendor not being under any incapacity of judgment, or led by accident or design, into a misapprehension of the value. *Western v. Russell*, 3 Ves. & Beam. 187.

4. The sale of a reversion by public auction held good, and the purchaser not bound to shew that he has given the full value. *Shelly v. Nash*, 3 Mad. 232.

3. Of the failure of the consideration before the conveyance — of loss by fire, &c.

1. Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. *Revell v. Hussey*, 2 B. & B. 287.

2. A vendee, before a conveyance, having agreed with a tenant, that if he had a conveyance by a given time, the tenant should quit at that period, and

and the tenant misconstruing the agreement, quitted before a conveyance was made, so that the land was untenanted and deteriorated; the loss held to fall upon the vendee, it being occasioned by his agreement with the tenant. *Harford v. Purrier*, 1 Mad. 532.

3. Contract for the sale of houses, which, from defects in the title, could not be completed on the day. The treaty however proceeded, upon a proposal to waive the objections upon certain terms. The houses being burnt before a conveyance, the purchaser is bound, if he accepted the title; and the circumstance, that the vendor suffered the insurance to expire at the day, on which the contract was originally to have been completed, without notice, makes no difference. A reference to the master was therefore directed to inquire, whether the proposal was accepted, or acquiesced in, on behalf of the purchaser. *Paine v. Meller*, 6 Ves. 349.

4. A vendor is bound to know that he actually has that which he professes to sell; and even though the subject matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately, yet if the contingency has already happened, the contract will be void. *Hitchcock v. Giddings*, 1 Dan. l. 4 Price, 135.

4. Of the failure of the consideration before the conveyance — of the death of a person, for an annuity upon whose life the estate was sold.

1. A. sells an estate for an annuity; A. dies before any payment of the annuity; if the contract be fair, it shall be specifically performed. *Mortimer v. Capper*, 1 B. C. C. 156.

2. A contract that the one party shall convey an estate, and the other shall grant an annuity, shall be specifically performed, though the grantor died previous to any payment of the annuity, (one having become due and been tendered). *Jackson v. Lever*, 3 B. C. C. 605.

3. Contract for the sale of an estate for a life-annuity must be executed; though the vendor dies before the end of the first half year. 9 Ves. 246.

4. A party having contracted with a person, since deceased, for the purchase of an advowson, took no steps during the lifetime of the vendor to enforce the contract, or for a considerable time after her death, (objecting to the title on the ground of outstanding judgments, and a creditor's bill pending); held, that he was not entitled as against a devisee, to present, on a vacancy occurring in the mean time, though he has not renounced his contract, but insists on having it completed. *Wyvill v. the Bishop of Exeter and others*, 1 Price, 292.

5. Acceptance or non-acceptance of title is the criterion of right to specific performance of contracts in equity. *Wyvill v. the Bishop of Exeter and others*, 1 Price, 296.

VI. Of the partial execution of a contract, where a vendor has not the interest which he pretended to sell; and of defects in the quantity and quality of the estate.

1. Where the vendor has not the interest which he sold — in what cases the vendor may enforce a part performance.

1. Where a man contracts to purchase, on the faith of the vendor's having a good title, he has a right to have the title sifted to the bottom, before he can be called upon either to accept an indemnity, or compensation for a defect, or to abandon the contract. *Knatchbull v. Grueber*, 3 Mer. 137.

2. Equity does not compel a purchaser to take such a title as a willing purchaser might be satisfied with. But the court will inquire whether a title can be had, and if the title is defective as to part, there is no principle of equity

equity more artificial than that which calls on the court to decide whether the purchaser shall be bound to take, with any and what compensation. *Knatchbull v. Grueber*, 3 Mer. 140.

3. Whether the interest contracted for be freehold or leasehold for a long term of years, or a short lease at rack rent, the party who comes for a specific performance should be prepared to shew that he is able to give what he seeks to compel the other to take. *Fildes v. Hooker*, 2 Mer. 424.

4. A purchaser cannot be compelled upon the principle of compensation to take, under a contract for a freehold estate, a leasehold, though a very long term. *Drewe v. Corp*, 9 Ves. 368.

5. If a purchaser cannot have what was his strong inducement to the contract, a specific performance with compensation not to be enforced. 13 Ves. 426.

6. Reference upon the title: an objection to the specific performance, on the ground, that premises, to which no title could be made, were represented as included in the purchase, and were a principal inducement to the purchaser, failing upon the evidence. *Stapylton v. Scott*, 13 Ves. 425.

7. Specific performance of a purchase agreement refused, no good title being made to a part of the estate, which though very small in proportion to the whole purchase, was essential to its enjoyment; and the defendant who was let into possession, being afterwards turned out by the plaintiffs. *Knatchbull v. Grueber*, 1 Mad. 153.

8. If a person possessed of a term, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term; and this court will not arrange the equities between the parties. *Wood v. Griffith, Swanst.* 54.

9. A small incumbrance, which may be the subject of compensation, no objection to a specific performance. *Guest v. Humfray*, 5 Ves. 818.

10. Specific performance decreed upon the bill of the purchaser, with compensation for a defect of title, if to be ascertained, by reduction of the purchase-money: if not, or the plaintiff would so take it, with an indemnity: the defendant, the vendor, proposing an option to take it, as it was, or relinquish the contract: the defect consisting in the representation by the particular of a church-lease for twenty-one years, with covenants for renewals to sixty-three years: the lease being actually for lives; and the covenants limited and contingent. *Milligan v. Cooke*, 16 Ves. 1.

11. A contract having been made for sale of an estate, it afterwards appeared that there were several outgoing from the estate, which were not disclosed at the time of the contract; yet these being matters which lie in compensation, the contract shall be carried into execution, with an allowance only to the purchaser for these particulars which diminish the value. The agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase-money shall appear to have been kept dead, for the special purpose of completing the contract. *Howland v. Norris, Cox*, 60.

12. *Scmble*, a purchaser is not to be compelled to take an indemnity against a judgment amounting to half of the purchase-money. *Wood v. Bernal*, 19 Ves. 221.

13. It is no objection to the title to an estate that an extent had issued from the crown against the owner, which remained in the hands of the sheriff unexecuted, it appearing that the lords of the treasury had, in fact, compromised the debt, though a writ of *amoveas manus* had not actually issued. *Poole v. Shergold*, 1 Cox, 160.

14. Held, that a lessee, subject to covenants, cannot compel a specific performance of an agreement to purchase the premises, though he offered to indemnify the purchaser against the performance of the covenants. *Fildes v. Hooker*, 3 Mad. 193.

15. *Quære*, how far the court will go in compelling a party to complete a pur-



a purchase when no title can be made to some part of the property. *Poole v. Shergold*, Cox, 273.

16. Contract for purchase in lots; no title can be made to two of the lots, and others had been deteriorated; if the former were not so blended with the others as to injure them, a specific performance shall be decreed. *Poole v. Shergold*, 2 B. C. C. 118.

17. The objection by a purchaser applying only to a small part of the estate, a specific performance decreed with compensation. *M'Queen v. Farquhar*, 11 Ves. 505.

18. Specific performance prayed both by original and cross bill, after considerable delay upon the title; the rents to be received and interest paid, from the time stipulated. *Fenton v. Browne*, 14 Ves. 144.

19. On a bill for specific performance of an agreement for the sale of a lease, the court cannot apportion the price according to the time already expired. *King v. Whightman*, 1 Anst. 80.

2. Where the vendor has not the interest which he sold—in what cases the purchaser may enforce a part-performance.

1. Vendor, representing and contracting to sell the estate as his own, cannot object, that he has only a partial interest. The purchaser is entitled to as much as he can have, and an abatement. 10 Ves. 316.

2. Defect of title to a considerable part of the estate, though a good objection by the purchaser to a specific performance, not so by the vendor. *Weston v. Russell*, 3 Ves. & Beam. 187.

3. Though it is generally, not universally, true, that a purchaser may take what he can get, with compensation for what he cannot have; whether this is ever done without an express undertaking on his part to do what the court shall order, *quære*. *Paton v. Rogers*, 1 Ves. & Beam. 351.

3. Of defects in the quality of the estate.

1. How far the maxim *caveat emptor* is to be applied. *Lowndes v. Lane*, 2 Cox, 363.

2. Purchaser must abide by the case of him from whom he buys. 1 Ves. 249.

3. In enforcing contracts upon the principle of compensation for a variance from the description the court has gone so far, to the extent even of wholly defeating the object of the purchaser, that where the principal subject of the contract was all the corn and hay tithes of a parish, and of the hay-tithe half was allotted to the vicar, and the other half commuted for a customary payment, the nature of that payment, the extent of meadow, and the possible conversion from arable, not distinctly appearing, the injunction against recovering the deposit was continued after answer. *Drewe v. Hanson*, 6 Ves. 675.

4. Compensation for the dry-rot in house and premises, decreed upon representations of the vendor to the purchaser as to the state of repairs; the purchaser relying upon such representations, and stating to the plaintiff that he did not employ a surveyor for that reason. *Grant v. Munt*, Cooper, 178.

5. No compensation in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or misstatement" in the particular. *Stewart v. Alliston*, 1 Mer. 206.

6. Reservation of salt-works, mines, &c. in 1704, with a right of entry, though no instance of any claim, and the title had been transferred in 1761, without such reservation, upon the usual covenants, held an objection, giving a right to compensation: the purchaser not insisting upon it farther. *Seamen v. Vawdrey*, 16 Ves. 390.

7. A joint stock-company having permitted a transfer of stock under a forged letter of attorney, held, that the company, and not the fair purchaser, should bear the loss. *Ashby v. Blackwell*, 2 Eden, 299.; *Amb.* 503.

4. Of

## 4. Of defects in the quantity of the estate.

1. Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance; he being referred to a more particular description, which did not include that part, and the surrender having been made according to that, and from his own instructions. *Calverley v. Williams*, 1 Ves. 210.

2. If one party thought he had purchased *bond fide* part of an estate, which the other thought he had not sold, it is a ground to set aside the contract. If both understood the whole was to be conveyed, it must; otherwise, if neither understood so. 1 Ves. 211.

3. Small variation in a general description of land not material. 1 Ves. 212.

4. All depends on the *bond fides* of the transaction; therefore trifling errors in the description are not material. *Calcraft v. Roebuck*, 1 Ves. 221.

5. Purchaser not entitled to an abatement for a deficiency in quantity: the particular describing the estate, as consisting by estimation of 41 acres, be the same more or less. *Winch v. Winchester*, 1 Ves. & Beam. 375.

6. As to the effect of the words, "be the same more or less," in a particular of sale, *quære*. 1 Ves. & Beam. 376.

7. General rule of specific performance, that the purchaser shall have what the vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. Enforced against trustees for infants upon the mere mistake of their agent without fraud, &c.; but the relief adapted to the justice of the case, viz. the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity, from erroneously inserting the hedges and fences, not included in the purchase, was directed with reference to land merely, not wood land. *Hill v. Buckley*, 17 Ves. jun. 394.

VII. *Of the title which a purchaser may require.*

## 1. Of the root of the title.

1. Contract for the sale of an existing and a reversionary lease, not specifically performed without production of the title of the lessors. The objection not waived by a premature conditional approbation of the title by the purchaser's counsel; but the expense incurred in making out the title before this objection was taken, repaid. *Deverell v. Lord Bolton*, 18 Ves. jun. 505.

2. Vide 3 Mer. 137.

## 2. Of the production of the lessor's title.

1. Whether, without express stipulation, a person, seized under a contract with a lessee for years to purchase the term, can insist upon a production of the lessor's title, and whether the lessee can compel such production, *quære*. The lessee's bill for a specific performance, dismissed: his interest, described as fifty years, the residue of a term, free from incumbrances, being a few years only of an old term, and a reversionary term, from another lessor; and old incumbrances not shown to be discharged. *White v. Foljambe*, 11 Ves. 337.

2. Whether the effect of advertising for sale a lease in possession, is precisely the same as a declaration, that the vendor cannot produce the lessor's title, *quære*. 18 Ves. jun. 512.

3. The consequence of requiring production of the lessor's title, in the absence of any stipulation to the contrary, will be, not to render property unalienable, but only to oblige the owner, if he does not mean to produce the lessor's title, to say so, on entering into the treaty. *Fildes v. Hooker*, 2 Mer. 424.

4. On a bill by vendor for specific performance of an agreement to take a lease for twenty-one years, at rack-rent, the master having reported in favour of the title shown by the abstract, and an exception being taken to the report; the question was, whether, where the agreement is silent, the vendor of a leasehold interest is not bound to produce the title of his lessor? and the exception was allowed. *Fildes v. Hooker*, 2 Mer. 424.

5. Objection on the ground of non-production of lessor's title, overruled in the case of a bishop's lease. *Fane v. Spencer*, 2 Mer. 430. n.

6. If the vendor of a leasehold interest means to sell without producing his lessor's title, he ought to declare it. *Ogilvie v. Foljambe*, 3 Mer. 53.

### 3. Of equitable and doubtful titles — of equitable titles.

Vide 2 Ves. 100.

### 4. Of equitable and doubtful titles — of doubtful titles.

1. Court will not decree a specific performance of an agreement to purchase, where there is a doubtful title. *Cooper v. Denne*, 4 B. C. C. 80.

2. Purchaser is not to be compelled to take an equitable estate. 2 Ves. 100.

3. Discretion in the court to decree specific performance of an agreement for a purchase, or to leave it at law; therefore a purchaser will not be compelled to take a doubtful title. *Cooper v. Denne*, 1 Ves. 565.

4. A purchaser not compelled to take a doubtful title: nor will a case be directed without his consent. The court also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by the tenant for life; there being no trustees to support them. *Roake v. Kidd*, 5 Ves. 647.

5. Purchaser not compelled to take a doubtful title. *Stapylton v. Scott*, 16 Ves. 272.

6. Formerly, a purchaser was not let off upon a doubtful title; but was compelled to take it, or establish the objection. 1 Ves. & Beam. 495.

7. The rule against compelling a purchaser to take a doubtful title, at least as old as Sir Joseph Jekyll's time. 2 Ves. & Beam. 149.

8. Purchaser not bound to accept a *prima facie* title, though reported good by the deputy remembrancer. *Eyton v. Dicken*, 4 Price, 303.

9. Mischievous consequences of the distinction, established by the case of *Shapland v. Smith*, between a title good or bad, and such as a purchaser will or will not be compelled to take. 11 Ves. 465.

10. A purchaser under a bankruptcy must take such title as the bankrupt had, and cannot insist upon a title strictly free from objection, as in other cases. In such a case, the purchaser objecting to the title, but insisting on his purchase, his bill for a specific performance was, under the circumstances, dismissed with costs, except as to some part of the answer and the depositions containing irrelevant matter. *Pope v. Simpson*, 5 Ves. 145.

11. Mere suspicion, upon opinions in the abstract, &c. will not support an objection by a purchaser. *M<sup>rs</sup> Queen v. Farquhar*, 11 Ves. 467.

12. The court must govern itself by a moral certainty upon title; for it is impossible there should be a mathematical certainty. 12 Ves. 252.

13. An old incumbrance to be attended to; unless it can be presumed that it does not exist. 11 Ves. 351.

14. Outstanding term, to attend the inheritance, the trusts being performed, may be an objection to the conveyance: not to the title. *Berkeley v. Dann*, 16 Ves. 380.

15. To make good a title to the residue of an old term, *verme assign-*ments, which cannot be produced, will be presumed, even at law. 11 Ves. 350.

16. Whether upon the sale of an annuity, charged upon a real estate, the vendor

vendor must make out the title of the grantor to the estate charged, *quære*. *Radcliffe v. Warrington*, 12 Ves. 326.

17. A. devised property to his wife in trust, to divide it among his seven children, in such proportions as they should deserve. One of the children sold her share, and covenanted to make it a full seventh. This is good without the mother joining. *Musprat v. Gordon*, 1 Anst. 34.

18. Purchaser decreed to take a title under an obscure will, amounting to a power to sell; the legal estate not being given, descends to the heir till execution of the power; and then passes to the vendee. *Warneford v. Thompson*, 3 Ves. 513.

19. Upon a late decision of the court of exchequer, that a presumption from non-payment of tithes cannot bar, even a lay impropiator, the lord chancellor, though holding the contrary opinion, would not compel a purchaser to take such a title; and dismissed the bill against him for a specific performance. *Rose v. Calland*, 5 Ves. 186.

20. Exception to a report, in favour of a title, on the ground, that the reversion in fee might have been disposed of, so as not to have descended to the heir, from whom the title was derived, overruled. *Sperling v. Trevor*, 7 Ves. 497.

21. Objection by a purchaser upon illegitimacy, upon the circumstance, that the register of marriage could not be found, an inaccurate statement in a deed, and some particularity of description of the child in a will. Upon the time of the marriage, previous to the marriage act, and other circumstances, the lord chancellor's opinion was against the objection: but it was overruled upon a general release; which, though only reciting generally, that objections were taken, was held sufficient; as binding the party to inquire into the nature of the objections. *Lord Braybrooke v. Inskip*, 8 Ves. 417.

22. Though a party is not permitted to execute a power for his own benefit, and the objection cannot be waived by a party participating in the benefit, as against other interests, the court will not act against the title upon a mere suspicion that a transaction was of that nature, appearing fair both upon the instrument and the abstract; viz. a purchase under the execution of a power of appointment by a father, subject to estates for life, in him and his wife, in favour of their son; all three joining, and receiving the money, the fair value; which is presumed to be receiving according to their interests in the estate; and the purchaser not bound to see to the application. *M<sup>c</sup>Queen v. Farquhar*, 11 Ves. 467.

23. An act of bankruptcy a sufficient objection to title; without showing a debt upon which a commission could issue. *Lowes v. Lush*, 14 Ves. 547.

24. An act of bankruptcy and a docket struck, though no commission issued, a sufficient objection to a bill for specific performance of a previous contract for the sale of an estate to the plaintiff; in a case even where part of the money had been paid, and sub-contracts for sale of part entered into by the plaintiff, and where the defendants had agreed to convey accordingly. *Franklin v. Lord Brownlow*, 14 Ves. 550.

25. Purchaser not compelled to take a doubtful title; viz. by executing a power of sale, introduced under a direction by a decree establishing a will, to the master to approve a proper settlement; the will not authorizing the insertion of such a power; nor could it be sustained under a power by a former settlement, which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object; and though purchasers are not put to exercise a very nice and critical judgment, with regard to the purposes for which purposes are created, it could never be intended to refer to a perfectly new set of limitations in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee; to be exercised, not for any purpose in the least degree connected with the settlement,

but avowedly as an expedient to supply the want of a valid power in that settlement; and enable those whom he had made only tenants for life, to dispose of the estate. *Wheate v. Hall*, 17 Ves. jun. 80.

26. Objection by a purchaser of allotments under an inclosing act, that the award of the commissioners was not made, overruled; the act containing a clause, enabling a sale, and declaring the conveyance valid, before the award; and supposing the possibility of the commissioners varying the allotments, the purchaser having full notice of all the circumstances. *Kingsley v. Young*, 17 Ves. jun. 468.

27. Specific performance against a purchaser, under a power of sale in a mortgage deed without the mortgagor, though under a covenant to the mortgagee to join in a sale, without costs; the only authority produced, not being in point. *Corder v. Morgan*, 18 Ves. jun. 344.

28. Purchaser not compelled to take a doubtful title; depending on the questions, whether a deed, not delivered, but merely retained by the vendor until payment of the money, could be considered as an escrow: in that case, as between a judgment creditor and the assignees under the bankruptcy of the vendor, whether payment to the assignees would be a performance of the condition, making the deed absolute from the beginning, and any conveyance from the assignees inoperative: if not an escrow, but absolute from the commencement, whether, with reference to the statute 21 Jac. 1. c. 19. s. 9. the judgment would be operative as against the lien of the assignees for the price; and if not, what would prevent its attaching on the estate. *Hoper v. Fish*, 2 Ves. & Beam. 145.

29. It is no objection to a title, that two fee-farm rents, created by letters patent by James I., are not shown to have been extinguished, it being proved that no claim had been made by the crown, of the rents from the year 1706, and no proof of any previous claim. *Simpson v. Gutteridge*, 1 Mad. 609.

30. Lands were settled in A. for life, remainder to his wife for life, remainder to their children, with a power of revocation and appointment to new uses by the husband and wife jointly; proviso, that if A. should become bankrupt, &c. then the limitation to him for life should cease, and the lands should go to trustees during life, for the benefit of his wife and children. A. agreed for the sale of this estate, and proposed to make title to the purchaser, by executing this power of revocation. The conveyancer, on the part of the purchaser, required an indemnity against A.'s having committed any secret acts of bankruptcy, for that the power of revocation would be extinguished by the forfeiture of the life-interest of A. on a bill filed by A. to compel the performance of this contract; the court thought there was no ground for the objection, and that the mistake in opinion of the conveyancer could not save the defendant from costs. *Maling v. Hill*, 1 Cox, 186.

### VIII. Of the time allowed to complete the contract.

#### 1. Of delays occasioned by the neglect of either party.

1. Specific performance may be decreed after considerable delay, if the vendor has not demanded his deposit or shown a determination not to proceed in the purchase. *Pincke v. Curtels*, 4 B. C. C. 329.

2. Where the sale is of a reversion, the time is material, and the money not being paid by the day, by default of vendee, the vendor was discharged from his contract. *Newman v. Rogers*, 4 B. C. C. 391.

3. The conduct of the parties, inevitable accident, &c. might induce the court to relieve against a lapse of the day fixed for completing a purchase. 4 Ves. 690.

4. Specific performance decreed: the abstract, though delivered very late, and under a notice, that the vendee would insist on his deposit with interest, if the title should not be made out, and possession delivered by the time of payment, having been received and kept without objection; and the vendee  
upon

upon the construction and the circumstances not being entitled to insist on the time, as the essence of the contract. *Seton v. Slade*, 7 Ves. 265.

5. By the terms of an auction, the title-deeds were to be produced by a certain day. They were not then ready, but the purchaser received them afterwards, without objection; he cannot afterwards, on disliking the title, object to the delay. *Smith v. Burnam*, 2 Anst. 527.

2. Of delays occasioned by the state of the title.

1. Where the time, at which the contract was to be executed, is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing is entitled to a specific performance. *Wynn v. Morgan*, 7 Ves. 202.

2. A purchaser cannot declare off a contract upon the ground of the vendor's not having perfected the title within a reasonable time, where the former who was in possession had been aware, from an early period of the treaty, that there was some objection to the abstract, but has nevertheless continued to negotiate with the latter down to a recent period, and then on the sudden (a fortnight after the last act of negotiation), tells him, that he abandons the contract. *Warde v. Jeffery*, 4 Price, 294.

3. Vendor, not having a title at the date of the contract, shall have a specific performance, if he procures a title before the report. 10 Ves. 315.

4. Purchaser cannot insist upon being discharged upon a report of defective title, if capable of being made good within a reasonable time; as to which the vendor will be put under terms. *Coffin v. Cooper*, 14 Ves. 205.

5. On a reference of title, the master having reported that a good title could be made; order, referring it back to the master to see whether such title could have been made prior to the filing of the bill by the vendor for a specific performance. *Birch v. Haynes*, 2 Mer. 444.

6. A vendor cannot come at any distance of time for a performance: but upon a bill filed fourteen months after the correspondence upon the objections to the title having ceased by the defendant's returning no answer to the last letter, calling for a distinct answer, and threatening a bill, and the auctioneer not having been called on to return the deposit, it was referred to the master. *The Marquis of Hertford v. Boore*, 5 Ves. 719.

7. In bill against the vendor, the vendee or his heir being in possession; (the agreement having been made by the tenant for life, with the reversioner;) and an account of the purchaser's personal estate becoming necessary, an early day shall be appointed for payment of the purchase money, and in failure, the bill *quoad hoc* to be dismissed. *Lowther v. Andover*, 1 B. C. C. 396.

8. An estate was sold by auction, and the purchase was to be completed in two months, according to the conditions of sale. The buyer died soon afterwards, and suits were instituted both in the spiritual court, and the court of chancery respecting his affairs, which prevented the completion of the contract. Four or five years after the sale, the vendor filed his bill to have the contract rescinded; and the affairs of the buyer still remaining unsettled, the court rescinded the contract, and gave the plaintiff his costs out of the deposit. *Mackreth v. Marlar*, 1 Cox, 259.

**IX. Of the abstract and conveyance; the assignment of terms; attested copies and covenants for title to which a purchaser is entitled; of searching for incumbrances; and of relief in respect of incumbrances.**

1. Of the abstract and conveyance — abstract when complete.

The abstract is complete, when it appears that upon certain acts done, the

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legal and equitable estates will be in the purchaser; though long before the title can be completed. *Lord Braybroke v. Inskip*, 8 Ves. 417.

2. Of the abstract and conveyance — at whose expence.

Expence of conveyance falls on the purchaser, if no particular stipulation. 2 Ves. 155.

3. Of the abstract and conveyance — indemnity on loss of title deeds.

The vendor of an estate having lost his title deeds, agreed to give the vendee a real security against such loss. The vendee, on a bill for a specific performance of the agreement, stated that he had not real property sufficient for such security, but offered ample personal security. Held, that vendor was bound to procure a sufficient real security. *Walker v. Barnes*, 3 Mad. 247.

4. Of assignment of terms.

Vide 16 Ves. 380.

5. Of attested copies — when the originals must be produced or forthcoming.

The reversion of an estate having been put up to sale by public auction, describing it as leased with a covenant on the part of the tenant to repair; and the purchaser objecting to the title, because no counterpart of the lease was in the possession of the vendors; it being stated to be in the hands of a party under a partition of the estate made some time before: the court thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take. *Shore v. Collett*, Cooper, 234.

6. Of attested copies — at whose expence.

1. A purchaser, who cannot have the original title deeds, the estate being sold in a great number of lots, is entitled to attested copies at the expence of the vendor, notwithstanding the inconvenience and expence. *Dare v. Tucker*, 6 Ves. 460.

2. Purchaser of small lots entitled to attested copies of the title deeds, accompanying the principal purchase, at the expence of the vendor: no stipulation having been made upon the subject. *Boughton v. Jewell*, 15 Ves. 176.

7. Of covenants for title.

Implied covenant by vendor of a freehold estate for the title, though an assignee under a commission of bankruptcy, selling, by a general description, not restrained to his actual interest. 18 Ves. jun. 512.

8. Of covenants against incumbrances.

Under a general agreement to sell a fee-simple estate, free from incumbrances, the purchaser is entitled to various covenants, according to the nature of the vendor's title. 15 Ves. 263.

9. Of covenants running with land.

1. Covenant upon a conveyance in fee with the grantees, lessees of water-works not to sell or dispose of water from a well to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns. Whether the covenant runs with the land, so as to bind, and be enforced by assignees; whether it is contrary to the policy of the law, and as to the effect of a renewal of a lease, *quære*.

2. The parties left to law, and a demurrer allowed, from the inconvenience of enforcing such a covenant by injunction. *Collins v. Plumb*, 16 Ves. 454.

10. Of

10. Of relief from incumbrances — where the purchase money has not been paid.

1. The execution of a bond for securing the payment of the purchase-money, is not a completion of the contract; and where fraud is made out, the court will relieve against it. 1 Dan. 8.

2. Purchaser *pendente lite*, from the defendant in a real action, bound by the judgment. 2 Ves. & Beam. 205. So upon a suit of mesne, under the statute Westminster, 2. Ibid.

3. Purchaser of an estate charged with debts, pending a suit by creditors, bound by the decree. 2 Ves. & Beam. 207. Vide 19 Ves. 221.; 1 Cox, 160.

11. Of relief from incumbrances — where the purchase money has been paid.

1. The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction happened or was threatened; a bill lies to set aside the conveyance, and for a return of the purchase money and all expences. *Edwards v. M'Leary, Cooper*, 308.

2. Devise to A. charged with a legacy to B.; A. sells the estate without having discharged the legacy. On a bill filed by B. for payment of the legacy, decree against the purchasers, with decree over against A., in case upon inquiry it should turn out that no deduction had been made from the purchase money in respect of the legacy. *Newman v. Kent*, 1 Mer. 240.; 1 B. C. C. 301.; 2 B. C. C. 282.; 15 Ves. 345.; 7 Ves. 231.

## X. Of interest and costs.

### 1. Of interest — in what cases payable.

1. To excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient, that the money was appropriated and unproductive: but the vendor must have notice of that. *Powell v. Martyr*, 8 Ves. 146.

2. A purchaser of a future interest, after a term, shall not pay interest or an increased price, for a part of the term elapsing before the purchase is completed, unless the delay be by his fault. *Growsack v. Smith*, 3 Anst. 877.

3. When purchase money is agreed to be paid, and a conveyance made at a given time, and disputes arise as to the title, and the purchaser proposes to the vendor to lay out the purchase money in exchequer bills till it is wanted, but the vendor returns no answer, and the purchase money is laid out in exchequer bills, the vendee is at the risk, and is entitled to the benefit of such purchase money, with 4*l.* per cent. interest. *Gaisford v. Acland*, 2 Mad. 28.

4. Where a sale is avoided, the purchase money for which was secured by an instrument bearing interest, and interest had been paid thereon, such payments are to be considered as principal, and are not to be refunded with interest. *Murray v. Palmer*, 2 Sch. & Lef. 488.

5. Advertisement of an estate for sale by auction described it all as freehold, though a small part was held at will; after execution of articles, a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, purchaser took possession forcibly; but proceeded in the treaty afterwards, till he finally refused to agree to the purchase: on bill of vendor, purchase money decreed to be paid with 4 per cent. from the time it ought; but inquiry directed as to what ought to have been the compensation, at that time, for the part not freehold; that with the outgoings to be deducted. *Calcraft v. Roebuck*, 1 Ves. 221.



## 2. Of interest — at what rate.

1. Purchaser justified in taking a fair objection, though overruled. *Cox v. Chamberlain*, 4 Ves. 631.

2. Specific performance decreed, with costs, in a case where the defendants objecting to title, had been served with notice of a prior decision in a different cause in favour of the same title, against a similar objection. *Biscoe v. Wilks*, 3 Mer. 456. Vide *Cox*, 186.; 1 Ves. 221.; 2 Mad. 28.

# XI. Of the obligation of a purchaser to see to the application of the purchase money.

## 1. Of this liability with reference to real estate.

1. Where land is ordered generally to be sold, the purchaser is not bound to see to the application of the money. *Smith v. Guyon*, 1 B. C. C. 86. See also the case of *Jebb v. Abbet*, and *Baynon v. Gollins*, in the note, 1 B. C. C. 86.

2. Charge of debts and legacies on land, the purchaser is not obliged to see to the application. *Jebb v. Abbet*, 4 B. C. C. 186. n.

3. The doctrine as to binding a purchaser to see to the application of the money by trustees, has been extended farther than any sound equitable principle will warrant. 16 Ves. 156.

4. Charge or direction, by deed or will, for payment of debts generally, followed by specific dispositions: the purchaser is not bound to see to the application. 6 Ves. 654.

5. Whether the rule, that, where there is a general charge of debts, not scheduled, a purchaser is not to see to the application, holds, where the purchase is not from the original trustees, but from others, to whom they conveyed, *quære*. An objection upon that distinction was overruled upon circumstances. *Lord Braybroke v. Inskip*, 8 Ves. 417.

6. Objection to title by a purchaser, under a trust to sell, as bound to see to the application of the money in satisfaction of scheduled creditors, and others coming in within a limited time after the date of the deed; implying that the receipt of the trustees should be a discharge. *Balfour v. Welland*, 16 Ves. 151.

7. The contractor for an estate, devised to trustees to sell, subject to particular charges, must see the money applied in payment of such charges; but if only to sell, he has nothing to do with the application of the money. *Currer v. Walkley*, Dick. 649.

8. Account of arrears of an annuity decreed against a purchaser with notice: the length of time not being sufficient to raise a presumption of satisfaction. *Wynn v. Williams*, 5 Ves. 130.

9. Mortgage debt and premises were assigned by the mortgagee to trustees, with powers to sue and give acquittances, and all the same powers as the mortgagee had. The mortgaged estate was sold under a decree, and the purchase money paid into court. Held, on an exception to the title, because the scheduled creditors were not parties to the bills, but only the trustees, that the trustees could make a good conveyance; and that the exception ought not to have been made to the title but to the conveyance. *Binks v. Ld. Rokeby*, 2 Mad. 227.

## 2. Of this liability with reference to leasehold estates.

Vide 1 Cox, 145.

# XII. Of the vendor's lien on the estate sold for the purchase money, if not paid.

## 1. Original of.

Vide 15 Ves. 344.

## 2. In

2. In what cases raised.

Vide Dick. 485.; 1 B. C. C. 420.; 6 Ves. 94.; 12 Ves. 383.; 15 Ves. 329.; 16 Ves. 278.; 1 Rose, 306.

3. Whether it extends to third persons.

Vide 9 Ves. 209.; 15 Ves. 329.

4. Against whom it will be enforced.

Vide 6 Ves. 752.; 15 Ves. 329.

5. Waiver and discharge of.

Vide 1 Cox, 91.; 6 Ves. 752.; 15 Ves. 329.; 16 Ves. 278.; 19 Ves. 235.; 1 S. & L. 132.; 2 V. & B. 306.; 2 V. & B. 309.; 1 Rose, 306.; 2 Rose, 79.; 1 Mad. 346.

**XIII. Of the persons intapable of purchasing.**

1. Of purchases by trustees, agents, &c. — Bankrupt commissioner.

1. A commissioner, though he may not have acted, cannot become a purchaser of the bankrupt's estate without the consent of the creditors at a general meeting. *Ex parte Harrison*, 1 Buck. 17.

2. Vide in tit. **BANKRUPT**.

2. Of purchases by trustees, agents, &c. — Mortgagee.

Mortgagee of premises to be sold under the general order, permitted to bid at the sale. *Ex parte Du Cane*, 1 Buck. 18.

3. Of purchases by trustees, agents, &c. — Residuary legatee.

A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause. *Hooper v. Goodwin*, Cooper, 75.

**XIV. Of the protection and relief afforded to purchasers by statutes; and by the rules of equity.**

1. Of fraudulent and voluntary settlements.

1. A court of equity will not assist a vendor in defeating a prior voluntary settlement made by himself. *Smith v. Garland*, 2 Mer. 123.

2. Purchaser objecting to title on the ground of a voluntary settlement made by the vendor; a bill for specific performance by the vendor was dismissed, and an exception to the master's report approving the title, allowed. *Smith v. Garland*, Ibid.

2. Of protection from judgments and recognizances — in the case of freehold estates.

Purchaser bound by notice of a judgment, though not docketed. *Davis v. Lord Strathmore*, 16 Ves. 419.

3. Of protection from unregistered deeds, &c. — of the equitable doctrine on the acts in regard to notice.

Purchaser within the registry act (7 Ann. c. 20.) bound by notice of a deed, not registered. 16 Ves. 427.

4. Of equitable relief and protection — where the purchaser has not notice.

1. Plea of purchase for valuable consideration without notice. 13 Ves. 187.

2. Principle of the plea of purchase for valuable consideration without notice. 9 Ves. 33.

3. Whoever has the best right to call for the legal title, can avail himself of

of the plea of purchaser for a valuable consideration without notice. 1 Ball & Beatty, 171.

4. This court will not take the least step against a purchaser for valuable consideration without notice: not even to perpetuate testimony against him. 2 Ves. 458.

5. Bill by tenant for life in possession for discovery and delivery of the title deeds: plea, a mortgage in fee by a former tenant for life, alleging himself to be seised in fee, without notice, ordered to stand for an answer, with liberty to except. *Strode v. Blackburn*, 3 Ves. 222.

6. Bill by tenant in tail in possession under a marriage settlement for discovery and delivery of title-deeds. Plea, mortgage by the tenant for life, alleging himself to be seised in fee, and in possession of the premises and deeds as apparent owner, allowed; upon the rule, that a court of equity gives no assistance against a purchaser for valuable consideration without notice. *Walwyn v. Lee*, 9 Ves. 24.

#### 5. Of equitable relief and protection — effect of notice.

1. *Quære*, whether even a covenant against incumbrances will extend to protect a purchaser against incumbrances of which he has express notice. *Ogilvie v. Foljambe*, 3 Mer. 53.

2. Where tenant for life granted leases for lives under a power, and bound himself upon the dropping of a life to grant a new lease with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale. Though the power is exceeded, yet if a life drops in the life of the lessor, the purchaser having notice must specifically perform, by granting a new lease with the same provision. General notice to a purchaser, that there are leases, is notice of all their contents. *Taylor v. Stibbert*, 2 Ves. 437.

3. A person, affected by notice, has the benefit of the want of notice by intermediate parties. 11 Ves. 478.

4. Specific performance of a contract to purchase enforced against a subsequent purchaser, at an advanced price, with notice; who was decreed to convey on payment to him of the price for which the plaintiff contracted. *Daniels v. Davison*, 17 Ves. 433.

5. Notice to a purchaser in one transaction will not affect him in an independent subsequent one; but notice of a deed is notice of the whole of its contents, so far as they can affect the transaction in which notice of the deed is required. *Hamilton v. Royse*, 2 Sch. & Lef. 315.

### XV. Of notice.

#### 1. Of constructive notice.

1. A purchaser is not bound to take notice of an equity arising out of the mere construction of words, which are uncertain, and the meaning of which often depends upon their locality. *Cordwell v. Mackrill*, 2 Eden, 347.; *Amb. 515*.

2. Vendee says, he has bought, vendor is silent: conclusive notice to a third person. 1 Ves. 425.

3. Purchaser being told, part of the estate was in possession of a tenant, was bound by the lease. 2 Ves. 440.

4. Conveyance to B. of an estate, the money being paid by A., B. is a trustee: and C. takes from B. with notice. 15 Ves. 350.

5. Notice to a purchaser, that there is a lease, is notice of its contents. *Hall v. Smith*. 14 Ves. 426.

6. Notice to a purchaser, of possession by a tenant, is notice of his interest. 13 Ves. 120.

7. The possession of a tenant is notice to a purchaser of the actual interest he

he may have, either as tenant, or, farther, as in this instance, by an agreement to purchase the premises. *Daniels v. Davison*, 16 Ves. 244.

8. The possession of a tenant is notice to a purchaser of the actual interest he may have either as tenant, or, farther, as in this instance, by an agreement to purchase the premises. *Daniels v. Davison*, 17 Ves. jun. 433.

9. The possession of a tenant is notice to a purchaser of the whole actual interest he may have in the estate, therefore of a right to the timber on the estate, although such right accrued by a title posterior to that on which his possession was grounded. *Allen v. Anthony*, 1 Mer. 282.

10. Purchaser of a lease, though not considered a purchaser for valuable consideration without notice to the extent of not being bound to know from whom the lessor derived his title, is not to take notice of all the circumstances under which it is derived. Therefore understood to have notice, that the lessors were trustees for a charity, not that the lease was bad, that depending on circumstances *dehors*. 17 Ves. jun. 298.

11. Whether purchaser of copyhold must be presumed to have notice of every thing on the court rolls, *quære*. 18 Ves. jun. 462.

12. The registry of deeds, &c. under the stat. 6 Ann. c. 2. is not notice. It would be mischievous so to consider it. *Bushell v. Bushell*, 1 Sch. & Lef. 92. 97. 103.; *Latouche v. Lord Dunsany*, Id. 137. 157.

13. But the fourth clause of that stat. gives to all deeds registered as thereby directed, efficacy in law and equity according to the priority of the time of registry. 1 Sch. & Lef. 92. 98.

14. The provision in this clause (sect. 4.) not being contained in the English registry acts, has produced a difference in the decisions. Sch. & Lef. 98. 160. This provision in the Irish act has given even to articles, if registered, against a legal conveyance, a force and effect which they have not in England. Id. 102.

15. Registry is not notice, within the meaning of the word as applied by courts of equity. *Underwood v. Lord Courtown*, 2 Sch. & Lef. 64.

16. There is a difference between actual notice, and the operation of the register act: the former may bind the conscience of the parties; the latter binds their title, but not their conscience. *Underwood v. Lord Courtown*, 2 Sch. & Lef. 66.

17. Purchaser having employed the vendor's agent, who had notice of an incumbrance, charged with notice, notwithstanding the purchase was made under the sanction of the court, and an infant was interested in it. *Toulmin v. Steere*, 3 Mer. 210.

18. Notice of a judgment against a vendor, is sufficient notice to put a purchaser upon making further inquiry: and if he neglect it, and it afterwards appears that instead of a judgment, the party has a specific incumbrance on the property, he will be bound by it. *Taylor v. Baker*, 1 Dan. 71.

19. Covenant in a marriage settlement that the husband shall within one year execute, he being then under age, does not show such an interest in him, as to put a purchaser upon inquiry. *Howorth v. Deem*, 1 Eden, 351.

20. Where in the office copy of a will, a whole line of the original had been omitted, but the sense was left in such a manner as to give reason to suppose that the original contained a limitation in tail of real estate; held, that this was sufficient to put a purchaser upon inquiry. *Surman v. Barlow*, 2 Eden, 165.

21. Mortgage of a lease, which recited the surrender of a former lease, which was upon the surrender of a former, in which the plaintiff's title appeared, held to have notice of the title. *Coppin v. Fernyhough*, 2 B. C. C. 291.

**XVI. Miscellaneous points relative to the sale of personalty.**

1. Property in a cargo transferred by bill of sale, signed by vendor and vendee: but by a new agreement signed by them before they parted, that it shall be sold and accounted for by the factor, for vendor, it is reduced to agreement, and therefore remedy in equity. *Weymouth v. Boyer*, 1 Ves. 416.

2. A. receiving goods under circumstances, that would give him a right to return them, disaffirming the contract, if it would be against the interest of the other to return them, may sell them, considering himself as agent, and bring an action for the difference. 7 Ves. 247.

3. Upon a warranty to render a vendor liable, the scienter must be proved. 1 Ball & Beatty, 515.

**CONTRIBUTION.****I. Jurisdiction of courts of equity over the subject of contribution.**

Not ousted by the assumption of a jurisdiction by courts of law.

**II. Nature and foundation of the doctrine of contribution.**

As between co-sureties.

**III. In what cases the right of contribution exists; in what not.**

1. The case of an incumbrance.
2. The case of a co-surety, collateral and without privity.
3. The case of joint-wrongdoers.

**IV. To what extent the right of contribution exists.**

As between co-sureties.

**V. Mode of enforcing the right to contribution.**

As between co-sureties.

**I. Jurisdiction of courts of equity over subject of contribution.**

Not ousted by the assumption of a jurisdiction by courts at law.

Though contribution among partners is now enforced at law, the jurisdiction of courts of equity is not ousted; and therefore though the bill was dismissed, the object having been obtained in an action directed, the court would not dismiss it with costs. *Wright v. Hunter*, 5 Ves. 792.

**II. Nature and foundation of the doctrine of contribution.**

As between co-sureties.

The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality of burthen and benefit. Therefore where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute. *Dering v. Earl of Winchelsea*, 1 Cox, 318.

**III. In**

### III. In what cases the right of contribution exists; in what not.

#### 1. The case of an incumbrance.

1. No contribution to an incumbrance in respect of an estate sold by a prior tenant in tail, in favour of a remainder-man, who might have been bound; especially if the sale was under a decree. *Lloyd v. Johnes*, 9 Ves. 37.

2. See in tit. CHARGE.

#### 2. The case of a co-surety, collateral and without privity.

No contribution in favour of one surety against another: his engagement, according to the bond, and parol evidence, which was held admissible, being, not as co-surety, but, without the privity of the other, as a distinct collateral security, limited to default of payment by the principal and the other surety. *Craythorne v. Swinburne*, 14 Ves. 160.

#### 3. The case of joint wrong-doers.

No contribution between wrong-doers upon entire damages for a tort. 1 Ves. & Beam. 117.

### IV. To what extent the right of contribution exists.

As between co-sureties.

Right of contribution among co-sureties limited by the extent of their respective contracts, as where they are for different sums. 14 Ves. 165.

### V. Mode of enforcing the right to contribution.

As between co-sureties.

On a bill filed by a surety against his co-surety and the principal for a contribution from the co-surety in respect of money actually paid by the plaintiff for the principal; it is not necessary to prove the insolvency of the principal; otherwise where the principal is not a party to the suit. *Lawson v. Wright*, 1 Cox, 275.

## COPYHOLD.

### I. Of a surrender to the use of a will.

1. Whether of right.
2. A custom opposing the right, is void.
3. When necessary, on a devise by a mortgagor.
4. When necessary, on a devise of a remainder or reversion.
5. The estate passes by the surrender.
6. Nature, and effect, of a dormant surrender.
7. Preference between distinct surrenders, whereof one was to the use of the will.
8. Descent in default of surrender.

### II. Of supplying the want of a surrender.

1. Origin of the practice.
2. Foundation of the practice.
3. Analogy or difference between the practice, and that applicable to freehold interests.
4. In favour of a widow.
5. In favour of children.
6. In favour of grandchildren.

7. Analogy

7. Analogy on difference between the cases of children and creditors.
8. In favour of creditors.
9. In favour of other persons.
10. In the case of a deed.
11. In favour of a limited interest.

### III. Of admittance.

1. It enures according to the title.
2. Whether necessary to enable the surrenderee to devise.

### IV. Of the fine on admittance.

1. Effect of a remission to the tenant for life.
2. Of apportioning the fine between tenant for life and those in remainder.

### V. Of an estate tail in a copyhold.

Of the mode of barring the estate.

### VI. Of contingent remainders in a copyhold.

1. Whether destroyed by a forfeiture.
2. Whether destroyed by the expiration of the preceding estate.

### VII. Of the rights of the lord.

1. To work mines.
2. To open mines.
3. To enter and fell timber upon copyhold tenements.
4. To maintain trover for timber felled by copyholder.
5. To maintain waste against a copyholder.
6. To the equitable remedy of injunction and account against a copyholder committing waste.

### VIII. Of the right of the copyholder.

1. To the timber upon the copyhold tenement.
2. Of a mortgagee.

### IX. Of enfranchisement.

An enfranchisement by a particular tenant enures to those in remainder.

### X. Of merger.

In the case of a surrender to a purchaser and his heirs, tenant for life of the manor.

### XI. Of free bench.

1. Of trust estates.
2. Of the mode of barring the right.

### XII. The consequences of the copyhold tenure.

In relation to the exemption of copyhold from legal process.

### XIII. Of statutes relating to copyholds.

The stat. 49 Geo. 3.

**I. Of a surrender to the use of a will.****1. Whether of right.**

Copyholder's right of surrender to the use of his will; though no instance upon the records of the manor: or, if no such custom, there must be some mode of disposition by deed; as in the case of customary freeholds; the want of which (in the case of creditors, &c.) will be supplied. 15 Ves. 403.

**2. A custom opposing the right; is void.**

A custom in a manor that copyholds shall not be surrendered to the use of a will, is bad. *Pike v. White*, 9 B. C. C. 286.

**3. When necessary, on a devise by a mortgagor.**

Estates surrendered to the use of mortgagees: but they had not been admitted. The mortgagor devising them, must surrender to the use of his will. *Kenebel v. Scrafton*, 8 Ves. 30.

**4. When necessary, on a devise of a remainder or reversion.**

Admittance of the particular tenant of copyhold is an admittance of the remainder-man. A devise of the remainder or reversion therefore requires a surrender to the use of the will. *Church v. Mundy*, 12 Ves. 426.

**5. The estate passes by the surrender.**

Estates pass by the surrender, not by the will; which operates as a declaration of uses. 8 Ves. 286.

**6. Nature, and effect, of a dormant surrender.**

A dormant surrender of a copyhold (that is, a surrender of A. on condition to perform the will of the surrenderer), will vest an estate in the dormant surrenderee, sufficient to support the contingent remainders of the surrenderer's will, without the interposition of trustees for the purpose. A dormant surrender operates as a severance of a joint tenancy, though it is revocable during the lifetime of the surrenderer. *Ex parte Gale*, Cox, 136.

**7. Preference between distinct surrenders, whereof one was to the use of the will.**

Devise of copyhold supported by an existing surrender to the use of a will notwithstanding an intermediate surrender to other uses; under which there had never been any admittance. 16 Ves. 527.

**8. Descent in default of surrender.**

Copyhold not surrendered to the use of the will, descends to the heir. *Attorney-general v. Downing*, Dick. 416.

**II. Of supplying the want of a surrender.****1. Origin of the practice.**

The idea of supplying a surrender began after the statute of charitable uses. 3 Ves. 69.

**2. Foundation of the practice.**

The ground of supplying the want of a surrender of copyhold estate is a legal or moral obligation. 5 Ves. 563.

**3. Analogy or difference between the practice, and that applicable to freehold interests.**

Distinction as to supplying the want of surrender in certain cases to support a devise of copyhold estate, and refusing to aid a defective execution of a devise of freehold. 2 Ves. & Beam. 120.

**4. In**



## 4. In favour of a widow.

1. In supplying the want of surrender for a widow, it is immaterial how ample or scanty her provision may be. 16 Ves. 92.

2. A surrender supplied for a wife against a distant heir, not provided for by the testator, though provided for *aliunde*. Chapman v. Gibson, 3 B. C. C. 229.

3. The want of a surrender of copyhold estate to the use of the will supplied in favour of a widow against co-heiresses, daughters of the devisor, married, and infant granddaughters by deceased daughters. The lord chancellor was of opinion, that in supplying a surrender the court is to look only to the object, not to the circumstances of the parties: as, whether the heir has a provision or not. Hills v. Downton, 5 Ves. 557.

4. The want of surrender supplied for a widow against a collateral heir, viz. a sister: whether provided for, or not. As to a son, *quære*. Fielding v. Winwood, 16 Ves. 90.

5. Testator seized of freehold and copyhold estates in the counties of H. and C., devises all his lands, tenements, and messuages and hereditaments in those counties to his wife for life, remainder to his first and second sons in tail, remainder to his wife in fee, having in the beginning of the will, declared that as to all his worldly estate he disposed thereof as therein followed, but not having surrendered the copyhold to the use of his will, the court will not supply the want of a surrender, there being freehold estates to answer the words of the devise. *Ex parte* Milbourne, 1 Cox, 247.

## 5. In favour of children.

1. Surrender supplied for younger children, the heir having a provision under the will, without regard to the amount. Garn v. Garn, 16 Ves. 286.

2. Distinction as to supplying the want of a surrender between a lineal and collateral heir — not supplied for a child against a grandchild unprovided for. The answer stating only, that the heir inherited no other land, an inquiry was directed whether he has a provision; and as to the nature and extent of it. Rodgers v. Marshall, 17 Ves. jun. 294.

3. Surrender not supplied for a child under a devise in general terms not mentioning copyhold estate, and not executed to pass the freehold. Sampson v. Sampson, 2 Ves. & Beam. 337.

4. The court will not supply a surrender for a natural child; but if it has a legacy from the father payable at twenty-one, will allow maintenance. 3 Ves. 12.

## 6. In favour of grandchildren.

The want of a surrender of copyhold estate cannot be supplied for grandchildren. Perry v. Whitehead, 6 Ves. 544.

## 7. Analogy or difference between the cases of children and creditors.

Distinction, as to supplying a surrender by implication from general words, between the cases of creditors and children: in the latter the intention is satisfied by freehold estate: the extent of provision being indefinite; which in the other is measured by the amount of the debts. 15 Ves. 394.

## 8. In favour of creditors.

1. Defect of a surrender supplied for creditors. Ithel v. Bean, Dick. 132.

2. The want of a surrender of copyhold lands, devised for payment of debts, shall be supplied for creditors, although there be freeholds descended and specifically devised. Bixby v. Eley, 2 B. C. C. 325.; Dick. 698.

3. Want of surrender supplied, if copyhold estate is devised for debts. 12 Ves. 216.

## 9. In favour of other persons.

1. A copyhold estate devised to Pembroke-hall, Cambridge, not having been

been surrendered to the use of the will, the defect decreed to be supplied by the heir at law, to whom the testator had devised freehold estates. *Attorney-general v. Parkin*, Dick. 422.

2. Surrender of a copyhold supplied in order to pay a legacy. *Palmer v. Palmer*, Dick. 534.

#### 10. In the case of a deed.

The want of surrender supplied in the case of a deed, as well as a will: but upon the same principle as in the case of a will, or the execution of a power, viz. for, and against, the same persons. *Rodgers v. Marshall*, 17 Ves. jun. 294.

#### 11. In favour of a limited interest.

A surrender may be supplied for a limited interest (to the wife for life), though the devisees over are not entitled to have it supplied for them. *Marston v. Gowan*, 3 B. C. C. 170.

### III. *Of admittance.*

#### 1. It enures according to the title.

Admittance to a copyhold enures according to the title; though not correctly expressed. *Church v. Mundy*, 12 Ves. 426.

#### 2. Whether necessary to enable the surrenderee to devise.

The devisee of a copyhold, who has not been admitted, cannot devise the same. *Wainewright v. Elwell*, 1 Mad. 627.

### IV. *Of the fine on admittance.*

#### 1. Effect of a remission to the tenant for life.

The lord, remitting the fine upon the admission of tenant for life, does not discharge the remainders. 13 Ves. 252.

#### 2. Of apportioning the fine between tenant for life and those in remainder.

1. The lord, admitting a tenant for life, may apportion the fine; but cannot remit it to the tenant for life, and charge the whole upon the remainders. 13 Ves. 246.

2. Admission of tenant for life to a copyhold is the admission of him in remainder; and the lord may assess the whole fine. In case of separate assessments, as to the fine, when the fine is due in respect of the remainder, *quere*. 13 Ves. 253.

### V. *Of an estate tail in a copyhold.*

#### Of the mode of barring the estate.

Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended upon his eldest son, who, by will, charged all his real estates with debts and legacies, and devised it to his brother for life, with various remainders; the estates in the copyhold are barred. *Challoner v. Murhall*, 2 Ves. 524.

### VI. *Of contingent remainders in a copyhold.*

#### 1. Whether destroyed by a forfeiture.

1. The estate of the lord will preserve contingent remainders of copyhold estate. 10 Ves. 282.

2. Contingent remainders of copyhold will be preserved against a forfeiture

feiture by the estate in the lord ; not where the preceding estates are expired. 2 Ves. 209.

2. Whether destroyed by the expiration of the preceding estates.

Vide *supra*, pl. 1.

## VII. Of the rights of the lord.

### 1. To work mines.

Though the property in mines or trees, may be in the lord of a manor, it does not follow, that, therefore, he can enter, and take it without consent of the tenant. 17 Ves. jun. 282.

### 2. To open mines.

Injunction by a copyholder ; restraining the lord, preparing to open a mine. Distinction, as to a mine opened, and working. *Grey v. Duke of Northumberland*, 13 Ves. 236.

### 3. To enter and fell timber upon copyhold tenements.

1. The lord of a manor has not, by law, independently of custom, any such property or interest in the timber growing upon the copyhold premises of a tenant, as entitles him to enter and cut. *Whitechurch v. Holworthy*, 19 Ves. 213.; 4 M. & S. 340.

2. Vide 17 Ves. 282.

### 4. To maintain trover for timber felled by copyholder.

*Qu.* Whether upon waste by a copyholder by cutting timber, the lord can bring trover ; particularly where, by the custom, the right to the tree, when cut, is in both. The case of lord and tenant is not like that of tenant for life and the remainder-man. Their rights are upon the same ground ; and the reversioner enters for the forfeiture : but the lord must have it presented by the homage. 4 Ves. 706.

### 5. To maintain waste against a copyholder.

No action of waste by the lord against a copyholder. 4 Ves. 706.

### 6. To the equitable remedy of injunction and account against a copyholder committing waste.

The lord of a manor is confined to his legal remedy for waste committed by a copyholder ; and has no equity for an injunction and account. Upon the evidence the bill was dismissed with costs. *Dench v. Bampton*, 4 Ves. 700.

## VIII. Of the right of the copyholder.

### 1. To the timber upon the copyhold tenement.

*Qu.* Whether, by the custom of a manor, the timber can belong to the tenant. 4 Ves. 703.

### 2. Of a mortgagee.

Mortgagee of a copyhold may pull down ruinous houses and build better, to prevent a forfeiture. 4 Ves. 480.

## IX. Of enfranchisement.

An enfranchisement by a particular tenant enures to those in remainder.

Enfranchisement of a copyhold by one having a partial interest, is for the benefit of the remainder-man as well as his own. *Wynn v. Cooke*, 1 B. C. C. 517.

X. Of

**X. Of merger.**

In the case of a surrender to a purchaser and his heirs, tenant for life of the manor.

Copyhold premises, purchased by the lord, tenant for life of the manor, with remainders over, taking the surrender to him and his heirs, merge; and, as parcel, are subject to the limitations, of the manor; and, though under a covenant by the purchaser to surrender them by way of mortgage to the mortgagee and his heirs, he could compel a re-grant by the remainder-man, no re-grant having been made, the general devisees of the purchaser have no equity. *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 167.

**XI. Of free-bench.****1. Of trust estates.**

A widow shall not have free-bench of a trust estate in a copyhold. *Forder v. Wade*, 4 B. C. C. 520.

**2. Of the mode of barring the right.**

Copyholder having power to bar the widow's free-bench by surrender, any act by him for valuable consideration will bar in equity. *Brown v. Raindle*, 3 Ves. 256.

**XII. The consequences of the copyhold tenure.**

In relation to the exemption of copyholds from legal process.

1. Estates not liable to debts farther than subjected. 8 Ves. 393.
2. Estates not assets for specialty debts, nor even debts to the crown. 8 Ves. 394.

**XIII. Of statutes relating to copyholds.**

The stat. 49 Geo. 3. c. 29.

The statute 9 Geo. 1. c. 29. providing for the admission of copyholders, infants, or *femes covert*, is confined to the cases expressed; viz. title by descent or surrender to the use of a will; and does not apply to a title under a deed. Therefore, to a bill by the lord, stating a title in remainder by deed of appointment under a settlement, and an admission by the tenant for life, without fine, having paid a fine upon a former admission under his original title, and upon his death, praying a discovery and production of the deed, in aid of an action under the statute, a demurrer was allowed. *Lord Kensington v. Mansell*, 13 Ves. 240.

**COPYRIGHT.****I. Its nature, and original.**

Whether existing at common law.

**II. Of the subjects in which the right may exist.**

1. A common topic.
2. A translation.
3. Additions to an original work.
4. A print without name or date thereon.
5. Specification of patents.
6. An unpublished work.
7. Private letters.

**III. Of the prerogative copyright.**

1. In almanacks.
2. Legal operation of the king's printer's patent.
3. The course pursued between conflicting patents.

**IV. Of the assignment of copyright.**

Whether the author or his assignee is entitled to the additional fourteen years.

**V. What acts are in violation of the right.**

1. Quotation.
2. A fair abridgment.
3. A colourable abridgment.

**VI. Of restraining the violation of copyright by injunction.**

1. In the case where the two publications differ.
2. In the case of pirating part of a book.
3. Where publication is such that an action would not lie.
4. In the case where the right depends upon the construction of an agreement.
5. In the case where the work was sent to a bookseller many years since for publication.
6. In the case where the publication was permitted to some, from whom the others copied.
7. From a bill in relation to the joinder of parties.
8. Reference to the master for the purpose of comparison.

**I. Its nature, and original.**

Whether existing at common law.

Injunction obtained by the assignee of an author after the expiration of the two terms of years allowed by the statute of Anne, dissolved, the common law right of the author being so extremely doubtful. *Osborne v. Donaldson*, 2 Eden, 327.

**II. Of the subjects in which the right may exist.****1. A common topic.**

1. Copyright in an individual work; not in a general subject, though, from its nature the consequence may be close resemblance and considerable interference, as in the case of maps and road books. *Wilkins v. Aikin*, 17 Ves. jun. 422.

2. Distinction between the right to publish a similar work, or set up a similar trade, and the fraud of identifying it with the work or trade of another. Injunction in the latter case. 17 Ves. jun. 342.

3. Injunction to restrain publishing a magazine as a continuation of the plaintiff's magazine in numbers, and as to communications from correspondents, received by the defendant, while publishing for the plaintiff; not preventing the publication of an original work of the same nature, and under a similar title. *Hogg v. Kirby*, 8 Ves. 215.

4. Though copyright cannot subsist in an East India calendar, as a general subject, any more than in a map, chart, series of chronology, &c., it may in the individual work; and where it can be traced, that another work

work upon the same subject is, not original compilation, but a mere copy, with colourable variations, will be protected by injunction; which in this instance was continued till the hearing, without a trial at law. *Matthewson v. Stockdale*, 12 Ves. 270.

5. Injunction against pirating a court calendar, the individual work creating copyright; though the general subject, as in the case of a map or chart, is common. *Longman v. Winchester*, 16 Ves. 269.

#### 2. A translation.

Copyright in translation, whether produced by personal application and expence, or gift, protected by injunction. *Wyatt v. Barnard*, 3 Ves. & Beam. 77.

#### 3. Additions to an original work.

The plaintiff published a book of roads of Great Britain, comprising Patterson's road book, to the copyright of which the plaintiff was not entitled, with improvements and additions obtained by actual survey and otherwise. An injunction to restrain a publication of an edition of Patterson, comprising the plaintiff's improvements and additions, was refused. *Cary v. Faden*, 5 Ves. 24.

#### 4. A print without name or date thereon.

*Quære*, whether the clause in stat. 8 Geo. 2. c. 13. directing, that the date and name shall be engraved on each print, relates to the penalties only, or whether that is necessary to maintain the exclusive property; if so, whether it ought to appear on the bill. *Harrison v. Hogg*, 2 Ves. 323.

#### 5. Specification of patents.

No copyright in specification of patents. *Wyatt v. Barnard*, 3 Ves. & Beam. 77.

#### 6. An unpublished work.

1. Injunction to restrain the printing of an unpublished MS., a copy of which had been, by the representative of the author, given to a person under whom defendant claimed, but not with the intention that he should publish it. *Duke of Queensberry v. Shebbeare*, 2 Eden, 329.

2. Property of an author in an unpublished work, independent of the statute. *Southey v. Sherwood*, 2 Mer. 435.

#### 7. Private letters.

Copyright in private letters, remaining in the writer after transmission, and protected by injunction against publication. *Lord and Lady Perceval v. Phipps*, 2 Ves. & Beam. 19.

### III. Of the prerogative copyright.

#### 1. In almanacks.

Almanacks not prerogative copies. 13 Ves. 508.

#### 2. Legal operation of the king's printer's patent.

Whether the patents granted to the king's printer vest the copyright, or are merely authorities, *quære*. 6 Ves. 713.

#### 3. The course pursued between conflicting patents.

1. Upon a bill brought by the king's printer to restrain the defendant from the publication of certain acts of parliament, &c., to which the patentees for printing law books were also defendants; the court refused to interfere between the contending patents; and, therefore, only restrained the defendant from printing at any other than a patent press. *Basket v. Cunningham*, 2 Eden, 137.; 1 Blk. 370.

2. Bill by the king's printer in Ireland, to establish his right to print and distribute the copies of the statutes for Ireland, under the order of the king upon the resolutions of both houses of parliament of the united kingdom, and for an account against the king's printer in England in that respect, dismissed. *Grierson v. Eyre*, 9 Ves. 341.

3. Upon the answer to a bill by the universities of Oxford and Cambridge, the king's printer not joining, but being made a defendant, an injunction, restraining the sale in England of bibles, prayer books, &c. printed by the king's printer in Scotland, was continued to the hearing. *The Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689.

#### IV. Of the assignment of copyright.

Whether the author or his assignee is entitled to the additional fourteen years.

An author having sold his copyright, and living more than 14 years, the resulting right for 14 years more under the act of Queen Anne, results to his assignee, not to himself. *Carnan v. Bowles*, 2 B. C. C. 80.

#### V. What acts are in violation of the right.

##### 1. Quotation.

1. Action directed to try whether a work on architecture was original, with a fair use of another work, by quotation and compilation; which in a considerable degree was admitted; the injunction maintained in the mean time, viz. by permitting the sale on undertaking to account according to the result of the action. *Wilkins v. Aikin*, 17 Ves. jun. 422.

2. Whether the copying of a map, as an illustration in a fair history of all the maps of a county, would be restrained as an invasion of copyright, *quære*. 17 Ves. jun. 425.

##### 2. A fair abridgment.

An injunction shall be awarded against the sale of a book piratically taken from another, but not against a fair abridgment. *Bell v. Walker*, 1 B. C. C. 451.

##### 3. A colourable abridgment.

Injunction against a colourable abridgment of the term reports B. R. among other law reports, till answer or further order upon certificate of the bill filed. *Butterworth v. Robinson*, 5 Ves. 709.

#### VI. Of restraining the violation of copyright by injunction.

##### 1. In the case where the two publications differ.

*Quære*, whether difference between two books, will be sufficient to resist an application for an injunction to restrain defendant from publishing the latter work. *Carnan v. Bowles*, 1 Cox, 283.

##### 2. In the case of pirating part of a book.

An injunction shall go to prevent printing part of a book. *Carnan v. Bowles*, 2 B. C. C. 80.

##### 3. Where the publication is such that an action would not lie.

1. The court will not act either by giving an injunction or an account even upon a submission in the answer, upon a publication of such a nature that an action could not be maintained. *Wolcot v. Walker*, 7 Ves. 1.

2. The court will not interfere by injunction, upon the author's application to restrain the publication of a work, which is of such a nature that an action could not be maintained for damages. *Southey v. Sherwood*, 2 Mer. 435.

4. In

4. In the case where the right depends upon the construction of an agreement.

Injunction against an invasion of copyright, depending upon the effect of an agreement, refused till recovery in an action. *Wolcot v. Walker*, 7 Ves. 1.

5. In the case where the work was sent to a bookseller many years since for publication.

Injunction refused to restrain publication of a work which had been left for twenty-three years by the author in the hands of a bookseller, to whom it was originally sent with an intention of its being published; that intention being afterwards relinquished; and the work having passed into the hands of the defendants, who published it without the consent or privity of the author. *Southey v. Sherwood*, 2 Mer. 435.

6. In the case where the publication was permitted to some, from whom the others copied.

If the proprietor of a work gives permission to several to publish it, and then others copy it, he must bring his action before he can have an injunction to restrain the pirating his copyright. *Platts v. Button, Cooper*, 303.

7. From a bill in relation to the joinder of parties.

The proprietor of a copyright must file separate bills against each bookseller taking copies of a spurious edition for sale. *Dilly v. Doig*, 2 Ves. 486.

8. Reference to the master for the purpose of comparison.

A work alleged to be a piracy referred to the master. ——— *v. Leadbetter*, 4 Ves. 681.

## CORPORATION.

### I. *Jurisdiction of courts of equity over corporations.*

1. To restrain a misapplication of their possessions.
2. In the case of trusts.

### II. *Of the rights of corporations.*

To alienate their possessions.

### III. *Of the responsibility of a corporation.*

Of individual responsibility.

### IV. *Of the dissolution of corporations.*

For a crime amounting to forfeiture.

### V. *What acts are corporate acts.*

Effect of tacit acquiescence.

### VI. *Of informations in nature of quo warrants.*

Against one elected, but never admitted.

### VII. *Of associations in the nature of corporations.*

Jurisdiction of courts of equity over, in favour of a member.

### I. *Jurisdiction of courts of equity over corporations.*

1. To restrain a misapplication of their possessions.

Vide 1 Ves. & Beam. 226.

B b 4

2. In



## 2. In the case of trusts.

1. A corporation being a trustee, is in this court the same as an individual. 2 Ves. 46.

2. Jurisdiction over a corporation as an individual, to control the corrupt execution of a trust. 14 Ves. 252.

## II. Of the rights of corporations.

## To alienate their possessions.

1. General right of corporations, of whatever nature, at law, to alienate lands in fee, subject, as to ecclesiastical corporations to the restraining statutes; and no instances of a trust attached upon the ground of misapplication, as not to corporate purposes, except the case of corporations, holding to charitable uses. Mayor and Commonalty of Colchester v. Lowten, 1 Ves. & Beam. 226.

2. *Quære*, whether such a jurisdiction prevails in other cases, upon an application to purposes clearly not corporate. Mayor and Commonalty of Colchester v. Lowten, 1 Ves. & Beam. 226.

3. A bill on that ground impeaching securities as obtained under an abuse of trust by the select body of the corporation of Colchester, using the common seal for raising money to defray the expence of actions against the mayor and town-clerk, relative to elections of the recorder and a representative of the borough in parliament, dismissed upon various subsequent transactions, especially an award, binding the corporation at large through the select body, acting with authority, and upon a fair question whether the purpose was corporate or not. Mayor and Commonalty of Colchester v. Lowten, 1 Ves. & Beam. 226.

## III. Of the responsibility of a corporation.

## Of individual responsibility.

The mayor, or other individual member of a corporation, trustee of a rent-charge out of the estate of such member for a charitable use, must answer, not only with the rest under their common seal, but also individually, a charge of having destroyed or cancelled the deed. 14 Ves. 254.

## IV. Of the dissolution of corporations.

## For a crime amounting to forfeiture.

King may, at his discretion, seize the franchise of a corporation guilty of an offence amounting to a forfeiture. 1 Ves. 8.

## V. What acts are corporate acts.

## Effect of tacit acquiescence.

Whether a corporation consisting of numerous governors, would be bound by the acquiescence of some, standing by, permitting expenditure, &c. *quære*. Macher v. Foundling Hospital, 1 Ves. & Beam. 188.

VI. Of informations in nature of *quo warranto*.

## Against one elected, but never admitted.

Information in nature of *quo warranto* upon 9 Anne, c. 20. for usurping the office of free burgess, does not lie against the mere claim of one who, though elected, never was admitted; nor against a member, till removal by the corporation. The King v. Ponsonby, 1 Ves. 1.

## VII. Of

## VII. Of associations in the nature of corporations.

Jurisdiction of courts of equity over, in favour of a member.

Jurisdiction in equity against a corporation, in nature of a partnership, in favour of a member, as well as a stranger, by an account of the profits; where there is no remedy, or not a complete remedy, at law; and the difficulty of executing the decree from the peculiar circumstances and nature of the property will not prevent it; though that may be a ground for some modification, for instance, not recalling profits already distributed, as an account is directed in a limited way dispensing with vouchers, &c. upon the objection from length of time. *Adley v. the Whitstable Company*, 17 Ves. jun. 315.; 1 Mer. 107.

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## COURT.

### I. Of the ecclesiastical court.

Of vacating the appointment of an attorney in a suit.

### II. Of foreign courts.

Presumption in favour of the legality of their proceedings.

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#### I. Of the ecclesiastical courts.

Of vacating the appointment of an attorney in a suit.

Practice in the ecclesiastical court, that the party coming into court, and doing any act himself, vacates a power given to another to act for him. 12 Ves. 346.

#### II. Of foreign courts.

Presumption in favour of the legality of their proceedings.

Presumption that the courts of foreign countries decide according to law; but open to evidence. 6 Ves. 730.

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## CROWN.

### I. Of the rights of the crown.

1. To the recognizance of an infant's guardian.
2. To the property of colonies declared independent.
3. Effect of an inquisition, where there is a legal title in possession.

### II. Of the obligations of the crown.

On the acquisition of an estate by forfeiture.

### III. Of grants by the crown.

Effect of a reservation of royal mines.

### IV. Of the succession to the personal rights of the crown.

A bond to the king in his political capacity.

### V. Of judicial proceedings touching or affecting the rights of the crown.

1. In what court instituted.
2. Of making the attorney-general a party.
3. Courts as bound by the king's title appearing of record.
4. Commission of *melius inquirendum*.

### I. Of the rights of the crown.

1. To the recognizance of an infant's guardian.

A recognizance entered into by a guardian, in the matter of a minor, is not a debt due to the crown. 1 B. & B.

2. To the property of colonies declared independent.

Stock in the funds of this country, the property of the American state of Maryland before the revolution, after that event held to belong to the crown as *bona vacantia*. 10 Ves. 354.

3. Effect of an inquisition, where there is a legal title in possession.

An inquisition will not entitle the crown to seize where there is a legal title in possession. *Burgess v. Wheate*, 1 Eden, 188.

### II. Of the obligation of the crown.

On the acquisition of an estate by forfeiture.

The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. *Burgess v. Wheate*, 1 Eden, 203.

### III. Of grants by the crown.

Effect of a reservation of royal mines.

Whether under a mere reservation of royal mines, without a right of entry, the crown can grant a licence to enter on the land for the purpose of working them. 16 Ves. 398.

### IV. Of the succession to the personal rights of the crown.

A bond to the king in his political capacity.

A bond to the king in his political capacity, subsists to his successor. *Rex v. Bradford*, Dick. 24.

### V. Of judicial proceedings touching or affecting the rights of the crown.

1. In what court instituted.

When parties claim under two different grants from the crown, inasmuch as the rights of the crown are concerned, *Seemle*, that this court will not make a decree, and that the proceeding ought to be in the exchequer. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 617.

2. Of making the attorney-general a party.

1. When parties claim under two different grants, each reserving a rent, but of different amounts; inasmuch as the rights of the crown are concerned, the attorney-general ought to be before the court. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 617.

2. The

2. The king's fee farmer cannot be ousted under a prior grant from the crown, without the king being a party; unless it be for the benefit of the king. 2 Sch. & Lef. 618.

3. Courts as bound by the king's title appearing of record.

1. The court cannot decree against a title in the crown apparent on the record, though not insisted on at the hearing. *Barclay v. Russell*, 3 Ves. 424.

2. A court of law could not give judgment against the title of the crown appearing on the record. 3 Ves. 436.

4. Commission of *melius inquirendum*.

A commission of *melius inquirendum* directed to issue in this case for the king. *Ex parte Duplessis*, Dick. 264.

## DEBTOR AND CREDITOR.

### I. Of the relation of debtor and creditor.

By what contracts established.

### II. Who are specialty, who simple-contract, creditors only.

1. Bail in error paying the bond on which, &c.

2. In the case of an estate being sold which the owner had covenanted to settle.

3. In the case of an estate damaged by the tenant for life.

### III. Who are judgment-creditors.

One obtaining judgment for an usurious debt.

### IV. Of precedence among creditors in general.

Of the legality of a preference by the debtor.

### V. Of precedence among creditors of the same class.

1. Judgment-creditors.

2. Equitable mortgagees.

### VI. Of precedence among different classes of creditors.

As between a bond covenant creditor.

### VII. Of the rights of creditors.

1. A creditor may sue at law, notwithstanding the pendency of a bill by another creditor, for an account.

2. Right of a creditor to retain, without abatement, a payment made before the bill for a distribution filed.

3. A creditor cannot sue at law after a decree for payment of creditors.

4. A creditor cannot sue at law after coming in before the master.

5. Reciprocal rights of creditors to the effects of each other's diligence.

6. Their right to come in under a decree, whether limited in point of time.

7. To prosecute a decree for an amount.

8. To sue at law from right to prosecute a decree.

9. Of

9. Of the equity of a judgment-creditor.
10. The course for a judgment-creditor to pursue before the master.
11. Rights of judgment-creditor, whether affected by not coming in under a decree.
12. A Jamaica judgment creditor's lien upon proceeds remitted.
13. How far affected by their own fraud.
14. When prevented from obtaining judgment by the act of the court.
15. Right of a creditor having one security to stand in the place of another who, having two, has exhausted the former.
16. To sue the representative of an estate to the residue of which their debtors are entitled.
17. When in possession of the debtor's estate under a power of attorney.
18. To have a lease set aside, granted *pendente lite* for sale.
19. To charge for premiums of insurance.

#### VIII. Of transactions in fraud of the rights of creditors.

1. Of voluntary conveyances.
2. Of conveyances without possession.
3. Of the stat. 10 Car. 1.

#### IX. Of the liquidation and discharge of debts.

1. By an execution against the person.
2. By accepting a higher security.
3. By accepting an inferior security.
4. By giving bills without indorsement.
5. Specific application of a general payment.
6. The question resolved, whether a consignment was a specific appropriation or not.
7. Out of funds appropriated to the purchase of land that would be liable.
8. Out of a trust term, the uses of which are satisfied.
9. Of the creditor's obligation to seek satisfaction from a particular fund in the first instance.
10. The expense of a foreign remittance, by whom payable.

#### X. Of compounding debts.

1. Freedom from fraud essential to a composition.
2. Compositions by prisoners.
3. Accession by some creditors, refusal by others; the consequence.
4. Remitter to original rights on non-observance of the terms.
5. Acting under a composition, equivalent to signature.
6. Of additional securities collateral to the composition deed.
7. Preference between two composition deeds.
8. A misrepresentation by a creditor is rendered of no force by the treaty going off.

#### XI. Of the assignment of debts.

1. Of the equity of an assignee of a judgment.

**I. Of the relation of debtor and creditor.**

By what contracts established.

Promissory note to pay, when the circumstances of the drawer will admit without detriment to himself or family, creates no debt. *Ex parte Tootell*, 4 Ves. 372.

**II. Who are specialty, who simple-contract, creditors only.**

1. Bail in error paying the bond on which, &c.

Bail in error, paying the bond on which the judgment was obtained, with costs, &c., are only simple contract creditors. *Goodman v. Purcel*, 2 Anst. 548.

2. In the case of an estate being sold which the owner had covenanted to settle.

If a man covenant to settle his estate, and afterward sell it, he is only to be considered as a trustee, and a debtor by simple contract; but if an action of covenant be brought, and judgment obtained, he is a debtor by specialty. *Baily v. Ekins*, Dick. 632.

3. In the case of an estate damnified by the tenant for life.

A settlement under articles deviating from them set right, and made to agree with the articles, and what the estate was damnified by the tenant for life not upholding it as he ought, declared to be a specialty debt and to be answered out of his assets. *Langley v. Furlong*, Dick. 315.

**III. Who are judgment-creditors.**

One obtaining judgment for an usurious debt.

A judgment having been obtained at law, though for an usurious debt, the creditor must stand as a judgment creditor for the money actually advanced, and legal interest. *Scott v. Nesbitt*, 2 B. C. C. 641.

**IV. Of precedence among creditors in general.**

Of the legality of a preference by the debtor.

It is neither illegal nor immoral for a debtor to prefer one creditor to another. *Grogan v. Cooke*, 2 B. & B. 234.

**V. Of precedence among creditors of the same class.**

1. Judgment-creditors.

Judgment creditors have no priority by the registry-act, except where priority between deeds is to be adjusted. 1 Sch. & Lef. 161. *Sed vide D'Arcy v. Chambers*, 1 Sch. & Lef. Append. 467.

2. Equitable mortgagees.

Equitable securities (the legal estate being in a prior mortgagee), shall take their rank according to the priority of their dates. *Bocket v. Cordley*, 1 B. C. C. 353.

**VI. Of precedence among different classes of creditors.**

As between a bond covenant creditor.

A creditor by covenant equal to a creditor by bond. *Cheveley v. Stone*, Dick. 782.

VII. Of

## VII. Of the rights of creditors.

1. A creditor may sue at law, notwithstanding the pendency of a bill by another creditor for an account.

Creditors are not restrained from proceeding at law merely because there is a bill filed by other creditors, until there is a decree; but as soon as a decree is obtained, equity considers it as a judgment in favour of all the creditors, who shall be paid according to their priorities as they stand. 1 Sch. & Lef. 299.

2. Right of a creditor to retain, without abatement, a payment made before the bill for a distribution filed.

A creditor having five bonds, one of which had been paid before the bill filed, afterwards a decree that the specialty creditors should abate in proportion; he shall not be called upon to bring back what he had received, but only shall abate on the outstanding debt. Lowthian v. Hasel, 4 B. C. C. 167.

3. A creditor cannot sue at law after a decree for payment of creditors.

1. After a decree for a satisfaction of creditors, the court will enjoin a single creditor from proceeding at law for his debt. Douglas v. Clay, Dick. 393; Kenyon v. Worthington, Ibid. 668.

2. Where there has been a decree for payment of debts in a suit by trustees; although the parties have not proceeded under it, a creditor shall be restrained from proceeding at law. Brooks v. Reynolds, 1 B. C. C. 183; Dick. 603.

3. When a decree has been obtained by a creditor on behalf of himself and the other creditors, a prior creditor who has obtained judgment at law in ejectment grounded on an *elegit*, shall not be allowed to get into possession. Summer v. Kelly, 2 Sch. & Lef. 398.

4. A creditor cannot sue at law after coming in before the master.

Where a bill has been filed for an account, and a creditor comes in before the master, but afterwards brings an action, the court will grant an injunction. Hardcastle v. Chettle, 4 B. C. C. 163.

5. Reciprocal rights of creditors to the effects of each other's diligence.

In proceedings by creditors, all the creditors have a right to the benefit of the diligence of any of them. 1 Sch. & Lef. 156.

6. Their right to come in, under a decree, whether limited in point of time.

1. Creditors let in at any time, while the fund is in court; though the time has elapsed. Lashley v. Hogg, 11 Ves. 602.

2. Creditor allowed on motion to prove his debt, under a decree upon a creditor's bill, though money apportioned amongst the creditors, and transferred to the accountant-general, on paying the costs of the motion, and of re-appointing the funds. Angell v. Haddon, 1 Mad. 529.

7. To prosecute a decree for an account.

Any creditor may obtain an order for prosecuting a decree for an account. 2 Ves. 165.

8. To sue at law from right to prosecute a decree.

Leave to prosecute a suit given to a creditor, a decree made some years before not having been prosecuted. Powell v. Wallworth, 2 Mad. 183.

## 9. Of the equity of a judgment-creditor.

1. No equity for judgment-creditor, because there are prior judgments. *Cathcart v. Lewis*, 1 Ves. 464.

2. It is constant practice in Ireland for judgment-creditors after the death of conusor, to obtain a decree for sale of his lands, failing personal assets. 2 Sch. & Lef. 19.

3. The only equity which a judgment creditor has, is to accelerate the payment by obtaining a sale; instead of levying his debt out of rents and profits. 2 Sch. & Lef. 140.

10. The course for a judgment-creditor to pursue before the master.

Though a judgment-creditor cannot stir at law without a *scire facias*, before the master it is sufficient to produce the record of the judgment, and swear the debt is due. 11 Ves. 36.

11. Rights of judgment-creditor, whether affected by not coming in under a decree.

1. A judgment-creditor not deprived of his lien on the estate in the hands of a purchaser under a decree, by not proving his debt before the master, in pursuance of advertisements for that purpose, his legal right to enforce payment of the judgment not being in the least affected by the decree; the purchaser will therefore be discharged from his contract, unless the conusor undertake to clear off the judgments affecting the estate. *Barrett v. Blake*, 2 B. & B. 354.

2. The only inconvenience to a judgment-creditor, not proving before the master under a decree, is, that he loses the benefit of having his debt discharged out of the produce of the sale under the decree. *Barrett v. Blake*, 2 B. & B. 357.

12. A Jamaica judgment-creditor's lien upon proceeds remitted.

Creditor by judgment in Jamaica, filing bill here for satisfaction from rents and profits remitted and to be remitted, must shew his judgment to differ from judgment here, so that he cannot affect the land. *Cathcart v. Lewis*, 1 Ves. 463.

13. How far affected by their own fraud.

Creditor, by suppressing his debt, inducing another person to enter into a contract, not permitted to set up the debt even against the person, in whose favour and at whose instance he made the suppression. 16 Ves. 125.

14. When prevented from obtaining judgment by the act of the court.

Creditor prevented by the act of the court from obtaining judgment, put in the same situation as if he had it. 6 Ves. 93.

15. Right of a creditor having one security to stand in the place of another who, having two, has exhausted the former.

Mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors are entitled to stand in his place *pro tanto* against both the freehold and copyhold estates: the case of *Robinson v. Tonge* being overruled. *Aldrich v. Cooper*, 8 Ves. 382.

16. To sue the representative of an estate to the residue of which their debtors are entitled.

A creditor of A. cannot maintain a bill against the representative of B. to a part of the residue of whose estate A. is entitled. *Elmslie v. M'Auley*, 3 B. C. C. 624.

17. When



17. When in possession of the debtor's estate under a power of attorney.

A creditor, in possession of his debtor's estate, under a power of attorney, taking an assignment of a mortgage; to account as agent and allowed receiver's fees, so long as the trust, imposed by the power, required him to be in possession; after that, to account as mortgagee in possession. *Trimleston v. Hamill*, 1 Ball & Beatty, 377.

18. To have a lease set aside, granted *pendente lite* for a sale.

The court will not on the motion of a creditor coming in under a decree directing a sale of lands devised for payment of debts, set aside a lease obtained *pendente lite* from the devisee under the will with a leasing power. *Moore v. Macnamara*, 2 B. & B. 186.

19. To charge for premiums of insurance.

A creditor by bond cannot stand his own insurer, and charge the premium to his debtor. *Hutchinson v. Wilson*, 4 B. C. C. 488.

### VIII. Of transactions in fraud of the rights of creditors.

1. Of voluntary conveyances.

Assignments by a person much in debt of policies of insurance effected by him on his life, to relatives to whom he was indebted, not fraudulent as against his other creditors. *Grogan v. Cooke*, 2 B. & B. 230. Limitations of the money, after the death of the assignee, to children, not postponed to the creditors of the assignor, as voluntary; there being sufficient consideration for the purchase of the policies in the debts due to the assignee, under whom the children were considered as purchasers. *Ibid.*

2. Of conveyances without possession.

Assignment of furniture, &c. by a debtor to his creditors in satisfaction of their debts, retaining possession under a demise at a rent, and afterwards taking a re-assignment from some on payment of their debts with interest, though it would be void as against creditors, established between the parties against the answer, insisting that the deed, though absolute on the face of it with a fraudulent purpose was intended only as a security; and the circumstances precluding any legal remedy. *Baldwin v. Cawthorne*, 19 Ves. 166.

3. Of the st. 10 Car. 1.

Whether assignments of policies of insurance, which could not at the time be brought within the reach of creditors, and upon which the assignor could recover nothing, can be said to be made with intent to delay or defraud creditors, within the meaning and provisions of the 10 Car. 1., *quære*. *Grogan v. Cooke*, 2 B. & B. 230.

### IX. Of the liquidation and discharge of debts.

1. By an execution against the person.

The body being taken in execution, the debt is satisfied. 13 Ves. 193.

2. By accepting a higher security.

Where a man receives a bond for a debt due to him, he makes it his own. *Ex parte Swinney*, 1 Dick. 710.

3. By accepting an inferior security.

Specialty security not waived by a promissory note taken for the balance of account. *Curtis v. Rush*, 2 Ves. & Beam. 416.

4. By giving bills without indorsement.

A. and B. indebted to C. for goods sold, deliver to C. two Bills of

of exchange in part payment of such debt, but they do not indorse the bills, nor do their names in any manner appear thereon. A. & B. became bankrupts before the bills became due, and all the parties on the bills became insolvent. The bills must be sold (as in case of any other mortgage), and C. receive the produce, and prove the residue of his debt under the commission against A. and B. *Ex parte Smith*, 2 Cox, 209.

#### 5. Specific application of a general payment.

1. Application of indefinite payments by the rules of the civil law, giving the first option to the debtor, the second to the creditor, to be expressed at the time of payment, but if no express declaration by either, presuming an intention in favour of the debtor; or if the debts are equal in their nature, then applying the payment according to priority. *Devaynes v. Noble*, 1 Mer. 605.

2. Cases in which our courts appear to have extended the rule of civil law, so as to give the creditor, in the absence of express appropriation by the debt, or an indefinite right of electing. *Devaynes v. Noble*, 1 Mer. 606.

3. Other cases which seem to recognise the strict rule of the civil law, limiting the creditors' option to the time of payment. *Devaynes v. Noble*, 1 Mer. 607.

4. In cases, as of a banking account, where there has been a continuation of dealings, the appropriation, (in the absence of express declaration) can only be made on the ground of presumption, arising from the priority of receipts and payments. If any other appropriation is to be made, it is incumbent on the creditor to declare his intention at the time of payment. *Devaynes v. Noble*, 1 Mer. 608.

6. The question resolved, whether a consignment was a specific appropriation or not.

H. and Co., of Madras, make a consignment of pearls to B., with directions to sell and pay the proceeds to P. (to whom H. and Co. were at that time indebted,) on account; P. acknowledges the receipt of the consignment, and undertakes to perform these directions; but no notice is given by either party to P. H. and Co. subsequently write to B., requesting the pearls to be sent to America, and there disposed of; and afterwards being insolvent, make an assignment of all their effects in trust for the benefit of their creditors. Held, that the directions accompanying the consignment did not constitute an appropriation, but amounted to no more than a mere mandate, revocable at the pleasure of the consignor; and which was actually revoked by the subsequent disposition of the property; and that P., who had no express notice of the consignment, but on receiving information of it after he knew of the failure of H. and Co., had laid an attachment on the pearls in the hands of B., on which he had proceeded to judgment, and actually sold the pearls under it; having also executed the trust deed as a creditor; was bound to account with the trustees for the proceeds. *Scott v. Porcher*, 3 Mer. 652.

7. Out of funds appropriated to the purchase of land that would be liable.

Bond creditor ordered to be paid out of the money in court, which was to be laid out in land, which would be liable. *Cattell v. Money*, 3 B. C. C. 256.

8. Out of a trust term, the uses of which are satisfied.

Plea by trustee to a bill brought by creditors, that the plaintiffs had no interest, overruled; the bill stating the trusts to be fulfilled. *Davidson v. Foley*, 2 B. C. C. 203.

9. Of the creditor's obligation to seek satisfaction from a particular fund in the first instance.

Vide 3 B. C. C. 54.

10. The expence of a foreign remittance, by whom payable.

Debt, contracted in Jamaica, made payable in London. The expence of commission to the agent, remitting the money, falls upon the debtor. *Cash v. Kennion*, 11 Ves. 314.

### X. Of compounding debts.

1. Freedom from fraud essential to a composition.

A deed of compromise to be binding, must be free from fraud. 1 Ball & Beatty, 340.

2. Compositions by prisoners.

Compromise with a man in gaol, though not at the suit of the party with whom it is made, not to stand. 1 Ves. 43.

3. Acceptance by some creditors, refusal by others, the consequence.

Bill by such creditors as had signed a deed of composition, arising from a trust estate, conveyed for the purpose of paying debts in general; other creditors refusing to come in to have the trusts of the deeds carried into execution, dismissed. *Atherton v. Worth*, Dick. 375.

4. Remitter to original rights on non-observance of the terms.

Though an agreement for a composition, generally, is not binding on the creditor, unless absolutely and strictly fulfilled, a bond creditor, having concurred in a general resolution for a composition, to be secured by notes, was under the circumstances, with reference to the interest of the other creditors, restrained from taking execution in an action upon the bond, on non-payment of the notes, beyond the terms of the composition. *Mackenzie v. Mackenzie*, 16 Ves. 372.

5. Acting under a composition, equivalent to signature.

1. Creditors bound by acting under a composition; as if they had been signed. *Ex parte Sadler*, 15 Ves. 52.

2. Deed of composition by creditors, not signed within the time stated in it, though void at law, yet if the creditors act under it who have not signed it, it is good in equity. Plea of two creditors not having so signed it, therefore held bad. *Spottiswoode v. Stockdale*, Cooper, 102.

6. Of additional securities collateral to the composition deed.

1. A separate agreement, securing to some creditors, who had executed a deed of composition, a greater advantage than the other creditors would have under the deed, and without their knowledge, cannot be enforced. *Mawson v. Stock*, 6 Ves. 300.

2. Bond to one creditor, to secure the deficiency of a composition, not communicated to the others, now held bad at law, as well as in equity; though formerly otherwise. Such a bond, with the privity and consent of the other creditors, may be good. 13 Ves. 586.

3. Upon a composition a private agreement by some creditors for additional security, though for no greater sum, void. *Ex parte Sadler*, 15 Ves. 52.

4. Ground of holding any private agreement by parties to a composition for a greater payment, or better security, void: a fraud both upon the debtor and the other creditors. 15 Ves. 55.

5. Plaintiff being insolvent, agreed with his creditors that they should take  
15s. in

15s. in the pound, in satisfaction of their debts. One of the creditors refused to come in, unless plaintiff gave his promissory note for the remainder, which was done. There was no stipulation in the composition deed that all the creditors should accede to it within a given time, nor did it appear in fact that all the creditors had done so. The court will restrain defendant by injunction from proceeding at law on the promissory note. *Constantein v. Blache, Cox, 287.*

6. Upon a deed of composition, one creditor was prevailed upon by the debtor to represent his debt below the real amount; receiving notes for the dividend upon the remainder, and bonds for the remainder of his debt beyond the amount of the dividend: upon the bill of the debtor and a creditor, party to the deed, the bonds were decreed to be delivered up: but the court was of opinion the defendant would be entitled to the benefit of the notes, after all the trusts of the deed were satisfied; though not as against the creditors; and directed an inquiry as to that, reserving the question. *Eastbrook v. Scott, 3 Ves. 456.*

7. Bond to secure to one creditor the deficiency of a composition, not communicated to the other creditors, decreed to be delivered up, with costs, though to *particeps criminis*: in these cases, proceeding upon public policy, the relief being given on account, not of the individual, but of the public. *Jackman v. Mitchell, 13 Ves. 581.*

#### 7. Preference between two composition deeds.

Trust deed for payment of creditors, no creditor being a party, nor made by agreement, and without consideration on the part of any creditor. The debtor afterwards executes other deeds, varying the trusts of the first. Motion for an injunction by a creditor under the first deed, who had filed a bill, to restrain the trustees from executing the trusts of the subsequent deeds, till they had raised money to answer the first, refused. *Wallwyn v. Coutts, 3 Mer. 707.*

8. A misrepresentation by a creditor is rendered of no force by the treaty going off.

A. person dealing with another for a composition shall not be bound by a concealment or representation of the amount of his debt, if the plan under which the concealment or representation takes place, is not carried into effect. *Ex parte Oakley, 1 Rose, 138.*

### XI. Of the assignment of debts.

Of the equity of an assignee of a judgment.

A. taking an assignment of a judgment from an assignee; is bound to look to the assignment to him: if he neglects to do so, and it prove that such assignment was in trust for the consor, the judgment being satisfied, A. cannot set it up against creditors. But if A. took it without knowing of the fraud, he shall be satisfied by the person who assigned to him. *1 Sch. & Lef. 162.*

## DEED.

### I. Of the ceremonies necessary to the execution of deeds.

Signing.

### II. Of an escrow.

Of its relation back to the original delivery, on performance of the condition.

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III. Of

**III. Of joint and several deeds.**

The consequences of an execution by one obligor only.

**IV. Of the profert of deeds.**

1. At law a profert is now dispensed with, under circumstances.
2. Comment on the legal doctrine excusing a profert.

**V. Of the destruction of deeds by the adverse party.**

The other will be decreed to hold and enjoy.

**I. Of the ceremonies necessary to the execution of deeds.****Signing.**

Sealing and delivery essential to a deed; which, if delivered, may be a good deed, whether signed or not. If to be executed under a power with signature and sealing, both are necessary. 17 Ves. jun. 459.

**II. Of an escrow.**

Of its relation back to the original delivery on performance of the condition.

Bond delivered to a third person, to be delivered to obligee on performance of condition, takes effect on performance from original sealing and delivery, though obligor and obligee both dead. 1 Ves. 275.

**III. Of joint and several deeds.**

The consequences of an execution by one obligor only.

Where a man executes a bond, meaning it to be the joint bond of himself and another, who does not execute, it is the several bond of the former: but he may have it delivered up; as contrary to the intention. 10 Ves. 225.

**IV. Of the profert of deeds.**

1. At law a profert is now dispensed with, under circumstances.

Action upon a lost deed without profert. Seagrave v. Seagrave, 13 Ves. 439.

2. Comment on the legal doctrine excusing a profert.

Profert now dispensed with at law. The reason of that decision questionable. 6 Ves. 813.

**V. Of the destruction of deeds by the adverse party.**

The other will be decreed to hold and enjoy.

Deeds destroyed. Plaintiff decreed to hold and enjoy. Garland v. Radcliffe, Dick. 11.

**DEFENCE (GENERAL) ACT.****Appropriation of the proceeds of land taken under.**

In liquidation of a tenant for life's claim for redemption of land-tax. Vide Wightw. 131.

**DEVISE**

## DEVISE OF REAL PROPERTY.

- I. **Of the origin and nature of devises.**
  1. Origin of devises.
  2. No particular form is necessary.
  3. Of a codicil.
  4. Of the union of a devise with another instrument.
  5. Devises are void against creditors.
  6. Devises of land are specific.
  7. Whether the subjects of equitable jurisdiction.
  8. Analogy between devises in Scotland, and devises of copyhold in England.
- II. **Who may devise, and to whom; and of the rights and obligations of devisees.**
  1. Idiots and persons of non-sane memory.
  2. Analogy between a devisee and a legatee.
  3. Presumption as to the character in which a devisee, likewise a mortgagee, entered.
  4. Preference between the devisee and remainder-man, where the devisor has a fee at law and fee-tail in equity.
  5. Equity of the devisee of a contract of purchase to an application of the personal estate.
  6. Devisees' right to make claimants paramount the will, parties to a bill to establish it.
- III. **What may be devised.**
  1. Contingent and executory estates, and possibilities.
  2. Equitable interests.
  3. Equitable liens.
  4. The devisor must be seised or entitled.
- IV. **Of devises of copyholds.**  
What may be devised.
- V. **Of the solemnities necessary to a devise.**
  1. The rules in this particular are the same in equity as at law.
  2. Sealing not necessary.
  3. Signing by the testator.
  4. Attestation by three witnesses.
  5. The witnesses must attest in the presence of the testator.
  6. Wills charging lands are within the statute.
  7. Wills of rents are within the statute.
  8. Wills of the produce of the sale of lands, are within the statute.
  9. Subsequent wills or codicils giving legacies, are not within the statute.
  10. Wills of copyholds are not within the statute.
  11. Operation of a will defective in the necessary ceremonial.
  12. With respect to lands abroad.

**VI. Of the revocation of devises.**

1. Antecedent to the statute of frauds.
2. Analogy between the rules at law and in equity.
3. A subsequent will revoking or inconsistent with a former one.
4. An express revocation, subservient to another purpose, for which it is incompetent.
5. A codicil.
6. Of the solemnities necessary to revoke a devise of land.
7. Cancelling.
8. Cancelling one part revokes the other.
9. Marriage, and birth of a child.
10. Marriage with, and a settlement on, the devisee.
11. A woman's will revoked by marriage.
12. Alteration of the estate.
13. Alienation to a stranger.
14. Contract for sale.
15. An intended alienation.
16. Alienation to the use of the testator.
17. Alienation to strengthen the devise.
18. Fine and recovery.
19. Any conveyance inconsistent with the devise.
20. Parol evidence not admissible.
21. Alienation for a particular purpose.
22. A conveyance obtained by fraud.
23. Alteration of the quality of the estate.
24. Acquisition of the legal estate.
25. A partition.
26. A covenant.
27. By bankruptcy.
28. A devise to the heir at law.
29. Of partial revocations.
30. Revocation of leaseholds.
31. Disseisin and remitter by entry.
32. In the case of mutual wills.

**VII. Of the republication of devises.**

1. Nature and effect of.
2. Of the solemnities necessary to republish a devise of land.
3. A codicil is a republication.

**VIII. Of void devises.**

1. Void devises.
2. From uncertainty.
3. Void in part.
4. The estate descends to the heir.

**IX. Of the construction of devises — general rules.**

1. The rules at law and in equity are the same.
2. Each case is particular.
3. Preference between two modes of interpretation.
4. Effect must be given to every part.

5. In relation to grammatical construction.
  6. In relation to punctuation.
  7. In relation to rules of law.
  8. In relation to the usual acceptation of words.
  9. In relation to terms of art.
  10. In relation to the qualification of general words.
  11. Force of superfluous words.
  12. In relation to rejecting words.
  13. Whether expressions shall be taken imperatively, or by way of recital.
  14. In relation to implication.
  15. In relation to inferring an intention beyond the expression.
  16. In relation to inference and argument against a positive bequest.
  17. In relation to matter *dehors* the will.
  18. No averment allowed to explain wills.
  19. In relation to the state of the property.
  20. In relation to the amount of the property.
  21. In relation to the fact that testator was ignorant of the force of his expression.
  22. In relation to the fact that the event was not contemplated by the testator.
  23. In relation to the fact that the testator did not foresee the consequences.
  24. In relation to inconvenience.
  25. In relation to the precedence of a particular disposition.
  26. In relation to inconsistency.
  27. In relation to repugnancy.
  28. In relation to the case where the intention can be accomplished *pro tanto* only.
  29. In relation to favour and disfavour.
  30. Force of introductory expressions.
  31. Force of a *videlicet*.
  32. Force of the expression of a specific purpose.
  33. Force of a residuary clause.
  34. In relation to a residuary clause.
  35. Difference of construction with reference to different individuals.
  36. In relation to creditors.
  37. In relation to a devise of the whole property, with a particular interest given out of it.
  38. The word "or" construed "and," *et vice versâ*.
  39. A perpetuity cannot be created.
  40. Of the rule which governs the courts in adding to or altering a will.
  41. Distinction between the case of a legal devise and an executory trust.
- X. Construction — what words create a devise and describe the devisees and the things devised.
1. Words of advice or desire do not create a devise.
  2. Devises by implication.
  3. Force



3. Force of the expression of a specific purpose.
4. In relation to a mistaken description.
5. The words "child" "children."
6. The words "younger child."
7. The words "A.'s and B.'s children."
8. The word "grandchildren."
9. The word "granddaughter."
10. The word "great-grandchildren."
11. The word "issue."
12. The words "failure of issue."
13. The words "die without issue."
14. The words "next of kin."
15. The words "next of kin or heir at law."
16. The words "next of kin in equal degree."
17. The word "relations."
18. The words "relations, as sisters, nephews, and nieces."
19. The words "poor relations."
20. The word "family."
21. The words "A.'s and B.'s families."
22. The words "legal representatives."
23. The words "my right heirs on the part of my mother."
24. The words "to his own right heirs, his son excepted."
25. The word "survivors."
26. The word "unmarried."
27. The words "my seven children," naming only six.
28. General words confined to freeholds.
29. In relation to advowsons.
30. In relation to a devise subject to appointment.
31. In relation to an estate contracted for.
32. In relation to copyholds.
33. In relation to customary estates.
34. In relation to equitable estates.
35. In relation to a devise of the profits.
36. Of excluding the heir at law.
37. In relation to a renewed lease.
38. In relation to mortgages.
39. In relation to presentations to benefices.
40. In relation to a residuary clause.
41. Words excluding the residuary devisee.
42. In relation to reversions.
43. In relation to settled estates.
44. In relation to tithes.
45. In relation to trust-estates.
46. The words "all I am possessed of."
47. The words "all I am worth."
48. The words "all my real property."
49. The words "all my freehold lands."
50. The words "my estate."
51. The words "in case of the death."
52. The word "effects."
53. The words "what remains."
54. The words "rents and profits."

55. The word "share."
56. The word "surplus."
57. Two codicils, whether explanatory the one of the other, or duplicative.
58. Other cases.

**XI. Construction — what words create an estate in fee simple.**

1. Words showing an intention to give the whole interest.
2. Words of reference.
3. A devise with a limitation over.
4. The word "estate."
5. The words "remainder and reversion."
6. The words "heir male" may be taken as *nomen collectivum*.
7. Another case.
8. What words pass the whole interest in a chattel.

**XII. Construction — what words create an estate tail.**

A devise for life may be enlarged into an estate tail.

**XIII. Construction — what words create an estate for life.**

1. Distinction between the rules at law and in equity.
2. Where an express estate for life is devised.
3. Where an express estate for life is devised, though a power of disposal be given.
4. A devise without any words of limitation.
5. Where the general intention requires it.
6. A case left undecided.

**XIV. Construction — of the rule in *Shelly's case*.**

1. When the heirs take as purchasers.
2. In devises of trust-estates.
3. The rule not applied to the word "issue" with words of limitation, unless the general intent require a different construction.
4. The rule not applied where the estates are of different natures.
5. The rule not applied where a trust is created and a conveyance directed.

**XV. Construction — what words create a joint tenancy, or tenancy in common, and cross remainders.**

1. What words create a joint tenancy.
2. What words create a tenancy in common.
3. What words create cross remainders.

**XVI. Construction — what words create a condition, and make lands liable to debts and legacies, and enable persons to sell lands.**

1. What words create a condition.
2. What words make lands liable to debts and legacies.
3. Distinction between devise charged, and devise on trust.
4. What debts and legacies are charged.
5. Copyholds liable as well as freeholds.
6. Equity of personal estate to be exempt.

7. Equity

7. Equity of next of kin against the heir, on the personal estate being exhausted for purposes to which the real was devised.
8. Reference of creditors to legatees under a charge for payment of debts and legacies.
9. Validity of the preference of particular creditors.
10. Land devised for sale, from what time considered as sold.
11. Practice relating to the sale.
12. What words enable persons to sell lands.

**XVII. Construction — what words create a contingent remainder.**

A case in which a devise was held a limitation of the reversion.

**XVIII. Executory devises — devise over after a devise in fee simple.**

1. Origin and nature of executory devises.
2. Validity of executory devises, whether affected by the ends of their creation.
3. Devise over after a devise in fee.
4. Within what time an executory devise must vest.
5. A devise after a general failure of heirs or issue, void.

**XIX. Executory devises — devise of a freehold to commence in futuro.**

1. Within what time such devise must vest.
2. A devise over for life on failure of issue of the first devisee, is valid.

**XX. Executory devises of terms for years.**

The words "dying without issue" sometimes restrained to the death of a person *in esse*.

**XXI. Of other matters relating to executory devises.**

Of trusts of accumulation.

**XXII. Jurisdiction of courts of equity in relation to devises.**

Correction of mistake.

**I. Of the origin and nature of devises.**

**1. Origin of devises.**

By the common law, a man could not, by testamentary disposition, affect his lands or the guardianship of his children. 7 Ves. 370.

**2. No particular form is necessary.**

1. Indorsement upon a note, "I give this note to A.," may be proved as testamentary. 4 Ves. 565.

2. If a testator, by a paper subsequent to his will, says he has bequeathed that which he has not bequeathed, that paper may be proved as testamentary, and the property will pass. 6 Ves. 397.

3. A. by will, duly executed and attested, gives real estate to certain uses; and in default, to such uses as he should declare, by any deed executed in the presence of two witnesses, declares further uses. The deed poll is a testamentary act, but did not pass the freehold estate, because not executed

executed according to the statute of frauds, but passed copyholds. *Haberg-ham v. Vincent*, 4 B. C. C. 353.

4. C., by his will, devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common in fee. He had afterwards another daughter, L. He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took the minutes of the second will in writing, but before it was prepared the testator died. These minutes were proved in the spiritual court as a testamentary paper. 1. This paper being proved in the spiritual court, is sufficient to pass the copyhold estate. 2. But it is so totally void as to the freehold, that it will not put L. to her election under which will she takes; and she therefore will take her share of the freeholds under the first will, as well as the 15,000*l.* under the second. *Cary v. Askew*, 1 Cox, 241.

5. Where a testator refers expressly to a paper already written, and describes it sufficiently, it is as if incorporated in the will. 2 Ves. 228.

6. Unattested paper, clearly referred to in a devise of real estate, considered part of the will, if made previously; not, if subsequent. 1 Ves. & Beam. 445.

7. Legacies out of real estate, given by an unattested paper, cannot stand, unless that paper is clearly referred to by a will duly executed, so as to be incorporated with it: in this instance, there being no such clear reference upon the contents of the instrument, the legacies failed; the circumstance, that a paper was found inclosed in the same cover with the will, indorsed as his will, not being sufficient. *Smart v. Prujean*, 6 Ves. 560.

8. Erroneous reason given for not devising, cannot be taken as amounting to a devise. *Sandford v. Chichester*, 1 Mer. 652.

9. Under a devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease," natural children, who had acquired the reputation of being his children by her before the date of the will, entitled as upon the whole will intended and sufficiently described; rejecting as a description of the devisees, passages in a written book, unattested, of which probate was admitted, under a reference in the will to "the observations and directions which I shall leave in a written book." *Wilkinson v. Adam*, 1 Ves. & Beam. 422.

### 3. Of a codicil.

1. Codicil to be taken as part of the will. 3 Ves. 110.

2. Codicil by its nature refers to a former will, and becomes part of it. 1 Ves. 497.

3. Codicil considered as part of the will; and intent drawn from the whole. 1 Ves. 407.

4. All codicils are part of the will. Therefore a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie v. Macdonald*, 4 Ves. 610.

### 4. Of the union of a devise with another instrument.

1. A deed and a will cannot unite. 2 Ves. 235.

2. Will not construed by reference to a settlement; the provisions differing in some respect, though a substitution was intended. *Hixon v. Oliver*, 13 Ves. 108.

### 5. Devises are void against creditors.

1. Devise of an estate for payment of debts, takes it out of the statute of fraudulent devises, and being to pay out of rents and profits, no sale of mortgage can be made. *Lingard v. Derby*, 1 B. C. C. 311. (See the note.)

2. If a devise for payment of debts does not provide for it in a practicable manner,

manner, it does not take the case out of the statute of fraudulent devises. *Hughes v. Doulsen*, 2 B. C. C. 614. ; 2 Cox, 170.

3. A direction in a will to pay simple contract creditors before specialty ones, is not void ; it being within the exception in the statute of fraudulent devises. *Millar v. Horton*, Cooper, 45.

#### 6. Devises of land are specific.

1. Every devise of land must of necessity be specific, whether in particular or general terms ; otherwise as to personal property. 7 Ves. 147.

2. Every devise of real estate, whether in general terms or not, is in nature of a specific devise ; otherwise as to personal estate. 8 Ves. 305.

3. Every devise, whether particular or general, is specific ; as the deviser must have the land at the date of the will, and continue to have it until his death. 10 Ves. 605.

4. Devise of real estate, though in form residuary, is specific. 1 Ves. & Beam. 175.

#### 7: Whether the subjects of equitable jurisdiction.

A court of equity has no jurisdiction to declare what is, or is not, a man's last will. 13 Ves. 297.

#### 8. Analogy between devises in Scotland, and devises of copyhold in England.

Analogy between a devise in Scotland, and a devise of copyhold in England. The will operates as a declaration of the use of a previous surrender in the latter case, and of a previous conveyance, according to the proper feudal form, in the former. 2 Ves. & Beam. 133.

### II. Who may devise, and to whom ; and of the rights and obligations of devisees.

#### 1. Idiots and persons of non-sane memory.

Although a man have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making his will, he cannot be considered as having such a disposing mind as will give effect to his will. *Mountain v. Bennet*, 1 Cox, 354.

#### 2. Analogy between a devisee and a legatee.

Devisee not to be more favoured than a particular legatee. 10 Ves. 608.

#### 3. Presumption as to the character in which a devisee, likewise a mortgagee, entered.

Entry of the devisee, having also a mortgage, presumed to be as devisee, if no trace appears of any of the steps usually taken by a mortgagee to get into possession. 18 Ves. jun. 393.

#### 4. Preference between the devisee and remainder-man, where the deviser has a fee at law and fee-tail in equity.

A man has an estate in fee at law, and an estate in tail in equity, and devises the lands by his will. *Quære*, whether the court will assist the remainder-man in equity against the devisee. *Bland v. Bland*, 2 Cox, 349.

#### 5. Equity of the devisee of a contract of purchase to an application of the personal estate.

Devisee claiming the benefit of a contract for the purchase of an estate, directed to go to the uses of the will, the title proving defective, has no claim upon the personal estate, either to have the purchase-money, or another estate purchased, or the purchase completed, notwithstanding the defect. *Broome v. Monck*, 10 Ves. 597.

#### 6. Devisees'

6. Devisees' right to make claimants paramount the will, parties to a bill to establish it.

Devisees filing a bill to establish a will, and carry the trusts into execution, have no right to call upon persons who claim paramount the will, to litigate such claims with them. *Devonsher v. Newenham*. 2 Sch. & Lef. 199.

### III. What may be devised.

#### 1. Contingent and executory estates, and possibilities.

1. Contingent and executory estates, and possibilities, accompanied with an interest, are devisable. *Moor v. Hawkins*, 2 Eden, 342.
2. Contingent interest devisable, &c. 7 Ves. 300.
3. A possibility is devisable. 1 Ves. 254.
4. Possibility, a present interest; and capable of devise. 17 Ves. 182.

#### 2. Equitable interests.

Any equitable interest is devisable. 1 Ves. 254.

#### 3. Equitable liens.

An equitable lien is an equitable obligation to do according to conscience; and a devise of it good in equity. 1 Ves. 255.

#### 4. The devisor must be seised or entitled.

1. Testator cannot by any words devise lands, either under the statute or at common law, which he had not at the time of making the will. 1 Ves. 255.
2. Devisor must have the estate devised both at the date of his will and at his death. 8 Ves. 283.
3. Distinction as to real and personal estate. Every gift of land, even a general residuary devise, is specific; and that only, to which the party is entitled at the time, can pass: in the case of personal property, what he has at his death will pass; and if the description is specific, it may operate as a direction to purchase. 7 Ves. 399.
4. The rule, that after-purchased lands do not pass by a devise, does not arise from the word "having" in the statute of wills, but from the difference between the Roman testament or wills of personal estate, and a devise by the law of England; which is an appointment of the person to take the specific estate in nature of a conveyance, though fluctuating till death. 2 Ves. 427.
5. Leases renewed after making the will, do not pass under it. *Attorney-general v. Downing*, 1 Dick. 417, 418.
6. Leasehold estate held of a college devised, after the will the lease is renewed, the renewed lease does not pass. *Hone v. Medcraft*, 1 B. C. C. 261.
7. A renewed lease does not pass by a previous will, bequeathing the lease or the premises held on lease. 11 Ves. 387.
8. An estate contracted for will pass by a subsequent devise of all lands, the devisor being equitable owner under the contract. 9 Ves. 510.
9. By a contract for a purchase, if the vendor has a good title, in equity it is the real estate of the purchaser, and will pass by his will, or descend; and the devisee or heir may call for application of the personal estate in payment. 10 Ves. 613.

### IV. Of devises of copyhold.

#### What may be devised.

1. A. purchased a copyhold estate, which was surrendered to him out of court, but he died before he was admitted. *Quare*, whether it passed by the will. *Ardsoife v. Bennet*, Dick. 463.

#### 2. Copyhold

2. Copyhold estates, purchased and surrendered to uses declared or to be declared by will concerning the same, passed according to a will previous to the purchase, devising all copyholds generally, and therefore containing a description applicable to them. *Attorney-general v. Vigor*, 8 Ves. 256.

#### V. Of the solemnities necessary to a devise.

1. The rules in this particular are the same in equity as at law.

The construction of the execution of a will, the same in equity as at law. 1 Ves. 16.

2. Sealing not necessary.

Sealing not necessary to the execution of a devise, under the statute of frauds; not sufficient without signing. 17 Ves. 459.

3. Signing by the testator.

1. "I, A. B. do make this my will," equivalent to signature; and, if acknowledged before three witnesses, a good execution within the statute of frauds. 18 Ves. 183.

2. A declaration by the testator, in the attestation part of his will, that lands should go to a certain person, not a sufficient devise of them under the statute of frauds, not being signed by the testator, or by any person by his direction. *Blennerhassett v. Day*, 2 B. & B. 104.

4. Attestation by three witnesses.

1. Attestation of a devise by a mark, good within the statute of frauds. *Harrison v. Harrison*, 8 Ves. 185.; *Addy v. Grix*, 8 Ves. 504.

2. Attestation of a devise by a mark, good within the statute of frauds. 17 Ves. jun. 459.

3. A will not signed by the testator in the presence of witnesses, but acknowledged by him to the witnesses to be his signing, held to be sufficient within the statute of frauds. *Grayson v. Wilkinson*, Dick. 158.

4. A will established as to lands acknowledged only by the testator in the presence of three witnesses, and held also to revoke a former will of lands. *Ellis v. Smith*, Dick. 225.

5. Will subscribed by three witnesses before whom testator declared it to be his will, but did not sign it. Such declaration is equivalent to signing it before them; and such will is good within the fifth section of the statute of frauds, and is also a good will of revocation, within the sixth. *Ellis v. Smith*, 1 Ves. 11.

6. Acknowledgment by devisor of his hand-writing, to one of the witnesses, who did not see him execute, good. *Addy v. Grix*, 8 Ves. 504.

7. Witnesses may attest separately: in that case, if testator acknowledges before each, or signs before one, and acknowledges before the rest, it is good; bad, if he signs it before each, because three different executions, and no one good within the statute. 1 Ves. 16.

8. A will held to be well attested, though one of the subscribing witnesses was executor in trust under the will. *Phipps v. Pitcher*, 1 Mad. 144.

. Whether the attestation of the vice-consul abroad, apparently in his public character, can be considered as the signature of a subscribing witness, within the statute of frauds, to a will devising real estate, *quære*. *Clark v. Turton*, 11 Ves. 240.

5. The witnesses must attest in the presence of the testator.

A will being attested by the witnesses, where the testatrix could see them through the windows of her carriage, and of the attorney's office, is a good attestation in her presence. *Casson v. Dade*, 1 B. C. C. 99. Dick. 586.

6. Wills charging lands are within the statute.

Vide 6 Ves. 560.

7. Wills



## 7. Wills of rents are within the statute.

A rent is a tenement, and therefore cannot pass by will without three witnesses, if out of freehold; the word "tenement" being in the statute of frauds. 2 Ves. 232.

## 8. Wills of the produce of the sale of lands are within the statute.

Legacies by an unattested paper included under a charge of legacies on a real estate, by a will duly attested; but the produce of the sale of a real estate, cannot be directly disposed of by an unattested paper. 1 Ves. & Beam. 446.

## 9. Subsequent wills or codicils giving legacies, are not within the statute.

1. Where real estate is charged with legacies generally, by will duly attested, legacies may be revoked or charged by an unattested instrument. 2 Ves. 665.

2. The construction of the will being, that the real estate was well charged in aid of the personal with legacies, even supposing the charge not general, so as to include future legacies, a legacy may be revoked and given to another person by an unattested codicil. Attorney-general v. Ward, 3 Ves. 327.

3. Devise and bequest of all the testator's real and personal estate in Grenada, to pay all such annuities, legacies or bequests, as he should give or bequeath to be paid out of, or charged upon, his real or personal estate in Grenada, by his will or any codicil, whether witnessed or not. A charge by an unattested codicil is void; this being, not a charge by the will, of legacies, but a reservation, by a will executed according to the statute, of a power to charge by an unattested paper. As to the objection, that the real estate was not charged as a subsidiary fund to the general personal estate, *quære*. Rose v. Cunynghame, 12 Ves. 29.

## 10. Wills of copyholds are not within the statute.

1. Copyhold surrendered, will pass by a deed not attested according to the statute of frauds. *Habergham v. Vincent*, 4 B. C. C. 353.

2. Trust of a copyhold will pass by a will not attested according to the statute of frauds. *Tuffnel v. Page*, Dick. 76.

## 11. Operation of a will defective in the necessary ceremonial.

A will not executed according to the statute of frauds, has no operation; not even to raise an election against a person taking a benefit in the personal estate. 7 Ves. 372.

## 12. With respect to lands abroad.

Real estate in Bermuda passes by a will, not duly executed, to pass real estate according to the statute. *Sheddon v. Goodrich*, 8 Ves. 481.

VI. *Of the rebutation of devises.*

## 1. Antecedent to the statute of frauds.

1. The rule of the civil law required the same solemnity to annul an instrument, that was necessary to its completion: relaxed by Justinian in certain cases as to the revocation of a will. The rule never adopted in its full extent in this country. Parol revocation of a will good before the statute of frauds. Parol revocation of agreements. Different solemnities by that statute for the framing and the revocation of wills. 7 Ves. 376, 377.

2. Parol revocation of will before the statute of frauds. *Ibid*. 371.

3. Previously to the statute of frauds, and that as to guardianship, any declaration, from which an intention to revoke could be collected, was sufficient. 7 Ves. 371.

## 2. Analogy



## 2. Analogy between the rules at law and in equity.

1. The rules, as to revocations of wills, are the same in law and equity. *Brydges v. the Duchess of Chandos*, 2 Ves. 417.

2. Equity never controls the law upon revocation, except where the beneficial interest, being distinct from the legal estate, is devised, and the devisor afterwards takes the legal estate without any new modification or alteration: 2dly, where having the complete legal and beneficial estate at the date of the will he divests himself of the legal estate; but remains owner of the equitable interest; as in the case of a mortgage or conveyance for payment of debts. 6 Ves. 223.

3. No instance of a revocation of a will at law being held not a revocation in equity, where the partial, particular purpose was not for charges, or incumbrances, or to pay debts. 8 Ves. 126.

4. Any alteration of the estate, or a new estate taken, is at law a revocation, whether for a partial or general purpose; to which a court of law cannot advert; neither ought they to take any notice of articles or covenants, charging the estate in equity; but only to say upon the will and the subsequent deed, whether the old estate is changed, and a new estate acquired. 6 Ves. 222.

5. The question in a court of law as to the revocation of a will, is only, whether the legal devise is revoked by the deed. All other questions as to the partial purpose, &c. are merely equitable questions. The case of a partition is anomalous. *Ibid.* 219.

6. The rules as to revocation applied to legal estates, are in equity applied to equitable estates. Mortgage in fee is a total revocation at law, but in equity only *pro tanto*. 2 Ves. 598.

## 3. A subsequent will revoking or inconsistent with a former one.

1. Rule of the civil law; "*tunc prius testamentum rumpitur, cum posterius perfectum est.*" 7 Ves. 380.

2. A perfect and complete will, inconsistent with the former, is a revocation, though the devisee may never derive benefit from it; otherwise, if defectively executed and incapable as a will. *Ibid.* 379.

3. Construction of several testamentary papers, that some revoked others; probate having been granted of all. *Beauchamp v. the Earl of Hardwicke*, 5 Ves. 280.

## 4. An express revocation, subservient to another purpose, for which it is incompetent.

1. An express revocation, if only subservient to another purpose, for which it is incompetent, shall not revoke. 7 Ves. 379.

2. Disposition by will, so as to have legal effect, and afterwards another, by which the former would be revoked, but the other substituted; and it is evident, the testator did not intend revocation for any other purpose than to give it effect; if the second instrument cannot have the effect of disposition, it shall not be a revocation. *Ibid.* 372.

## 5. A codicil.

1. Codicil reciting a specific and limited purpose, revokes the whole devise, declaring the trusts again, with the proposed alteration, and confirms the will in every particular, not thereby altered or revoked. The omission of one trust, though probably against the intention, cannot be supplied. *Holder v. Howell*, 8 Ves. 97.

2. Two inconsistent wills; a codicil referring to the first by date as the last will cancels the intermediate will; and evidence of mistake cannot be admitted. 4 Ves. 616.

3. Testator devised all his real estate to his sister for life; remainder to her children as she should appoint; for want of appointment, to all her children  
and

and their heirs as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will not then at hand, he gave one of them an annuity; and directing his annuities to be paid out of his three per cent. stock, he charged them on his real estate in case of a deficiency; and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying all his estates and property, which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions, as she should approve, with remainder to their respective issue, and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life; and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate the will is not revoked, but is re-published by the codicil; and the two nieces are entitled to all the real estates, and to those directed to be purchased as tenants in common in fee. *Meggison v. Moore*, 2 Ves. 630.

4. A will devising estates for life, without impeachment of waste, is not revoked by a codicil, directing the trustees to let, until tenant for life married; such leases under restrictions, one of which was, that the leases should not be unimpeachable of waste. *Lushington v. Boldero*, Cooper, 216.

#### 6. Of the solemnities necessary to revoke a devise of land.

Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil, not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real. *Gallini v. Noble*, 3 Mer. 691.

#### 7. Cancelling.

Cancellation of a codicil effectual, notwithstanding an interlineation to the same effect left standing in the will. *Utterson v. Utterson*, 3 Ves. & Beam. 122.

#### 8. Cancelling one part revokes the other.

Presumption, that the cancellation of one duplicate of a will cancels the other, though both are in the testator's possession, and the cancelled instrument had been altered. In the two latter cases the presumption weaker. 13 Ves. 310.

#### 9. Marriage, and birth of a child.

1. Marriage, and the birth of a child is a revocation. *Christopher v. Christopher*, Dick. 445.

2. A subsequent marriage and the birth of a child revoke a will. *Quere*, as to the propriety of admitting evidence against the presumption, 4 Ves. 848.

3. Even a devise of land may be revoked by implication, from a total change in the situation of the family, as, the deviser having no children at the date of the will, by his marriage and the birth of an heir; upon an implied condition that the will should not operate in that event. 1 Ves. & Beam. 397.

4. Testator a widower, having a son and two daughters, by will gave all his real and personal estate in trust, subject to debts, for those children, and in case of their deaths, over. Marriage and the birth of a daughter, held a revocation of the will in the ecclesiastical court (against a former decision), not a revocation of the devise of the real estate. *Sheeth v. York*, 1 Ves. & Beam. 390.

5. Marriage alone not a revocation of a will: as with the birth of a child it is. 1 Ves. & Beam. 465. Exception, where the will provides for children. *Ibid*.

6. Whether a will was revoked by marriage and the birth of a child under particular circumstances, *quere*. 5 Ves. 663.

7. A second marriage and the birth of children, the wife and children provided

provided for by settlement, and there being children by the former marriage, a case of exception from the rule, that marriage and the birth of a child revoke a will. *Ex parte* the Earl of Ilchester, 7 Ves. 348.

8. Whether by the birth of more children subsequent to the date of the will, and, after the death of the testator's wife. his second marriage, but no children by that, the will is revoked, *quære*. *Gibbons v. Caunt*, 4 Ves. 840.

10. Marriage with, and a settlement on, the devisee.

Marriage with, and a settlement on, the devisee, is a revocation of the devise. *Ibid.* 1 B. C. C. 61. n.

11. A woman's will revoked by marriage.

Marriage is a revocation of the will of a woman, though made immediately before the marriage, in execution of a power reserved by articles by which she was enabled to dispose of her property by will after marriage. *Hodsdon v. Lloyd*, 2 B. C. C. 534.

12. Alteration of the estate.

1. Distinction between intention and alteration of estate, as the ground of revocation of a will. 2 V. & B. 386.

2. Devise of fee-farm rents revoked in equity as well as at law by a subsequent conveyance to a trustee, operating an alteration of the estate beyond the mere purpose of securing a mortgage; but on account of the laches of the plaintiffs, the heirs at law, the master of the rolls would not assist them further by retaining the bill, with liberty to bring such action or suit as they may be advised; to give an opportunity of taking the opinion of a court of law upon the question, whether there is a revocation at law, or whether a court of law will presume re-publication from the long possession, leaving open the question, whether the plaintiffs are entitled to any account, or how far back. *Harmood v. Oglander*, 6 Ves. 199.

3. Upon an appeal from the decree at the rolls, the lord chancellor was of opinion that the devise was revoked in equity as well as at law; and that the fee-farm rents, by the effect of the revocation descending to the heir, were not applicable to the debts before the other real estates devised, with the exception of a part, upon a special trust for that purpose by sale; but, that the decree deciding that the parties ought to go to law, ought to have directed the specific proceeding. The title, however, not appearing correctly upon the pleadings, inquiries were directed. *Harmood v. Oglander*, 8 Ves. 106.

4. A. devised all his estates, whether freehold or leasehold at M., O., and L., to his widow for life, remainder to his nephew, paying 2,000*l.* to the appointee of the widow, and made her executrix and residuary legatee; the estates in question were held under church leases, which the testator renewed after making the will; the widow, by her will, reciting the devise and the power of appointment, "in pursuance of the said power" appointed to the plaintiffs, and devised the estates "so given her by her said husband's will, and all her legal estate and interest therein" to trustees for the nephew, upon his paying the said charge "according to the true intent and meaning of her said late husband's will, but not before or otherwise."—Supposing the renewal of the leases to have been a legal revocation of the devise by the husband, the executrix shall not be understood to have acted through ignorance of her right to the whole, but to have designedly given effect to the real intention of the husband. *Penrice v. Garnons*, 3 Anst. 821. Whether the renewal of the church leases, revoked the devise of the husband, *quære*. *Ibid.*

13. Alienation to a stranger.

Revocation of a devise by an exchange, though the land after the death of the devisor was restored to his heir, under an arrangement in consequence

of a defect discovered in the title of the other party to the exchange. *Attorney-general v. Vigor*, 8 Ves. 256.

#### 14. Contract for sale.

1. Question whether a contract by testator after his will, for sale of an estate thereby devised, is a revocation of the will as to that devise and descends to heirs; or whether the contract is to be performed, and the purchase money considered as personal estate. Held to be part of the personal estate. *Mayer v. Gowland*, Dick. 563.
2. Sale of the devised estate, by the testator, is a revocation of the will. *Arnald v. Arnald*, 1 B. C. C. 401.
3. Articles to sell a devised estate are a revocation in equity, but not at law. 2 Ves. 601.
4. Devise revoked by a contract for sale. 5 Ves. 654.
5. A binding and valid contract for the sale of lands devised, is in equity much a revocation as a conveyance would be at law. *Ibid.* 19 Ves. 178.
6. Revocation by a contract to sell a devised estate. 2 V. & B. 387.
7. Distinction where partition was the sole object. *Ibid.* 386.
8. Revocation of devise, by a contract for sale, though rescinded after the deviser's death. *Bennett v. Lord Tankerville*, 19 Ves. 170.
9. The effect of revocation in equity produced by an agreement for partition, in such a manner as to deprive the testatrix in equity of any interest in the estate devised; and the devisee disappointed has no right to compensation from the heir. The agreement good to this effect, though it cannot be precisely executed; admitting compensation, whether, if abandoned, the will is set up again, *quære*. *Knollys v. Alcock*, 7 Ves. 558.

#### 15. An intended alienation.

1. Ground of the cases of feoffment without livery, and bargain and sale without enrolment as to the revocation of a will. 7 Ves. 378.
2. An act inconsistent with the will, though by some accident, independent of the will, it fails of effect, is a revocation; as a covenant to make a feoffment and letter of attorney to make livery; but no livery made. *Ibid.* 370.
3. Revocation of a will by a conveyance never completed. 3 Ves. 653.
4. A will may be revoked by an instrument; not attested as would be required to give it effect. Any disposition, that would by the instrument have completely put an end to that will, shall have that effect, though the instrument becomes ineffectual by any accident or circumstance *dehors* the will. 7 Ves. 374.
5. Where the act is valid for the whole purpose, but by disability of the person to take, or some matter *dehors* or subsequent to the will, it is ineffectual, it is a revocation. *Ibid.* 373.

#### 16. Alienation to the use of the testator.

1. If testator makes a feoffment after the will to the use of himself in fee, or suffers a recovery, it is a revocation. 3 Ves. 664.
2. Revocation by feoffment to such uses as the deviser shall appoint, with remainder to himself in fee. 2 V. & B. 386.
3. Feme covert, under a power, makes a will, afterwards being discoverd, she takes a conveyance from the trustees to her own use: this is a revocation. *Lawrence v. Wallis*, 2 B. C. C. 319.

#### 17. Alienation to strengthen the devise.

A recovery after a will, though expressly with a view to confirm it, held by the judges to be a revocation. *Darley v. Darley*, Dick. 397.



## 18. Fine and recovery.

1. A recovery after a will, though no intention to revoke, is a revocation. 2 Ves. 430.
2. Recovery by tenant in tail with reversion in fee, is a revocation at law; so in equity, if an equitable estate. Ibid. 599.
3. Fine for the mere purpose of a partition is no revocation even at law. Ibid. 600.

## 19. Any conveyance inconsistent with the devise.

1. Articles to settle estates of the husband, subject to certain uses and trusts, on the first and other sons in tail male; remainder to the husband in fee; the husband confirming the articles, devised the same estate in case he should die without issue male, or in failure of issue male in the life of his wife; and by a subsequent settlement in performance of the articles, conveyed to trustees and their heirs (after certain uses and trusts) to the use of the first and other sons in tail male; remainder to himself in fee; the whole fee being conveyed, and some of the purposes being inconsistent with the will and the articles, the will is revoked as to the settled estates. *Brydges v. the Duchess of Chandos*, 2 Ves. 417.

2. Devise by tenant in fee, in case he should die without leaving any issue living at his decease, and subject to such jointure or jointures as he might make upon the woman he might marry; by lease and release previous to the marriage of the devisor, the devised estates were conveyed to trustees and their heirs as to part, subject to certain trusts to the use of the devisor and his heirs till the marriage; and afterwards, subject to other trusts to the use of him for life; remainder to trustees to preserve, &c.; remainder subject to farther trusts, to the use of the first and other sons of the marriage in tail male; remainder to the devisor in fee; and as to the other part, to the use of the devisor till the marriage; and afterwards subject to a jointure to the intended wife, to the use of the devisor in fee; by an article executed previously to the will in contemplation of the said marriage, provisions were made as the basis of a settlement of the same nature, but in certain respects different from that which was executed; the will is revoked as to the whole estate, both in law and equity; a settlement having been made previously to the marriage, the articles were laid out of the case, and parol evidence of an intention not to revoke was rejected. *Cave v. Holford*, 3 Ves. 650.

3. Devise revoked by a conveyance to trustees and their heirs, to secure a jointure, and subject to a term for that purpose to the devisor, and his heirs, with a covenant to surrender copyhold estates to the same uses *Vawser v. Jeffrey*, 16 Ves. 519.

4. Devise of the equitable fee, under a contract to purchase, revoked by the conveyance to a trustee and his heirs, to such uses as the devisor should appoint by deed, with two witnesses, or will; with remainder to him for life to the trustee for the life of the devisor to bar dower, and to the devisor in fee. *Rawlins v. Burgis*, 2 Ves. & Beam. 382.

5. Testator devises real and personal estate to certain uses, and afterwards by deed conveys it to the same uses until marriage, and then to new uses; providing for his intended wife, and the issue of the marriage. After the deed, and before marriage by codicil attested by three witnesses, and directed to be annexed to his will, he imposes a forfeiture in case of his wife being disturbed; and after the codicil marries. Held, that the settlement revokes the will, which is re-published by the codicil; that the new uses springing on the marriage do not revoke the codicil, nor the marriage, as being contemplated by the will. *Jackson v. Hurlock*, 2 Eden, 263; *Amb.* 487.

## 20. Parol

## 20. Parol evidence not admissible.

Vide 3 Ves. 650.; 4 Ves. 616.

## 21. Alienation for a particular purpose.

1. Wherever the whole legal estate is conveyed, whether for a partial or general purpose, with the single exception of the case of partition, a court of law has nothing to do with the purpose; but to see whether the interest remains the same in the devisor as at the date of the will; if not, whether the purpose is partial or general, by way of charge, or not, it is a revocation at law. 6 Ves. 218.

2. A grant of an advowson, and a deed declaring the trust though for a particular purpose, held to be a revocation of the will as to the advowson. *Sparrow v. Hardcastle*, Dick. 256.

3. Conveyance in fee for payment of debts is no revocation. 2 Ves. 600.

4. Devise not revoked in equity by a mortgage in fee for payment of debts; though after the debts are paid the devisor takes a conveyance to him and his heirs. 6 Ves. 221.

## 22. A conveyance obtained by fraud.

A deed, though obtained by fraud, is nevertheless a revocation of a prior will. (But this decree was afterwards reversed.) *Hawes v. Wyatt*, 2 Cox, 263.; 3 B. C. C. 156.

## 23. Alteration of the quality of the estate.

1. Where a devised estate is differently modified, there is a revocation; otherwise, where a testator remains with the same estate and interest, and subject to the same means of disposition, though changed as to the legal or equitable quality. 2 Ves. 599.

2. Mortgage to the devisee after making the will, no revocation of it. *Peach v. Phillips*, Dick. 538.

3. A devise is not revoked by a mortgage in fee to the devisee. *Baxter v. Dyer*, 5 Ves. 656.

4. By marriage articles, the husband covenanted to convey to the use of himself for life; remainder in trust to secure an annuity to his wife for life in bar of dower: remainder to trustees for years to raise portions; remainder to the sons and daughters successively in tail; remainder to his own right heirs; afterwards he devised upon condition that he should leave no issue; and after the will he, in pursuance of the articles, conveyed to trustees and their heirs to the uses and trusts of the articles; the will is not revoked. *Williams v. Owens*, 2 Ves. 595.

## 24. Acquisition of the legal estate.

1. Legal estate taken after a devise of the equitable estate; that is no revocation. 2 Ves. 429.

2. Devise not revoked by merely taking the legal estate. 2 Ves. & Beam. 385.

3. In cases of contracts for land before, but executed after making a will of land, the subsequent execution is not a revocation; the legal interest coming *in esse* afterwards, would not pass by the will at law, but in equity is bound by the prior devise of the equitable interest. 1 Ves. 255.

## 25. A partition.

1. Partition is no revocation of a devise; otherwise, if the object extends farther, even merely to a power of appointment. 2 Ves. 429.

2. Mere partition, whether by compulsion or agreement, is not a revocation of a will; but the slightest addition, as a power of appointment prior to the limitation of the uses, is sufficient. 7 Ves. 564.

3. The ground, upon which a partition does not revoke a devise. If the object is to do any thing beyond mere partition, it is a revocation. 8 Ves. 281.

4. Distinction as to the effect of a partition upon a devise. If the conveyance goes no farther, the devise is not revoked, as it is, if he takes the divided estate, with a power of appointment. 10 Ves. 256.

5. Ground of the distinction, as to the revocation of a devise, between a partition merely, and with the addition of a power of appointment. 10 Ves. 284.

#### 26. A covenant.

A covenant may be a revocation of a will. 2 Ves. 436.

#### 27. By bankruptcy.

Devise of real estate not revoked by bankruptcy. Distinction in that respect between bankruptcy and disseisin. *Charman v. Charman*, 14 Ves. 580.

#### 28. A devise to the heir at law.

Deed to an heir at law void: but if executed according to the statute of frauds, it is a good revocation of a former will. 1 Ves. 17.

#### 29. Of partial revocations.

1. Where the deed, clearly revoking the will at law, is only for the partial purpose of introducing a particular charge or incumbrance, and does not affect the interest of the testator beyond that purpose, it is only a partial revocation in equity; and though after that purpose is answered, the use is declared for the testator and his heirs, a court of equity will hold the party a trustee for the devisees; so, upon a devise of an equitable estate, and a subsequent conveyance of the legal estate to the devisor and his heirs. 6 Ves. 219.

2. If lands devised are conveyed for a partial purpose, as a mortgage or payment of debts, it is a revocation *pro tanto* only. 2 Ves. 417.

3. Mortgage in fee, after a devise, a revocation *pro tanto* only. 17 Ves. 134.

4. Mortgages in fee and conveyances in fee, for payment of debts, revoke a will *pro tanto* only in equity. 3 Ves. 654.

5. By a mortgage in fee of a devised estate, or a conveyance in fee for payment of debts, the will is revoked *pro tanto* only. *Earl Temple v. the Duchess of Chandos*, 9 Ves. 685.

6. Lease for years or life is a revocation of a will *pro tanto* only. 3 Ves. 653.

7. Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts, and subject thereto, to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust, to be laid out in land, to be settled to the same uses, &c. A codicil revoking so much of the will, as directed the settlement of his said estate upon his sons, and varying the order of the limitations, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise; and therefore extending to the estates to be purchased with the personal estate. *Lord Carrington v. Payne*, 5 Ves. 404.

#### 30. Revocation of leaseholds.

1. Renewal of leases for lives, a revocation of the will as to those leases; but not of leases for years, they being personalty. *Digby v. Legard*, Dick. 500.

2. Settlement of leasehold estates not revoked by a subsequent assignment by the trustee to the settlor, entitled for life, or by the will of the latter; no intention to revoke appearing, and the terms of a power of revocation not being complied with. *Ellison v. Ellison*, 6 Ves. 656.

#### 31. Dissein and remitter by entry.

Disseisin and remitter by entry, no revocation. 8 Ves. 282.

32. In

## 32. In the case of mutual wills.

Mutual wills by two unmarried sisters under twenty-one; the marriage of one does not revoke the will of the other. *Hinckley v. Simmonds*, 4 Ves. 160.

VII. *Of the re-publication of devises.*

## 1. Nature and effect of.

Estate contracted for after a general devise, will pass by a general re-publication, and must be paid for out of the personal estate. 10 Ves. 605.

## 2. Of the solemnities necessary to republish a devise of land.

To re-publish a will, re-execution not necessary, nor a particular intent to re-publish; intent to consider it as of a subsequent date, is sufficient; which intent, in case of land, must, since the statute of frauds, appear in writing, according to the provisions of the statute. 1 Ves. 497.

## 3. A codicil is a re-publication.

1. Re-publication by a codicil, when and where not a re-publication of the will. *Attorney-general v. Downing*, Dick. 416.

2. A codicil referring to a will operates as a re-publication. *Coppin v. Fernyhough*, 1 B. C. C. 265. n.

3. Adding a codicil, though merely of personalty, is a re-publication of a will. *Coppin v. Fernyhough*, 2 B. C. C. 291.; *S. P. Powell v. Clever*, 2 B. C. C. 511. 513.

4. A codicil, though made for the purpose of passing after-purchased estates, is a re-publication of a will. *Coppin v. Fernyhough*, 2 B. C. C. 391. So, though of personalty only, it is a re-publication of a will of lands. *Powell v. Clever*, Ibid. 511. 513.

5. Renewal of a prebendal lease is an ademption of the gift; but a codicil to the will, though only to pass after-purchased estate, is a re-publication of the will, and the renewed lease shall pass under such re-publication. *Coppin v. Fernyhough*, Ibid. 291; see also *Powell v. Clever*, Ibid. 511.

6. Lands purchased after a general devise, pass under it; re-publication being implied from a codicil concerning personalty referring to the will, directed to be taken as part of it, and attested by three witnesses. *Barnes v. Crowe*, 1 Ves. 486.; 4 B. C. C. 2.

7. A codicil, with three witnesses, though relating only to personal estate, and expressing no intention as to re-publication of the will, is a re-publication; and therefore the will containing a general devise, lands purchased in the interval pass. *Pigott v. Waller*, 7 Ves. 98.

8. A codicil is a re-publication of a devise revoked by marriage and a settlement. *Jackson v. Hurlock*, 1 B. C. C. 61. n.

9. Testator, by his will, devises all his freehold and copyhold manors, &c. and real estate whatever, upon certain trusts, and gives to the same trustees the sum of 35,000*l.* to lay out in the purchase of lands, to be settled upon the same trusts; he afterwards contracts for the purchase of several estates, and by a codicil specifying some of the estates which he had so contracted to purchase, devises them to the same trustees upon the trusts of his will, and directs that the purchase money shall be taken as part of the 35,000*l.*, confirming his will in all other respects; the codicil amounts to a re-publication of the will, so as to pass not only the estates therein specified, but all the estates contracted to be purchased between the dates of the will and codicil. *Hulm v. Heygate*, 1 Mer. 285.

10. Testator, by will, charges all his estates with payment of debts, and makes his son residuary legatee; afterwards purchases copyholds which are duly surrendered to the use of his will, and by codicil devises those copyholds to his son in fee. The codicil held a re-publication of the will, so as



to subject those copyholds to the payment of debts. *Rowley v. Eyton*, 2 Mer. 128.

11. Testator, by will, executed previous to the statute of 9 Geo. 2., devises his real estate, and also his personal, to be laid out in land for a charity. By a codicil, subsequent to the statute, not attested, he confirms the will. Held, that it operates as a new will, and that the bequest of the personal estate is void. *Attorney-general v. Heartwell*, 2 Eden, 234.; *Amb.* 451.

### VIII. Of void devises.

#### 1. Void devises.

Trust by will for accumulation during a life, contrary to the statute 39 & 40 Geo. 3. c. 98. is good for twenty-one years by that statute. *Griffiths v. Vere*, 9 Ves. 127.

#### 2. From uncertainty.

1. A devise void for uncertainty. *Leslie v. Duke of Devonshire*, 2 B. C. C. 187.

2. Testamentary papers in this form: "I leave and bequeath to all my grandchildren, and share and share alike;" and "further, I appoint T. H. and T. E. my trustees for all my grandchildren and nieces," are void for uncertainty, and pass no interest in the real estate. Persons nominated trustees by an instrument which, being void, passes no trust fund, not allowed costs as between solicitor and client. *Ex parte Mohun*, *Swanst.* 201.

#### 3. Void in part.

1. Where the general object of the devise is void, to support, upon an intention of personal benefit, the interest of a devisee, it must be totally separate from that object. *Grieves v. Case*, 1 Ves. 548.

2. A will, disposing both of real and personal property, with a clause of attestation, but no witnesses, established as to the personal property. *Cobbold v. Baas*, 4 Ves. 200.

3. Construction of a will, with this residuary clause: "all the remainders of my different bequests" to trustees for charitable purposes; "and any thing not specified I commit to the discretion of my executors;" as passing the general residue by the former words to the charity, not by the latter to the executors; who would not under those words have been trustees for the next of kin: the devise for the charity void as to real estate, or personal, connected with land, as leaseholds and mortgages, by stat. 9 Geo. 2. c. 36. The charges upon the fund apportioned accordingly. *Paice v. Archbishop of Canterbury*, 14 Ves. 364.

4. A testator having attempted to give to *all* his grandchildren, and also to postpone the period of vesting till twenty-five, which are two objects legally inconsistent, the court cannot choose between these inconsistent objects, so as to give effect to the one and disappoint the other. 2 Mer. 388.

5. Principle as to executory devise; that going beyond the period allowed by law, it is void for the whole, and not good for the time allowed by law. 9 Ves. 130.

6. Executory devise transgressing the allowed limits is wholly void, not for the excess only, independently of the statute; but *secus* as to executory devises within the scope of the statute. *Leake v. Robinson*, 2 Mer. 389.

7. Trust by will for accumulation beyond the stat. 39 & 40 Geo. 3. c. 98., is void only for the excess. Therefore, where directed until the age of twenty-one of the legatee, not then born, it is good for twenty-one years. *Longden v. Simson*, 12 Ves. 295.

8. Accumulation, exceeding the limits of the statute, 39 & 40 Geo. 3. c. 98., void only for the excess. 2 Ves. & Beam. 61.

#### 4. The

4. The estate descends to the heir.

1. A charge on the devised estate, void by the statute of mortmain, whether it shall sink for the benefit of the devisee, or go to the heir. *Wright v. Bow*, 1 B. C. C. 61.

2. Land devised to be sold; the produce to be applied as after-mentioned; if no disposition is made, the heir shall take. 2 Ves. 447.

3. A devise failing, the effect of a paramount title, established as to other premises, against the express intention, that they should go together. *Southey v. Lord Somerville*, 13 Ves. 486.

IX. *Of the construction of devises — general rules.*

1. The rules at law and in equity are the same.

Only one general rule of construction for courts of law and equity applicable to all wills, however the court may condemn the object; the intention is to be collected from the whole will, every word is to have effect according to the natural common import; words of art to be construed according to the technical sense, unless upon the whole will plainly not so intended. The court are bound to carry the will into effect, if consistent with the rules of law; and if they can see a general intention consistent with the rules of law, but the particular mode is not, though that shall fail, the general intention shall take effect. 4 Ves. 329.

2. Each case is particular.

1. There is no certain rule in cases arising on the construction of a will; they must always be construed according to the particular words, the circumstances, or views of the testator. 1 Ball & Beatty, 460.

2. Circumstances, from which an inference has been ordinarily raised, as that of the same person being constituted trustee of the real estate and executor, the personal estate being given as a residue, or as personal estate generally; or after an enumeration of particulars, the residuary legatee being also devisee of the real estate, or of part for life or otherwise, &c.: are circumstances entitled to consideration, only in reference to the context of every particular will in which they occur. *Bootle v. Blundell*, 1 Mer. 194.

3. Preference between two modes of interpretation.

If words are capable of a two-fold construction, the rule is to adopt such as tends to make it good even in the case of a deed, much more of a will. 4 Ves. 312.

4. Effect must be given to every part.

1. Some effect must be given to every part of a will. 1 Ves. 270.

2. The court is bound to give effect to all the will. 3 Ves. 105.

3. Every word of a will must have a meaning imputed to it, if capable of it, without a violation of the general intent or any other provision in the will. 4 Ves. 698.

4. Some sense to be given to every part of a will, if consistent with other parts; the legal sense, if possible. 5 Ves. 818.

5. Every word to have effect, if not inconsistent with the general intention, which is to control; if two parts are totally inconsistent, the latter prevails; if a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty. *Constantine v. Constantine*, 6 Ves. 100.

6. A will cannot be construed by adverting to a single clause; every thing bearing on the subject, must be taken together. 1 Ball & Beatty, 466. 480.

7. For the purpose of collecting the intention, every part of the will must be considered. *Gittins v. Steele*, *Swanst.* 28.

## 5. In relation to grammatical construction.

1. The Intention of the testator, if clear and consistent with the rules of law, is to govern, without regard to the grammatical construction, or whether it deserves favour or not. 4 Ves. 311.

2. Construction, to support the intention upon the whole will, against the strict grammatical rule. 11 Ves. 148.

## 6. In relation to punctuation.

The meaning of an ambiguous will is to be collected from the words and the context, not from the punctuation. Sandford v. Chichester, 1 Mer. 651.

## 7. In relation to rules of law.

1. In the construction of a will, it is to be presumed, that the testator was acquainted with the rules of law. Langham v. Sandford, 2 Mer. 22.

2. *Primâ facie* words must be understood in their legal sense, unless by the context or express words plainly appearing, intended otherwise. 5 Ves. 401.

3. Words used by a testator shall be interpreted according to their legal effect and operation, unless it clearly appears that he intended to use them in a different sense. Winslow v. Tighe, 2 B. & B. 204.

## 8. In relation to the usual acceptance of words.

Rule of construction, upon the effect of general words in a will, as applying to rents and profits undisposed of, reversions, &c. to consider as intended what falls within the usual sense; unless declaration plain to the contrary. 15 Ves. 406.

## 9. In relation to terms of art.

Vide 4 Ves. 329.

## 10. In relation to the qualification of general words.

1. Slight circumstances are sufficient to qualify and restrain general words in a will. 4 Ves. 325.

2. General words controlled, in order to make the whole will consistent. Whitmore v. Trelawny, 6 Ves. 129.

3. Devise by very general and extensive words, restrained upon the apparent intention. Green v. Stephens, 12 Ves. 419.

## 11. Force of superfluous words.

Intent may be argued from, though the words, by which it appears, were unnecessary. 1 Ves. 444.

## 12. In relation to rejecting words.

To authorise the rejection of words in a will, there must be an absolute impossibility of construing the will, those words being retained. The mere improbability that a testator could have meant what he has expressed, neither amounts to a cause for rejection, nor renders the devise void for uncertainty. Chambers v. Brailsford, 2 Mer. 25.

## 13. Whether expressions shall be taken imperatively, or by way of recital.

Testator having a right to order a thing to be done, expressing in his will that it is to be done, must be taken as speaking imperatively, and not merely by way of recital. 1 Mer. 651.

## 14. In relation to implication.

1. Implication in a will cannot prevail, unless necessary. Upton v. Lord Ferrers, 5 Ves. 801.

2. Necessary implication imports, not natural necessity, but so strong probability, that an intention to the contrary cannot be supposed. 1 Ves. & Beam. 466.

## 3. Rule

3. Rule of construction not to make any intendment contrary to the plain and usual sense of the words, unless from other parts of the will, plainly appearing not intended to have that extensive operation. 7 Ves. 368.

15. In relation to inferring an intention beyond the expression.

In some cases, as for creditors, an intention will be inferred from the purpose, beyond what is expressed. 4 Ves. 311.

16. In relation to inference and argument against a positive bequest.

1. The effect of a positive bequest not to be controlled by inference and argument from other parts of the will. 8 Ves. 42.

2. An express immediate disposition in a will not controlled by subsequent inference. 1 Ves. 269.

17. In relation to matter *dehors* the will.

1. Will not to be construed by something *dehors*, as by the state of the property, where no latent ambiguity. Attorney-general v. Grote, 3 Mer. 316.

2. The amount of the personal estate is not a circumstance to be inquired into, so as to furnish a ground for construction. 1 Mer. 194.

3. It is competent to the court to go out of the will, to ascertain the state of the testator's family, and his knowledge of it, with respect to the disposition made. 1 B. & B. 481.

4. The state of the testator's property cannot be resorted to, as a criterion to explain the will. 1 B. & B. 543.

18. No averment allowed to explain wills.

1. The situation of a testator and his family taken into consideration, in questions relative to the validity of a devise. Lytton v. Lytton, 4 B. C. C. 441.

2. The acts and declarations of a testator at the time of his will, are admissible to shew what he meant by a particular expression. Blake v. Marnell, 2 B. & B. 48.

3. If, on the face of the will, there is not an apparent intention to exclude the executor, parol evidence of such intention is not admissible. Langhorn v. Sanford, 2 Mer. 17.

19. In relation to the state of the property.

Property not to be taken as it is, but as it ought to be, at the death of the party from whom the representatives claim. Ashby v. Palmer, 1 Mer. 296.

20. In relation to the amount of the property.

1. The amount of the property, the piety or prudence of the disposition, afford no fair ground for controlling a will. 4 Ves. 340.

2. The court will not take into consideration, the amount of the property or the number of objects, for the purpose of construing a will, except in the case of a specific disposition. Sibley v. Perry, 7 Ves. 522.

21. In relation to the fact that testator was ignorant of the force of his expression.

Words, having an obvious meaning, not to be rejected upon a suspicion, that the testator did not know what he meant. 8 Ves. 306.

22. In relation to the fact that the event was not contemplated by the testator.

Though the testator might not have contemplated the event, that will not affect the construction. 7 Ves. 369.

23. In

23. In relation to the fact that the testator did not foresee the consequences.

If the meaning of a will is ascertained, reasoning from supposed cases will not induce the court to make a different construction; but can only lead to a conclusion, that the testator did not see all the consequences; but the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction or another, are attended to, with a view of ascertaining the meaning. 15 Ves. 103.

24. In relation to inconvenience.

Inconvenience attending the carrying into effect a particular disposition by will, not a sufficient reason for controlling its obvious construction. *Deffis v. Goldschmidt*, 1 Mer. 417.

25. In relation to the precedence of a particular disposition.

Vide 4 Ves. 340.

26. In relation to inconsistency.

1. Of two inconsistent limitations in a will, the latter prevails. 18 Ves. 421.

2. The particular intent, clashing with the general intent in a will, must give way. 1 B. & B. 470.

27. In relation to repugnancy.

1. Words not to be rejected, unless repugnant to the clear intention manifested by other parts of the will. 3 Ves. 320.

2. The rule of construction of wills is, that if the general intention can be collected, or any one particular object, expressions militating with that may be rejected, if plainly appearing to have been inserted by mistake, not otherwise; and if two parts of the will are totally irreconcilable, the latter overrules the former. *Sims v. Doughty*, 5 Ves. 243.

28. In relation to the case where the intention can be accomplished *pro tanto* only.

The intention of the testator is not to be set aside, because it cannot take effect to the full extent, but is to work as far as it can. 4 Ves. 325.

29. In relation to favour and disfavour.

Favour or disfavour to the object, if the intention can be discovered, is not a ground for construing a will. 4 Ves. 574.

30. Force of introductory expressions.

Clear words in the operative part of a clause, not controlled by ambiguous words in the introduction. 3 Ves. & Beam. 67.

31. Force of a *videlicet*.

A *videlicet* shall be rejected, if repugnant; not if it can be reconciled and made restrictive. 3 Ves. 194.

32. Force of the expression of a specific purpose.

1. It is not universally true, that the expression of a purpose, for which even a devise of land is made, limits the devise to the purpose expressed; where, for instance, there is a devise of land for payment of debts, it does not necessarily follow, that there is a trust for the heir after the debts paid. There is no general rule; but each case depends upon the circumstances. Where the purpose expressed, is in favour of the party, to whom the bequest is made, the presumption for limiting the bequest, is rather stronger. 14 Ves. 322.

2. Express bequest, or power, not controlled by the reason assigned, which,

which, though it may aid the construction of doubtful, cannot warrant the rejection of clear words. 16 Ves. 46.

33. Force of a residuary clause.

Residuary clause is a mark of intention, but not sufficient ground to say it was absolutely the intent there should be something to satisfy it. 1 Ves. 151.

34. In relation to a residuary clause.

1. The court inclines to construe a residuary clause, so as to prevent intestacy. *Leake v. Robinson*, 2 Mer. 386.

2. The limitations of a particular bequest, and of the residue, may be incongruous; but whatever turns out to be undisposed of, is not the less residue. 2 Mer. 393.

35. Difference of construction with reference to different individuals.

Different construction in favour of creditors, wife, or children, and in other cases. 13 Ves. 176.

36. In relation to creditors.

Construction for creditors favoured, not doing violence to or straining the words. *Noel v. Weston*, 2 Ves. & Beam. 269.

37. In relation to a devise of the whole property, with a particular interest given out of it.

Where the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property. 4 Ves. 408.

38. The word "or" construed "and," *et vice versa*.

1. "And" construed "or," to give effect to all the words. 7 Ves. 458.

2. Limitation over upon the death of a person unmarried, and without issue: "unmarried" in its usual sense, meaning never having been married, "and" was construed "or," to afford a reasonable construction. *Maberly v. Strode*, 3 Ves. 450.

39. A perpetuity cannot be created.

1. Testator devises his real estates to trustees, to several persons for life, with remainder to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male. Held, that this clause of revocation and settlement was void, as tending to a perpetuity, and being repugnant to the estate settled. *Duke of Marlborough v. Lord Godolphin*, 1 Eden, 404.; 5 Toml. P. C. 232.

2. Leasehold estates bequeathed, in trust to pay the rents and profits to the persons for the time being entitled under the limitations of real estate devised in strict settlement; with power to the trustees, at any time, with the consent of the persons so entitled, or if minors, at their own discretion, to sell, and invest the produce in an estate to the same uses. The leasehold estates vest absolutely in the tenant in tail, upon his birth, and the power is void. *Ware v. Polehill*, 11 Ves. 257.

3. That in case the devisee shall come into possession of the estate devised by T., the trustees shall stand possessed of this estate to the use of the next person in remainder, is valid. *Nicholls v. Sheffield*, 2 B. C. C. 215.

40. Of the rule which governs the courts in adding to or altering a will.

The court never alters or adds to a will without necessity. 7 Ves. 130.

41. Dis-

#### 41. Distinction between the case of a legal devise and an executory trust.

Distinction between a legal devise and an executory trust by will; in the latter, the actual intention, if it is to be collected, regarded in a much greater degree, than in the construction of a legal devise by the same instrument. 17 Ves. 76.

### X. Construction — what words create a devise and describe the devisees and the things devised.

#### 1. Words of advice or desire do not create a devise.

1. Devise of absolute interest to one, with any expression that he shall dispose of the whole or part to A., not properly a devise, but a trust for A., which court will execute after death of the first devisee. 1 Ves. 271.

2. Testator devised all his estate to his wife; in case of death happening to her, he desired his executors to take care of the whole for his daughter: the wife shall take only an estate for life, with remainder in fee to his daughter. *Nowlan v. Nolligan*, 1 B. C. C. 489.

#### 2. Devise by implication.

1. Devise may be by implication, if upon a clear presumption. 1 Ves. 561.

2. Devise by implication from the mere recital of an erroneous conception of right. As to an implied election, the will imposing an express election in favour of another person, *quære*. *Dashwood v. Peyton*, 18 Ves. 27.

3. Devise after the death of the devisor's wife. If the devisee is heir, the wife takes for life by implication; otherwise not, 5 Ves. 806.

4. Devise to the heir after the death of the devisor's wife, a necessary implication that the wife shall take for life; but no implication for her, upon such a devise of another man's estate, through the medium of election. 18 Ves. 48.

5. Devise to B. after the death of A. B. being the heir at law, a necessary implication for A. for life. 18 Ves. 40.

6. Term for ninety-nine years in a will, restrained to a life, by implication from a subsequent limitation, not after the end of the term, but after the failure of that life. 18 Ves. 421.

7. Testator gives to A. an annuity of 20*l.* to be paid out of his freehold estate at W., for his life. He gives the rents and profits of certain houses for her life, and another house, with 10*l.* a year for her life, to C.; and all the residue of his estate and effects, after the death of A., B., and C., to D. No estate for life in the residue passes by implication to A., B., and C. *Dyer v. Dyer*, 1 Mer. 414.

8. Testator contracts for the purchase of a house, and afterwards by a codicil to his will, gives to A., his executor, "the house which he had given a memorandum to purchase, and which was to be paid for out of timber which he had ordered to be cut down." This amounts to a direction that the purchase money for the house shall be so provided for; and the evidence was admitted to shew what was the order given by the testator with reference to the cutting of timber. Not the case of a devise by implication. *Sandford v. Chichester*, 1 Mer. 646.

#### 3. Force of the expression of a specific purpose.

Where a testator means to convert real estates into personal, for a particular purpose, if that purpose cannot be served, the court will not infer any other purpose. 1 Ves. & Beam. 175.

## 4. In relation to a mistaken description.

1. General disposition by will, not restrained by a defective specification. *Chalmers v. Stovi.* 2 V. & B. 222.

2. Devise of "my estates at S. which were devised to me by or purchased from A.," the fact proving otherwise, held not an intended restriction, but an erroneous description. 2 V. & B. 191.

3. Testator devised all the residue of his estates, as well copyhold as freehold ("the copyhold part thereof having been previously surrendered to the use of my will,") upon several trusts in favour of his wife and children; the only trust for his eldest son and heir was an annuity of 300*l.* for life; the remainder to his wife and children; the testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect; and was not bound by receiving half a year's payment of the annuity while abroad. *Rumbold v. Rumbold*, 3 Ves. 65.

## 5. The words "child," "children."

1. In the construction of a devise to children, the courts go as far as they can to comprehend every child. 1 B. & B. 486.

2. Gift to A., for life, remainder to his children. This includes all children, both those born before and those born after the testator's death; the rule of exclusion being an artificial rule of construction. *Leake v. Robinson*, 2 Mer. 382.

3. Under a devise to all the children of A., except B., a posthumous child is entitled. *Clarke v. Blake*, 2 Ves. 673.

4. When the enjoyment of a thing devised is postponed to a particular period, or until a particular event happen; the persons then answering the description, will take, and after-born children will be included. 1 Ball & Beatty, 459.

5. When a life estate is interposed between the death of the testator, and the enjoyment by the children of the tenant for life, and nothing to limit the general description; after-born children will be included. 1 B. & B. 462.

6. Where a devise is in terms immediate, and the description of the persons to take is general, those answering the description on the testator's death, can alone take; and after-born children will be excluded. 1 B. & B. 459.

7. When there is an immediate devise to children and grandchildren, generally, vesting in possession on the death of the testator; after-born children are excluded. 1 Ball & Beatty, 483. But if the vesting in possession be postponed, then after-born children *in esse* at the time of distribution are entitled; though the devise be immediate. 1 B. & B. 462.

8. E. S. devised all her real estate to trustees for a term of 500 years to raise 200*l.* for the purposes in the will mentioned, and after the determination of that term, and subject thereto, to other trustees for a term of 1000 years, in trust, to pay out of the rents certain annuities, and subject to the said two terms, she gave the premises to all and every the child and children of her brother T. G. and the heirs of their bodies, &c. T. G. had two children at the death of the testatrix, and one born afterwards, but before the death of the annuitants. This is an immediate devise, and the last-mentioned child being born after the testatrix's death, is not entitled to any share of the premises. *Singleton v. Gilbert*, 1 Cox, 68.

9. Testator gave the residue of his real and personal estate to his wife for life, and upon her decease he bequeathed it to the children of A. and his wife Jane, to be equally divided amongst them the said Jane's children, and not to any children by any other marriage of either party. The residue is divisible amongst the children of A. and his wife, who were living at the death of the widow, but will not extend to children born after that time. *Ayton v. Ayton*, 1 Cox, 327.

10. Re-



10. Residuary disposition to the children of the testator's brothers and sisters as aforesaid (named previously as legatees) who shall be living at his decease, at twenty-five, equally; but in case of the decease of any of the aforesaid brothers and sisters having issue, then the child or children to have the same share as if the parent had been living at his decease; with maintenance and survivorship in case of the death of any unmarried and without issue. The first clear designation of nephews and nieces, living at his death, as the sole objects of his bounty, not altered or controlled by the subsequent designation of the brothers and sisters, admitting questions of doubtful construction; as to after-born children. *Barker v. Lea*, 3 Ves. & Beam. 113.

11. Devise of an estate to A. J., subject to the payment of 500*l.* with interest to M. H. on her marriage, or attaining twenty-one, but if she dies before marriage, or twenty-one, and there be no child or children of R. H. (the testator's brother) then the 500*l.* to revert to A. J. M. H. died before marriage or attaining twenty-one; and held, that children of R. H. born after the death of M. H. were entitled. *Hutcheson v. Jones*, 2 Mad. 124.

12. Gift by will to the children of a deceased sister, is a gift to those who were living at the death of the testator. *Viner v. Francis*, 2 Cox, 190.

13. A bequest for all and every the child and children of A., includes every child born before the period of distribution; which in this case was the attainment of the age of twenty-one by the eldest, the marriage of a daughter, or the death of a child under twenty-one, leaving issue. Upon the general rule a child by a subsequent marriage was included, notwithstanding a strong implication in favour of children by the prior marriage. *Barrington v. Tristram*, 6 Ves. 345.

14. "Child" &c. *prima facie* means legitimate. 1 Ves. & Beam. 462.

15. Under the description of "children" in a will, illegitimate children, existing at the date of the will, not entitled, unless proved by the will itself to be intended; and evidence can be received only for the purpose of collecting who had acquired the reputation of children. *Swaine v. Kennerley*, 1 Ves. & Beam. 469.

16. An only illegitimate son, therefore, held entitled as devisee. 1 V. & B. 469.

17. An illegitimate child not entitled to share under a devise to children generally; notwithstanding a strong implication upon the will in favour of that child. *Cartwright v. Vawdry*, 5 Ves. 530.

18. An illegitimate child not entitled under the description of a child in a will; though the testator knew the state of the family, viz. several illegitimate and no legitimate children. *Godfrey v. Davis*, 6 Ves. 43.

19. Grandchildren may take under the description of children, if there can be no other construction, not otherwise. *Reeves v. Brymer*, 4 Ves. 692.

20. Where there is a total want of persons properly answering the description, others, who do not so completely answer it, may be let in: grandchildren, for instance, under a liberal construction of the word "children" if there are none; but no such instance, if there are children. 3 V. & B. 69.

21. Under a bequest to children, grandchildren are not entitled, except from necessity; as, if the will would otherwise be inoperative; or, where by other words as "issue," it clearly appears, that the word "children" was used, not in the proper, but in a more extensive sense. The construction not altered upon the inference from the testator's knowledge of the circumstances of the family. *Radcliffe v. Buckley*, 10 Ves. 195.

22. Grandchildren entitled under the description of "children" in a will; the intention upon the whole clause being children, or the issue of those who should be dead. *Royle v. Hamilton*, 4 Ves. 437.

## 6. The words "younger child."

1. A daughter, though eldest, shall take by description as a younger child. *Pierson v. Garnet*, 2 B. C. C. 33.

2. Bequest to the youngest child of A. if she should have any child or children within a certain period; if no child or children within that period, then over; her eldest child, being the only one within the period described, is entitled. *Emery v. England*, 3 Ves. 232.

## 7. The words "A.'s and B.'s children."

Bequest of one-fourth to the children of A., and other fourth to or among the children of B. Distribution *per capita*. *Lady Lincoln v. Pelham*, 10 Ves. 166.

## 8. The word "grandchildren."

1. Opinion given, that the word grandchildren in a will comprehends great-grandchildren, unless an opposite intention appears. In the present case it was so held, on the ground of the testatrix having, in another part of the will, described a great-grand-daughter as a grand-daughter. *Hussey v. Berkeley*, 2 Eden, 194.

2. Construction of a will and settlement, as not comprehending great-grandchildren under the description of children and grandchildren. *Earl of Oxford v. Churchill*, 3 Ves. & Beam. 59.

3. A devise of the entire residue, real and personal, to A., B., and C., (children of the testator,) "and all their younger children, their heirs, executors, administrators, and assigns for ever; A., B., and C., to receive the yearly interest for their respective lives of such parts thereof as were intended for their respective younger children. And in case of the death of A., B., and C., the share of any of them so dying, to go to his or her younger children; and in case of the death of A., B., and C., or any of them, without leaving younger children, the share of such child so dying, to go to the survivors, and their younger children," with powers of appointment amongst their respective younger children. "And in case of the death of any of the younger grandchildren before twenty-one, or days of marriage, the shares of such to go to the brethren of the child so dying." At the time of making the will, and of the testator's death, A. had one younger child, B. several, and C. none; each had several since. On a bill by after-born grandchildren, it was held: 1. That the residue was divisible into three parts, the yearly interest of each to go to A., B., and C., for their respective lives. 2. That after-born grandchildren were entitled, subject to the power of appointment in their parents. 3. That the share of a younger child, dying under twenty-one, and unmarried, goes over to the brothers and sisters of such child. 4. That the share of A., B., or C., dying without leaving younger children, goes over to the survivors, for the same estate as their original shares. 5. That a younger grandchild, dying in the lifetime of its parent, under twenty-one, and unmarried, had not a vested interest in its share, transmissible to its representatives. *Crone v. Odel*. 1 Ball & Beatty, 449.

4. Devise to testator's wife S. D. for life, and after her decease that the estate should be settled by counsel to go to and amongst his grandchildren of the male kind, and their issue in tail male, with remainder over, only one grandchild born in testator's life, but two born afterwards, before the death of the testator's wife; and held, a grandchild born after the death of the testator, and before the death of his wife, took an estate male. *Marshall v. Bousfield*, 2 Mad. 166.

## 9. The word "grand-daughter."

Widow of a grandson held not to be comprehended under the description of a grand-daughter. 2 Eden, 194.; *Amb. 603*.

10. Residuary  
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 testator's death. *Ex parte Freemantle*,

a word "issue."

on; sometimes confined to children, some-  
 descendants. 3 Ves. & Beam. 67.

by any indication of intention, includes all  
 necessary to restrain it to children, grandchildren

children *per capita*. *Leigh v. Norbury*, 13 Ves. 340.

under a bequest to issue. *Freeman v. Parsley*,

"issue" will comprehend all descendants, upon the  
 of this will it was confined to children. *Sibley v.*

13. The words "failure of issue."

to A., B., and C., and their heirs, each in due succession,  
 usual limitations in failure of issue in D.," does not import  
 of issue in D. *Stratford v. Powell*, 1 Ball & Beatty, 1.

13. The words "die without issue."

words "die without issue" have their legal signification; viz. a  
 unless there are expressions or circumstances, from which  
 collected that they are used in a more confined sense. 17 Ves.

though, where nothing but a life-interest is given over upon a failure  
 must necessarily be intended a failure within the compass of that  
 the entire interest is given over, the mere circumstance that  
 is confined to a life-interest, furnishes no indication of an intention  
 the whole bequest depend on the existence of that person, when  
 happens on which the limitation over is to take effect. 17 Ves.

14. The words "next of kin."

Construction of the description "*proximo de sanguine*." 15 Ves. 109.

The description "next of kin" means at the death. 15 Ves. 536.

Testator ordered real estate to be sold, and the residue to be laid out  
 the funds, to remain for ten years, and at the end thereof, gave the same  
 to his next of kin; those who were so at his death shall take. *Spink v.*  
*Lewis*, 3 B. C. C. 355.

15. The words "next of kin or heir at law."

Testator by a will unattested, after, among others, charitable legacies, to  
 be distributed by his executor or executors, gave the remainder and residue of  
 his estate, if any, and effects of what nature soever and wheresoever, which  
 he should be seized on, possessed of, &c. "next of kin or heir at law whom  
 I appoint my executor" after debts, &c. paid. He left one brother, and by  
 deceased brothers a niece and several nephews, one of whom was heir at  
 law. Distribution decreed according to the statute. *Lowndes v. Stone*,  
 4 Ves. 649.

16. The words "next of kin in equal degree."

Under a residuary bequest to "the next of kin in equal degree," brothers  
 entitled, excluding nephews and nieces. *Wimbles v. Pitcher*, 12 Ves. 433.

17. The word "relations."

1. A bequest to relations means such persons as would be entitled under  
 the statute of distributions. *Thomas v. Hole*, *Dick*. 50.

2. Bequest to "relations" confined to the next of kin according to the statute of distributions. 9 Ves. 323.

3. Word "relations" in a will, means "next of kin." Pope v. Whitcombe, 3 Mer. 689.

4. Though upon bequests to "relations," with a power of selection, the party may go beyond the statute of distributions, that rule is adhered to wherever the execution devolves on the court. 9 Ves. 324.

5. Bequest to relations does not include those by marriage. Maitland v. Adair, 3 Ves. 231.

18. The words "relations, as sisters, nephews, and nieces."

Testator directed the residue of his estate to be parted to his "next relations, as sisters, nephews, and nieces." Testator left his three sisters A., B., and C., and D., the only child of a deceased sister, and L., the only child of a deceased brother, his next of kin; but at the time of his death, his sister A. had two children living. The residue must go according to the statute of distributions. Stamp v. Cooke, 1 Cox, 234.

19. The words "poor relations."

Poor relations in a will, mean the next of kin according to the statute. Brunson v. Woolridge, Dick. 380.

20. The word "family."

A will devising real estates for life, with remainder "to my family;" the heir at law is entitled under that term. Wright v. Atkins, Cooper, 117.

21. The words "A.'s and B.'s families."

Under a disposition by will, to A.'s and B.'s families, the children are entitled, exclusive of their parents, and *per capita*. Barnes v. Patch, 8 Ves. 604.

22. The words "legal representatives."

Leasehold property bequeathed in remainder in tail, for a child *in ventre*, if a son, for life; and after his decease, for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator. A son being born, and dying without issue, the limitation over was established in favour of the next of kin, according to the statute, at the time of distribution. Long v. Blackall, 3 Ves. 486.

23. The words "my right heirs on the part of my mother."

Under a residuary disposition to the testator's right heirs on the part of his mother, his sister and nephew by a deceased sister are entitled against remoter relations, claiming on the ground of an express provision by an annuity for the separate use of the sister. Forster v. Sierra, 4 Ves. 766.

24. The words "to his own right heirs, his son excepted."

Devise of estates in M. to the eldest son of testator's son for life, and of estates in H. to the second and other sons; if but one, then all the real estates to him for his life, and "for want of heirs of him" to the right heirs of the testator "his son excepted," testator died leaving a son and daughters. Held, by the court of king's bench, that the daughters took as *persons designata*. But judgment reversed on error. Doe v. Pugh, 2 Mer. 348.

25. The word "survivors."

The word "survivors" construed "others." 17 Ves. 482.

26. The word "unmarried."

The expression "without being married" in a will, construed according to

to the common acceptance, "without having ever been married." 7 Ves. 458.

27. The words "my seven children," naming only six.

1. The testator gave the residue "amongst his seven children, A., B., &c. naming only six. The seven children shall all share equally. *Humphreys v. Humphreys*, 2 Cox, 184.

2. Testatrix devises her estates to trustees to sell to pay debts, and devises the surplus to five persons, one of whom dies in her lifetime; on the question, whether the share given to the person dying was to be considered as land, it was held land, and to go to testatrix's heir. *Digby v. Legard*, Dick. 500.

3. Testatrix orders lands to be sold, and the money to be laid out in the funds to uses, among which 1000*l.* was to be paid to A., her executors, administrators, and assigns, who died before the testatrix; the gift lapses, and shall go as land to the heir of the testatrix, *ex parte materna*, being the side from whence the land came. *Hutchinson v. Hammond*, 3 B. C. C. 128.

4. Devise to the heir at law and his issue male in strict settlement; remainder in trust to be sold, and the money to be distributed among certain persons, or the survivors or survivor of them, and that the share of one should, previous to her marriage, be settled upon her for life, and after her death upon her issue; in default of issue, upon her right heirs; the produce of the sale is to be considered as personal, and vests in the survivors at the death of the tenant for life without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children, as they should appoint; in default of appointment, equally; if no children, according to their joint appointment; in default thereof, to the husband, his executors, &c. is a sufficient execution of the direction in the will. *Brograve v. Winder*, 2 Ves. 634.

5. Real estate devised, to be sold, and the produce disposed of with the personal, with a power to direct the fund to be laid out in land; no such direction having been given, it was held personal property. *Maberly v. Strode*, 3 Ves. 450.

28. General words confined to freeholds.

1. Copyhold will not pass by general description, where there is freehold to satisfy the words; though it had been supposed to be a freehold, and the first devise was for payment of debts, and then given to a younger child otherwise provided for. *Lindopp v. Eborall*, 3 B. C. C. 188.

2. Devise of all testator's real estates wheresoever situate, lying, and being; held, not to include leaseholds as well as freeholds. *Whitaker v. Ambler*, 1 Eden, 151.

3. Testator having both freehold and leasehold property, the leasehold was held to pass under a general devise applicable to freehold, the intention of the testator being collected from the will, that it should pass under such devise. *Lowther v. Cavendish*, 1 Eden, 99; *Amb.* 356.; 3 Toml. P. C. 186.

4. Testator gave, devised, and bequeathed all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and all his monies in the funds, to trustees, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein; and declared the trust of the rents, issues, and profits, dividends, interest, and proceeds, subject to ground-rents and other out-goings in respect of his said messuages, lands, &c. The leasehold estates pass with the freehold upon the subsequent words. *Hartley v. Hurlie*, 5 Ves. 540.

29. In relation to advowsons.

Devise of lands, tenements, and hereditaments, subject to a term of eleven years,

years, in trust to receive the rents, issues, and profits of the premises, that from time to time should accrue and become due, and dispose, &c.; an advowson in gross passes; and a sale of the next presentation within the term, by direction and for the benefit of the *cestuy que* trust, was established. *Earl of Albemarle v. Rogers*, 2 Ves. 477.

### 30. In relation to a devise subject to appointment.

Devise properly attested of land upon several trusts; remainder to such trusts as testator should by any deed appoint; whether land would pass by the deed of appointment sent to law upon a case stating the devise to be to uses. *Habergham v. Vincent*, 1 Ves. 410.

### 31. In relation to an estate contracted for.

1. A. having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, "as to all the worldly goods that it had pleased God to bless him with, gave and bequeathed to his wife and two sons all his goods, cattle, chattels, personal estate and effects whatsoever;" and in case they died without issue, &c. gave "the children's share of the personal estate and effects" over. Testator dying before the purchase could be completed, held, that the agreement ought to be specifically performed; and that the words of the will being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son and his heirs, &c. *Cave v. Cave*, 2 Eden, 139.

2. Bequest of "the whole of my property, of whatever description, freehold, leasehold, &c., of which I may be in possession at the time of my decease," passes real estate agreed to be purchased by the testator. *Holmes v. Barker*, 2 Mad. 462.

### 32. In relation to copyholds.

1. Devise by general words, viz. messuages, lands, tenements, and hereditaments, for payment of debts, will include copyholds, if required; and the want of a surrender will be supplied. In this instance the intention to subject the copyhold estate appeared in other parts of the will. *Williams v. Cousmaker*, 12 Ves. 136.

2. Construction of a residuary devise, as including under the general words "estate and effects" a copyhold, not surrendered, in favour of a younger son, subject to debts, the will reciting that the eldest son was provided for, and no freehold estate. *Pennington v. Pennington*, 1 Ves. & Beam. 406.

3. Devise of all copyhold estates, in general terms, unrestrained to a child, passes all copyholds, surrendered and not surrendered, to the use of the will. *Blunt v. Clitherow*, 10 Ves. 589.

4. Where a father and two sons, A. and B., were successive lives in a copyhold, where by the custom the person first named might dispose of the whole interest; and upon the marriage of A. it was agreed, that the father should have power to appoint during the life of A. and the widowhood of his intended wife. The father having afterwards obtained a new grant for the lives of C. a third son, and A. and B. by a will made after the death of C. in which no mention is made of the copyhold, gives the residue of his personal estate to B.; held, that B. was not thereby entitled to the copyhold. *Rumboll v. Rumboll*, 2 Eden, 15.

5. Devise of all freehold and copyhold lands " (the copyhold part whereof I have surrendered to the use of my will) " subject to debts; some were surrendered, others not; the latter did not pass. *Wilson v. Mount*, 3 Ves. 191.

6. Copyhold not intended to be comprehended in devise to the wife in general terms, "real and personal estates," so as to entitle her to have the surrender supplied. *Church v. Mundy*, 12 Ves. 426.



7. Devise by the general terms, "all the rest, residue, and remainder of my real and personal estate, of what nature," &c. soever, to nephews and nieces, not being for creditors, wife, or children, is not sufficient to raise a case of election, or for supplying the want of surrender of copyhold land, contiguous and intermixed with the freehold, against the heir. *Judd v. Pratt*, 13 Ves. 168.

### 33. In relation to customary estates.

An estate held by copy of court-roll, according to the custom of the manor, but in case of intestacy distributable as personal estate, and in other respects differing from copyhold, passed under a residuary bequest of the personal estate, not with copyhold estates, under a general devise of all freehold and copyhold messuages, lands, &c. with limitations in strict settlement, upon the whole will and the circumstances. *Watkins v. Lea*, 6 Ves. 683.

### 34. In relation to equitable estates.

By a general devise, an estate, in which the deviser has acquired the equitable title, passes. 10 Ves. 605.

### 35. In relation to a devise of the profits.

Devise of the profits would pass the land. 2 Ves. & Beam. 74.

### 36. Of excluding the heir at law.

1. There is no way to exclude an heir, but by giving to somebody else; for he will take what is not disposed of, even against the intention. 2 Ves. 225.

2. Neither an heir at law nor next of kin can be barred by any thing but a disposition. 3 Ves. 493.

3. Plain words of gift or necessary implication are required to disinherit an heir at law. 3 Ves. 92.

4. An heir at law is not to be disinherited in equity, but by express words, or necessary implication. 1 Ball & Beatty, 541.

5. A legacy to an heir at law is not sufficient to defeat his claim to the undisposed real estate. 1 Ball & Beatty, 543.

6. Real and personal estate devised to the executor in trust to pay debts and legacies: the rest and residue to himself; the only purpose of devising the real appearing to be to ensure payment of the debts, without any intention to disinherit the heir, it was held only a charge; and that the heir was entitled to the surplus of the real estate. *Halliday v. Hudson*, 3 Ves. 210.

### 37. In relation to a renewed lease.

1. A renewed lease does not pass by a general bequest of all leasehold estates, unless controlled by the context. 11 Ves. 390.

2. A renewed lease does not pass by a previous will, bequeathing the lease, or the premises held on lease. 15 Ves. 288.

3. Bequest of leasehold premises, "and all estate, term, and interest therein." The interest acquired under a subsequent renewal of the lease, does not pass. *Hatter v. Noton*, 16 Ves. 197.

4. Bequests of leaseholds for years, determinable upon lives, for life, with remainder over, for all the residue of the term and interest the testator shall have to come therein at his decease. The term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death, as tenant by the year. Upon the general words, unrestrained, comprising the interest from year to year, and the intention upon the whole will, a subsequent lease, obtained by the executrix, the widow and tenant for life under the will, was held subject to the uses of the will; as the residue of the term at his death, however short, would have been. *James v. Dean*, 15 Ves. 236.

38. In

## 38. In relation to mortgages.

1. Will of mortgagee disposing of the money, carries his interest in the land. 3 Ves. & Beam. 49.

2. Construction of a will as passing an estate, originally on mortgage, but foreclosed: the testator's intention appearing to dispose of all his interest, though inaccurately mentioned, both as land mortgaged, and as money due on mortgage. *Silberschildt v. Schiott*, 3 Ves. & Beam. 45.

3. Lands originally held under old mortgages pass by a general devise, though no release of the equity of redemption appears. *Attorney-general v. Bowyer*, 3 Ves. 714.

4. Lands originally held under old mortgages passed by a general disposition by will, as the testator's estate, though no release of the equity of redemption appeared. *Attorney-general v. Vigor*, 3 Ves. 256.

5. Lands originally held under old mortgages passed by a general devise, though no release of the equity of redemption appeared. *The Attorney-general v. Bowyer*, 5 Ves. 300.

6. The lord chancellor and the master of the rolls inclined to think, the legal estate in mortgaged premises passed by a general residuary devise by the mortgagee to A., who was also executor, his heirs, executors, administrators and assigns for ever, on the side of his mother. A. being nineteen, the lord chancellor would not order him to join in the conveyance under the statute 7 Anne, c. 19., but ordered the money to be paid into the bank *ex parte* the infant; and said, when he should come of age, it would be very reasonable that he should join. *Ex parte Sergison*, 4 Ves. 147.

7. T. W. being seised and possessed of considerable freehold, copyhold, and leasehold estates, in the county of H., and in possession, as mortgagee, of certain leasehold houses in K. in the county of M.; and having other estates vested in him, as mortgagee, besides those at K., makes his will, devising "all his freehold, copyhold, and leasehold messuages, &c. in the county of K." to A. W. for life; and, after death, "all and singular other his freehold, copyhold, and leasehold messuages," &c. in the counties of H. and M. or elsewhere, to E. W. and A. T. for their joint lives; and after their several deceases, "all the said freehold, leasehold, and copyhold messuages," &c. unto and equally among their children; and gives to A. W. "all the residue of his real estate not before disposed of, and all other his estates and interests whatsoever vested in him, as mortgagee or trustee," &c.; "and all the residue of his personal estate, ready money, and securities for money," &c. subject to the payment of debts and legacies; held, that the mortgaged premises at K. passed under the devise of all freehold, copyhold, and leasehold messuages, &c. in the county of H. and in the town of K. *Woodhouse v. Meredith*, 1 Mer. 450.

8. The legal estate in mortgaged premises did not pass by a general residuary devise by the mortgagee. *Duke of Leeds v. Munday*, 3 Ves. 348.

## 39. In relation to presentations to benefices.

After a clear gift to a college of three presentations to a living, their interest cannot be extended by doubtful words. *Emanuel College v. the Bishop of Norwich*, 4 B. C. C. 481.

## 40. In relation to a residuary clause.

1. General residuary clause passes all that is not sufficiently disposed of, as in case of lapse. *Brown v. Higgs*, 4 Ves. 708.

2. General residuary clause in a will, passes what is not well disposed of. 5 Ves. 501.

3. A leasehold house, the bequest of which being to a charity fails, passes under a general disposition of the residue, and does not belong to the next of kin, as undisposed of. *Shanley v. Baker*, 4 Ves. 732.

4. The produce of real estate sold under a power in a will, passed by a



residuary clause with the personal estate, the object being a conversion out and out; but part remaining unsold, was held a resulting trust for the heir at law. *Brown v. Bigg*, 7 Ves. 279.

5. General devise of all manors, messuages, lands, tenements, and hereditaments, in the county of York or elsewhere, with long limitations in strict settlement; and a residuary disposition of the personal estate also, by very general words. The lord chancellor was clearly of opinion, that two leasehold houses passed with the personal estate, and not under the devise of the land; but granted a case. *Thompson v. Lawley*, 5 Ves. 476.

6. See 12 Ves. 426. Upon appeal, the lord chancellor's opinion being that the reversion of the copyhold estate passed under the general devise, "as to all such worldly estate and effects as it may please God to bless me withal, or I may leave, or I may be entitled to at the time of my decease, whether real or personal, not before given or disposed of," especially if there was no freehold estate, inquiries were directed to ascertain that fact; and also, whether any custom of surrendering a vested interest, in reversion or remainder, expectant upon an estate tail. *Church v. Mundy*, 15 Ves. 396.

#### 41. Words excluding the residuary devisee.

Where testatrix by will directed a sum of money to be laid out in land, and settled, after some previous limitations, on her own right heirs, and afterwards made a general residuary devise of all her real and personal estate; held, that upon the evident intent of the testatrix to exclude the residuary devisee, the heir at law was entitled to a remainder in fee in the lands to be purchased. *Robinson v. Knight*, 2 Eden, 155.

#### 42. In relation to reversions.

1. A remote reversion in real estates and land to be purchased and settled, will pass by general words in a will; as "all and every other my lands, tenements, and hereditaments," though the uses are immediate. But, the purchase being postponed to the death of the deviser, the reversion in the estates to be purchased and settled to the same uses, subsequent to his death, not being an interest vested in him, did not pass; and though upon the settlement a power of appointment was implied, the will, particularly executing express powers, did not amount to an execution of that implied power. *Attorney-general v. Vigor*, 8 Ves. 256.

2. Devise of lands not in settlement on testator's wife, will pass the reversion in fee of the settled lands. *Glover v. Spendlove*, 4 B. C. C. 337.

3. By a devise of ground rents, the reversion passes. *Kaye v. Laxon*, 1 B. C. C. 76.

#### 43. In relation to settled estates.

Part of testator's estate being in settlement, he devised all his estates, &c. in general words; held, that there was not such an indication of his intention to dispose of that over which he had no power, as to induce a court of equity to compel the devisee to elect. *Forrester v. Cotton*, 1 Eden, 532.; *Amb.* 388.

#### 44. In relation to tithes.

Testator having freehold and leasehold tithes (the latter perpetually renewable), gave all his tithes; both kinds will pass. *Turner v. Hasler*, 1 B. C. C. 78.

#### 45. In relation to trust-estates.

1. A general devise by a trustee does not pass the trust-estate. *The Attorney-general v. Buller*, 5 Ves. 339.

2. Under a general residuary disposition by will to a natural son, his heirs, executors, administrators, and assigns, for ever, to and for his and their own proper use and behoof, a trust-estate does not pass. *Ex parte Brettell*, 6 Ves. 577.

#### 3. Devise

## 3. Devise of the trust of copyhold by general words. 13 Ves. 174.

4. A. seised in fee, subject to a jointure of 500*l.* a year to his wife, by will duly executed to pass land, gave to his wife "200*l.* per annum during her natural life in addition to her jointure;" his debts being previously paid; and to his two younger children 6000*l.* each; and appointed three persons, "as trustees of inheritance for the execution thereof." Whether any interest in, or power over, the real estate passes to the trustees, *quære*; the lord chancellor, not being satisfied with a certificate of the court of common pleas in the negative, upon a case directed, sent a case to the court of king's bench; there being only one instance of sending a case back to the same court to be reviewed. *Trent v. Hanning*, 10 Ves. 495.

5. Devise of freehold and copyhold, surrendered to the use of the will, to trustees and the survivor and his heirs, in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage, or attaining twenty-one, of his grand-daughter, to convey to her for life, remainder to trustees, &c., remainder to her first and other sons in tail male; remainder to her daughters in tail general; remainder to such persons for such estates, and subject to such charges and conditions as he should, by any deed or instrument, with two or more witnesses, appoint. The next day by deed poll, with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate, farther he directed his trustees, immediately after the death of his grand-daughter and failure of her issue, to convey all his real to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. No conveyance was made. The grand-daughter died without issue; then the son died without issue, leaving one trustee surviving. Under the will alone the trustees have a mere legal estate; and all the equitable interest beyond the express dispositions, would result to the son as heir; but the deed was considered as a codicil sufficiently executed to pass copyhold, but not freehold. The last limitation is a contingent remainder to the heir of the surviving trustee; and a conveyance was directed, with an insertion of trustees to support that remainder as to the copyhold; the rents and profits of the copyhold, during the life of the trustee, and all the freehold, to go to the heir of the testator. *Habergham v. Vincent*, 2 Ves. 204.

## 46. The words "all I am possessed of."

The words "all I am possessed of" in a will in legal construction relate to the time of the death, not of the execution of the will, unless explained. *5 Ves. 816.*

## 47. The words "all I am worth."

Testator devised in these terms, "all I am worth." Real as well as personal estate shall pass. *Huxtep v. Brooman*, 1 B. C. C. 437.

## 48. The words "all my real property."

Under a devise of "all my real property," copyhold estate passed to the devisee and his heirs. *Nicholls v. Butcher*, 18 Ves. 193.

## 49. The words "all my freehold lands."

Devise of all freehold lands would include lease for lives, though the limitations are inapplicable. *6 Ves. 642.*

## 50. The words "my estate."

1. The word "estate" in a will, unless qualified, passes both real and personal estate. *Barnes v. Patch*, 8 Ves. 604.

2. Under the general word "estate" in a will, a real estate will pass, unless restrained, as in this instance, by the intention, collected from the whole will. *Woollam v. Kenworthy*, 9 Ves. 137.

3. Testator gave to his executors "all his goods, *estates*, bonds, debts, to be

be sold," &c. The word "estates" will pass a copyhold which was surrendered to the use of the will. *Jongsma v. Jongsma*, 1 Cox, 362.

4. General expression "my estate" in a will, not necessarily extending to dower. 2 Ves. & Beam. 225.

#### 51. The words "in case of the death."

The words "in case of the death" construed to refer to death in the life of the tenant for life. Bequest of personal estate being in trust, to pay the interest to M. the testator's widow during her life, and on her death "to pay and divide the trust monies unto and equally between his daughters H. and A., for their own use and benefit absolutely, and in case of the death of them H. and A., or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till twenty-one, then to divide the trust-money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of H. and A., without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life; H. and A. become entitled to the absolute interest. *Gal-land v. Leonard*, Swanst. 162.

#### 52. The word "effects."

The word "effects" in a will equivalent to "property" or "worldly substance." 15 Ves. 507.

#### 53. The words "what remains."

The words "what remains," at the close of a bequest of a specific fund, held a general residuary disposition; the full sense not being necessarily confined; comprising therefore personal estate, bequeathed upon a contingency too remote; not being to take place until thirty years after the testator's death. *Crooke v. De Vandes*, 11 Ves. 330.

#### 54. The words "rents and profits."

The words "rents and profits" extended beyond their natural meaning annual profits, to mortgage or sale when necessary to effect the object, raising a gross sum; for fines on renewal therefore as well as portions; and not controlled by the apparent general intention to preserve the estate entire. *Allan v. Backhouse*, 2 Ves. & Beam. 65.

#### 55. The word "share."

Testator gives to his daughter B. a leasehold, held under the corporation of L. for three lives, and twenty-one years after the death of the survivor "for all his estate and interest therein." He gives other parts of his property to his son, and two other daughters, and the residue of his estate real and personal to be equally divided between his three daughters and his son; with a proviso that in case of the death of any without leaving issue "the dying child or children's *share or shares*," should go over to and be divided among the survivors; followed by a clause that any or either of his said children who should dispute his will, should have no benefit from any thing therein contained, but the *share or shares* therein before given to him, her, or them, should go over to the others. B. enters on the leasehold given her by the will, and, after the expiration of the three lives, but during the twenty-one years, which commenced on the death of the survivor, obtains a renewal. She then dies, after the expiration of the twenty-one years without issue, having by her will given the premises to J. J. "for all her estate and interest therein;" on her death, S., the only surviving child of the testator, enters by virtue of the proviso in his will. J. J. brings ejectment and recovers possession; and afterwards purchases the reversion in fee, for which the option is given him, as tenant of the premises, by the corporation. Held,

1. That

1. That the proviso in the will, with reference to the subsequent clause, extended to all the interests taken by the children under the will, and was not confined to the residue only; the meaning of the word shares being explained by that subsequent clause. 2. That the renewed lease was purchased by B. as trustee of the term, and went over to S. upon her death without issue. 3. But with respect to the reversion in fee, it was further held, that J. J. was a purchaser thereof for his own benefit, there not being enough in the case to extend to it the principle upon which the renewed lease was held to be taken for the benefit of those in remainder. *Hardman v. Johnson*, 3 Mer. 348.

#### 56. The word "surplus."

Different construction of the word "surplus" from that which it commonly bears, inferred from the expression of the will. 18 Ves. 466.

#### 57. Two codicils, whether explanatory the one of the other, or duplicative.

Two codicils nearly the same, (though with a legacy in the one not in the other,) held to be explanatory, not duplicative. *Mogridge v. Thackwell*, 3 B. C. C. 517.

#### 58. Other cases.

1. Residue bequeathed to relations, in the proportion the testator had given the other part of his fortune. Pecuniary legatees only are entitled; not a devisee of real estate. *Maitland v. Adair*, 3 Ves. 231.

2. The rule of distribution *per capita* applied to a bequest to a brother, and the children of a deceased brother; though under the statute they would have taken *per stirpes*. 10 Ves. 176.

3. A right of pre-emption given by will, whether at a price expressed or to be fixed by the trustees, will be executed: the construction in the latter case being a reasonable price to be ascertained by reference to the master. But to pass such right to the heir or devisee the intention to accept the offer must appear by some act, or at least by will. In this case, the will directing, that A., or whoever shall after the testator's decease be entitled to estates in settlement, may have the refusal, A. having died without shewing such intention, and a tenant for life of part of the settled estates, not by the settlement but under a recovery by A. not answering the description, it was held, that the right did not then exist in any one. *The Earl of Radnor v. Shafto*, 11 Ves. 448.

4. Direction to settle construed with reference to a preceding power of sale. 2 Ves. & Beam. 78.

5. Qualification restrained to the last antecedent. 2 Ves. & Beam. 192.

6. Construction of a devise, as applying to the body of the estate, or merely a reversion, from the combination of it with other estates, the general inaptitude of the limitations, &c. 2 Ves. & Beam. 192.

7. Words importing contingency applied to an inevitable event, construed to refer to the occurrence of the event under particular circumstances. *Galland v. Leonard*, Swanst. 164.

8. Testator having by his will made his daughter tenant for life of his general real estates, and of lands to be purchased, both with his personal estate, and with the profits arising from sale of timber, devises his collieries, &c. upon trust to dispose and convey the same, in such manner as she, whether sole or covert, should direct or appoint; and in default of appointment, to apply the money produced by the collieries, after paying the expences, to the same uses as the residue of his personal estate. The testator then, after declaring, that though his meaning was to give his daughter the *absolute disposal* of the said collieries, &c. to prevent the expense and trouble that must attend the management of affairs of such a nature, under the direction of the court of chancery, requested her to direct the money arising therefrom

from to be applied in such manner as he had directed the same, in default of appointment; held, that from the general frame and intent of the will, the daughter had not the absolute disposal of this property, but that her interest was confined to a disposition by sale. *Earl of Bute v. Stuart*, 2 Eden, 87.; 1 Toml. 476.

9. Testator possessed of freehold and copyhold not surrendered, of which latter his mansion-house was part, after certain legacies, devises all his real and personal estate to his wife for life; remainder to his heir at law. Held, from an expression in his will of "if she should think proper to reside at his mansion-house," that the testator intended to devise his copyhold, and that the heir therefore ought to be put to his election. *Unett v. Wilkes*, 2 Eden, 187.; *Amb.* 430.

10. A. devised his estate in strict settlement, and orders other estates to be sold and converted into personalty, and the produce, with the residue of his personalty, to be laid out in lands in A., contiguous and convenient to his estate in A.; and by strong expressions (though without direct words) shewed he intended it to be to the same uses, it was decreed so to be. *Browne v. De Laet*, 4 B. C. C. 527.

11. Testator devised his estates to trustees "upon trust, as counsel should advise, to convey, settle, and assure the said premises, to or for the use of, or in trust for his daughter I., for her life, and after her death then on the heirs of his body," &c. The court directed the estates to be settled upon I. for her life, with remainder to her first and other sons in tail general, with remainder to her daughters in tail general, &c. The limitation being to both sons and daughters in tail general, there is no necessity for a subsequent limitation to I. and the heirs of her body. *Bastard v. Proby*, 2 Cox, 6.

12. A. by will devised all his lands, &c. in L. to his wife B. and her heirs, provided she paid all his debts and raised a sum of 4000*l.* for the portion of his daughter. On the marriage of C., the eldest son of A. and B., the family estates in Y. and part of the lands in L. were (with the concurrence of B.) settled on C. for life, remainder to D. (the intended wife) for her jointure, remainder to the first and other sons of the marriage, in tail male, with remainders over, with a proviso that if C. at any time after the birth of a son should be minded to alter the uses of the premises thereby limited to the eldest son, so as to *reduce such son to be tenant for life*, with remainder to trustees to preserve, &c. with remainder to his first and other sons in tail male, and signified such intention by deed or will as therein mentioned, then the estate before limited to such eldest son and the heirs male of his body, should thenceforth *cease*, and in lieu thereof the said indenture of settlement should be and enure to such son *for life*, with remainder to trustees, &c. And as to the other part of the said devised estate in L., it was to remain to B. in fee, subject to the debts and legacies of A., with a proviso, that if the same should not be sufficient to answer such debts and legacies, and also a further sum of 2000*l.* to be charged thereon, then B. should be at liberty to raise the deficiency out of the premises so settled to the uses of the marriage. B. by her will gave all her real and personal estate to C. his heirs, executors, &c. chargeable with the debts and legacies of A., and then followed this clause: "As it is my earnest request to my son C., that on failure of issue of his body, he will sometime in his lifetime settle the said premises, or so much as he shall stand seized of at the time of his decease, in such manner as that on failure of issue of his body, the same may come to my daughter, and the heirs of her body," &c. C. made his will, and "as to his real estate in Y. and L. which were *unsettled at his marriage*, and were then absolutely in his power;" he devised the same to D. for a term of fourteen years, in trust to raise portions for his younger children, and to pay his debts, &c.; and when such portions, &c. should be raised, the same term was to cease, and from and after the expiration of the said term, he gave the said lands, &c. to trustees until his son E. had a son of the age of twenty-one

one years, to whom they should deliver up the possession of all his real estate comprised in the said term, with the arrears that should have accrued before that time, with a proviso, that E. should entail all the said estates on such of his brothers (if he should have no son who should attain twenty-one years) who should come next to the title; and he directed that his said estate should not be put in the power of his son E., but be preserved for the use of the eldest and other sons of E. in tail male, and then to the use of his (the testator's) son H. in like manner. He then recited the power reserved to him by the marriage settlement, and in pursuance thereof he appointed his son E. "to be only tenant for life of the said premises, with remainder to his heirs male." — 1. The lands devised by the will of B. are to be considered as lands "unsettled at the marriage of C." 2. The words of request in the will of B. are not imperative on C. 3. *Quære*, whether the power in the marriage settlement of C. of appointing new uses, is legal. 4. *Quære*, whether the power were in itself legal or not, it is not well executed by the will of C. 5. The surplus of the rents and profits during the term of fourteen years, and until C. had a son who attained twenty-one years, is undisposed of by the will, and goes to the heir at law. *Bland v. Bland*, 2 Cox, 349.

13. Devise of lands to be sold in aid of personal, "and after death of my wife the estates not sold, and the personal not applied, to be subject as after-mentioned; the rents and produce to be carried on in accumulation of three *per cents.* as aforesaid, during her life, and also for five years after her death, and to be laid out in land; then if my son M. shall be living, and any lawful issue of his body, and if my son G. shall be living, and lawful issue of his body, to them for life as tenants in common, then to their issue in moieties; if only issue of one, to that issue; if but one, to that one," with power of settlement; "my wife to receive such provision as aforesaid neat and clear, and the residue only to be subject to the devise over, to take place after her death; and if both my said sons shall be dead without issue," then to his daughter for life: after her death to her son, his heirs, &c.; and if she should have any other issue to them, their heirs, &c. on failure of issue of his sons and grandson: the devise over is attached to the single event of both sons being dead without issue at the death of the wife, or five years after at most; and one son being alive at that time, though without issue, it never took effect; but the son is not entitled to the estate absolutely, on account of the contingent interest in his issue. *Graves v. Bainbrige*, 1 Ves. 562.

14. Devise, subject to a term of 1000 years, to A. in strict settlement; remainder to B. in strict settlement; and after other limitations in tail, remainder upon trust to be sold; the trust of the term was to raise 4000*l.*, to be applied first to debts, legacies, &c.; the rents, profits, and emoluments arising, growing, or received from the real and personal, to be applied to debts and legacies, and afterwards to be an aggregate fund, and attend the inheritance; the interest of the 4000*l.* to be paid out of the rents and profits of the estates in the term; the rents and profits to accumulate till one of the devisees should attain twenty-one, then to be paid to him; by codicil, the testator reciting the trust to sell bequeathed part of the produce, and gave all the residue, and all the residue of his personal, not disposed of by his will, to his legatees; the residue of the money raised under the term, and of the personal, is to attend the inheritance; and the interest is payable to the tenant for life, the principal to the first tenant in tail. *Sheldon v. Barnes*, 2 Ves. 444.

15. Testator devised all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children successively in strict settlement; and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed

renewed if those two children, or either, should be living at his death, and that their lives, or that of the survivor, should be inserted in the new lease, and the fine paid out of his personal. He gave part of his personal specifically, and directed the residue to be laid out in land, to be settled to the same uses as his real; but afterwards, by a testamentary paper unattested, he disposed of his personal otherwise; the heir contracted to sell the lease of the rectory; and upon a case directed to the court of king's bench, on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the lord chancellor considered that title too doubtful to be forced on a purchaser. *Sheffield v. Lord Mulgrave*, 2 Ves. 526.

16. Testator gave his wife real and personal estate in bar, full satisfaction, and recompence of all dower or thirds, which she can have or claim in, out of, or to all or any part of his real and personal estate, or either of them; he gave the residue to four persons; and afterwards, by a codicil, he directed them to dispose thereof in charities; part of the residue being invested in real securities, goes according to the statute as undisposed of; and the widow is not barred. *Pickering v. Lord Stamford*, 3 Ves. 332. 492.

17. Testator gave real and personal estate to one daughter, in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate: he also gave a provision to his wife in full of her dower, thirds, or other claim at law or in equity, or by any local custom, to any other part of his real or personal estate; the residue to his other daughter; upon her death in his life, he by codicil gave it according to the appointment of his wife: the power not being duly executed, the residue goes according to the statute as undisposed of; and the widow and daughter are not barred. *Sympson v. Hornsby*, 3 Ves. 335.

18. Testator gave certain leasehold houses in trust for A. absolutely for her separate use, and other leasehold houses in trust for B. for her separate use for life; and after her decease for her children; if none, to fall into the residue; and he gave the residue in trust for A. and B. to be divided between them share and share alike, and to be paid and applied in like manner for their use and benefit, as the rents and profits of the leasehold premises hereinbefore settled upon them; and their receipts to be a sufficient discharge. The reference in the residuary clause is, not to the interests of A. and B. in the houses, but to the provision, that they shall take for their separate use; therefore they take the residue absolutely. *Shanley v. Baker*, 4 Ves. 732.

19. Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn; a subsequent direction, that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and therefore upon the death of the first tenant for life under twenty-five the accumulation belonged to his personal representative. *Montgomerie v. Woodley*, 5 Ves. 592.

20. Devise upon several limitations for life and in strict settlement; with a direction, that incumbrances shall remain charged upon the estates respectively, until discharged by the several tenants for life, to whom they are respectively limited. All the rents and profits during the estates for life are to be applied to the incumbrances, principal as well as interest. *Milnes v. Slater*, 8 Ves. 295.

21. Devise to A. an infant for life and his first and other sons in strict settlement; with remainders for similar estates. The will farther directed "during the minority of the A. family," an accumulation of the rents to be laid out in a purchase, "until the minor arrives at the full age of twenty-five years," and then "the heir to take full possession of this estate." A. being residuary legatee, is entitled absolutely to the accumulation. *Bingley v. Broadhead*, 8 Ves. 415.

22. Trust

22. Trust by will as to a moiety of the share of the testator's married daughter A. for her separate use, to the end, that it may not be subject to the controul of B. her husband, or any other husband; remainder to her husband B. for life; remainder for all the children of A.; and in case there shall not be any children of A., or all shall die before twenty-one, for the survivor of B. and A., his wife, his or her executors, &c.; and as to a moiety of each of the shares of each of his two unmarried daughters, "upon the like trusts and under the like restrictions" as described concerning the share of A., "so and in such manner as that the same may be secured for the benefit of his said daughters and their children, and not be subject or liable to the controul of any husband they may happen to marry." One of the unmarried daughters having married and died without issue, her husband surviving not entitled to any interest in the moiety, the subject of the trust created by the will. *Judd v. Wyatt*, 11 Ves. 483.

23. Devise, in default of issue male of A. to the first daughter living at the death of the testator, who should attain twenty-five, for life, with remainder to her first and other sons in tail male; remainders over; subject to a trust for debts and accumulation of the surplus rents and profits, until a son or daughter should first come to the actual possession of the estates or receipt of the rents: after that period such persons to take the surplus rents; and the surplus of the accumulation, after payment of the debts, to be paid to such person or persons, who by the limitation should first come to the actual possession of the estates, or receipt of the rents and profits. A daughter living at the death of the testator, and having attained twenty-five, entitled to possession of the estate and to the accumulated fund. *Barker v. Barker*, 12 Ves. 409.

24. Construction of a will, giving the real and personal estate to the testator's son, his heirs, executors, &c. when he shall attain twenty-one, or marry before that age with consent, in case of his marriage under that age, without consent, the real estate to be conveyed to him and his children in strict settlement; remainder to the daughters; and a subsequent limitation of the personal estate to the daughters, in case the son should not attain twenty-one, or marry before that age with consent; that the son having married under twenty-one without consent, attaining that age became absolutely entitled to the personal estate. *Austen v. Halsey*, 13 Ves. 125.

25. Devise to the devisor's sister A., then unmarried, for life; with remainders to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B. then married, for life, and to her first and other sons in tail: remainder to the first and nearest of his kindred being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body. A person claiming under the last limitation must be of the name as well as the blood; and the qualification as to the name is not satisfied by having the name, taken by the king's licence, previous to the determination of the preceding estates. *Leigh v. Leigh*, 15 Ves. 92.

26. Devise in strict settlement, with power to the tenants for life to jointure, on condition that two-thirds of the portion should upon such marriage be settled: one-third upon the eldest son of the marriage and one-third upon the younger children. Upon the intention, that the settlement should be conformable to the limitations of the real estate, a trust for the father for life was established; and the interest to the eldest son was not to be divested except by his death under twenty-one without issue male. *Burrell v. Crutchley*, 15 Ves. 544.

27. Proviso, that if any of the tenants for life in devise and executory trust to convey in strict settlement shall become possessed of the family estate, the devise or limitation directed shall thereupon cease and become void, or not take effect, and the persons next in remainder under the said limitations or directions shall thereupon become entitled to the possession.

The



The first tenant in tail entitled under the proviso, notwithstanding the descent of the other estate upon his father, the first devisee for life. *Stanley v. Stanley*, 16 Ves. 491.

28. Devise in remainder to "the said T. B. for life," and after his decease to "the said T. B. son of my nephew S." and his heirs. A nephew of the same name "T. B." not being before mentioned, and in every other instance, the devisee being pointed out by reference and particular description of the degree of relationship, the great nephew held to be intended in both limitations. *Chambers v. Brailsford*, 18 Ves. 368.

29. G. C. by articles settling in strict settlement real estate, then subject to a mortgage of 1500*l.* (which had been borrowed to pay fines of certain leasehold interests), and subject also to other incumbrances, covenanted to exonerate the real estate from the 1500*l.*, and to charge it on the leasehold. Afterwards, G. C. by will reciting the articles, devised the leasehold to his eldest son "in order to exonerate his said real estates from the said sum of 1500*l.*, and to enable his said son to pay the same, and other debts and incumbrances affecting the same:" and the will proceeded; "and I do hereby charge and incumber the said leasehold interest so bequeathed with the payment of the said sum of 1500*l.*" The testator also by his will confirmed the articles, with the exception of certain directions therein made as to the rents and profits of the settled lands, which he thereby limited in a manner different from the articles. Held, 1st. that the words "in order to exonerate," &c., and "to enable," amounted to a direction; and that the devisee was a trustee to pay out of the leasehold not only the 1500*l.* but all other debts and incumbrances affecting the real. 2d. That G. C. by charging such debts and incumbrances on the leasehold, meant to purchase the power of disposing of the rents and profits of the settled estate, as he did by his will, differently from the provisions in the articles. 3d. The testator's eldest son, who was tenant in tail of the settled estates, not having applied the leasehold property in exoneration thereof, in pursuance of the will, and having died without suffering a recovery; held, that the remainder-man in tail had a right to compel the exoneration of the settled estate out of the leasehold. *Cary v. Cary*, 2 Sch. & Lef. 173.

30. A. being possessed of a copyhold estate at F., subject to a life-estate of B., and also subject to a mortgage, devised his freehold and copyhold estates to trustees for his two daughters, in equal moieties as tenants in common; and then provided, that in case the mortgagee of the estate at F. would not wait and take his principal and interest out of the rents and profits of that estate, after the death of B., then his trustees should have power to sell the estate after the death of B.; he then directed, that the money arising from the sale should be first applied to the discharge of the mortgage and his other debts, and the residue equally divided between his daughters. By subsequent codicils, he directed the residue of his personal estate, together with the money arising from the sale of the estate at F., to be equally divided between his daughters. This does not constitute a fixed trust to be executed on the death of the tenant for life; but only gives a power to the trustees to sell, on the mortgagee refusing to wait for his money. *Bowman v. Matthews*, *Forrest*, 163.

31. Testator directs "that A. be appointed receiver of his real and personal estate," and dies seised of no real estate, except an estate in the West Indies, having by his will directed a sum of money to be invested in the purchase of lands in England. A. appointed manager of the West India estate, upon entering into a personal recognizance to account for the produce. *Hibbert v. Hibbert*, 3 Mer. 681.

32. A testator entitled by leases of unequal duration to iron mines and works, by will gave a pecuniary legacy to B., "as a capital for him, to become a partner with my executor of one-fourth share in the trade of all those works as long as the lease endures;" and gave all the residue of his  
real

real and personal estates to H. and his wife, and appointed H. executor. By a codicil he gave to C. "three-eighths of the concerns at this iron work, and of the premises at C., so the partnership will stand at my demise; C. three-eighths, H. three-eighths, B. two-eighths." Held, that by the codicil, three-eighths of the mines, &c. became vested in H. solely, and were taken out of the operation of the general devise in the will to H. and his wife. *Crawshaw, v. Maule*, 1 W. C. C. 181.

## XI. Construction—what words create an estate in fee simple.

### 1. Words showing an intention to give the whole interest.

1. Estate given to such uses as A. shall appoint, is a fee. 3 Ves. 470.
2. Devise of the residue of the testator's real and personal estate, to his executors in trust, for A. till he should attain twenty-one, and then that the trust should cease. Held, to give the whole beneficial estate to A. *Peat v. Powell*, 1 Eden, 479.; *Amb.* 396.
3. Construction of a will passing a fee without words of limitation. *Chorlton v. Taylor*, 3 Ves. & Beam. 160.

### 2. Words of reference.

1. Devise of testator's estate at A. to his eldest son and his heirs, and in default of such, to the heirs of his other children; his estate at B. to the husbands of his two daughters in like manner.—The former is an estate tail, the latter a joint estate in fee. *Pickering v. Towers*, 1 Eden, 143.; *Amb.* 363.
2. Testator devised real estate to A. in tail male, remainder over, and gave a sum of money in trust, to be laid out in land, to be settled to the same uses; by codicil he devised the same real estate to B. and his heirs, and gave every thing he had given by his will to A. in as ample a manner to B.; B. is tenant in fee of the real estate, and is entitled to have the money paid to him. *Younge v. Combe*, 4 Ves. 101.

### 3. A devise with a limitation over.

A mortgagee in fee devised to A., B., and C., "and the survivor of them, and the heirs of such survivor." The infant heir of the testator was directed to join in reconveying to the mortgagor, as having the fee in him during the joint lives of the devisees. *Harrison's case*, 3 Anst. 836.

### 4. The word "estate."

1. Effect of the word "estate" in a will, as importing the absolute property. 18 Ves. 195.
2. As to the effect of a description of lands, as in the occupation of a particular tenant, to restrain the legal effect of the word "estate" in a devise to pass the fee, *quære*. 3 Ves. & Beam. 160.

### 5. The words "remainder and reversion."

1. Devise of all my estate at C. H. to A. for life, remainder to B. and C., is a devise in fee to B. and C. *Price v. Gibson*, 2 Eden, 115.
2. Devise to A. for life, remainder to her sons in tail, remainder to her daughters, as tenants in common: the question, whether the daughters took estates for life only, or of inheritance, agitated but not determined. *Tweedale v. Coventry*, 1 B. C. C. 240.

### 6. The words "heir male" may be taken as *nomen collectivum*.

In a will the words "heir male," may be *nomen collectivum* to effectuate the general intention to include all the issue. 4 Ves. 794.

### 7. Another case.

Devise and bequest of real and personal estate in trust to pay the rents, dividends, &c. to the separate use of a married woman for life; and after

her decease to convey, &c. according to her appointment; with a limitation over, in case of her death in the life of the testatrix, or in default of appointment. Absolute property; notwithstanding the indication of an intention that the estate should remain in the trustee for her life, with powers, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. *Barford v. Street*, 16 Ves. 135.

8. What words pass the whole interest in a chattel.

1. Where the use and the property can have no separate existence, the old rule must prevail; viz. that a gift for life carries the absolute interest. In this case where the gift was of a leasehold farm, and the stock and crop thereon, an inquiry was directed, to ascertain of what the stock consisted. *Randall v. Russell*, 3 Mer. 195.

2. Testator by his will, devises his real estates to A. for life, without impeachment, &c. with remainder to trustees to preserve, &c. with remainder to the heirs of the body of A. By codicil reciting the after-purchase of a leasehold estate, he devises the same to the trustees named in his will, "for such estate and estates and in such manner and form" as his real estates were given in his will. A. taking an estate tail in the real estates under the will, held entitled to the absolute interest in the leasehold bequeathed by the codicil. *Brouncker v. Bagot*, 1 Mer. 271.

3. Testator gives leaseholds for lives and years, in the same manner as he had already devised his last-mentioned freeholds, the legal estate being in the trustees. Held, all the nine took in equal shares absolute interests in the leasehold for years, and estates in the nature of estates tail, in the leaseholds for lives, and that the limitations in the latter property were barred by deeds executed by some of his children. *Mogg v. Mogg*, 1 Mer. 654.

## XII. Construction — what words create an estate-tail.

A devise for life may be enlarged into an estate-tail.

1. Devise to A. after his death to his first and other sons, and in default of male issue, then unto his eldest and other daughter, and to their heirs male for ever. An estate in tail male in A. *Wight v. Leigh*, 15 Ves. 564.

2. Devise to the use of the devisor's second son A. for life, without impeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common, and not as joint tenants; and in case of his decease without issue, to the devisor's eldest son B., his heirs, &c.; and in case both sons should die before twenty-one, over an estate tail in the land, and absolute interest in personality, bequeathed with it. *Bennett v. Lord Tankerville*, 19 Ves. 170.

## XIII. Construction — what words create an estate for life.

1. Distinction between the rules at law and in equity.

Devise and bequest of real and leasehold estate to the defendant "and her heirs for ever, in the fullest confidence that, after her decease, she will devise the property to my family," is an estate in fee at law, but only for life in equity, with a trust as to the inheritance. *Wright v. Atkyns*, Cooper, 111.

2. Where an express estate for life is devised.

1. Testator devised his estate upon trust, that his mansion-house, park, garden, &c. pictures, plate, furniture, &c. (to go as heir-looms) should, by the trustee, be kept in hand, and in good order and repair, till all incumbrances paid; upon farther trust, to permit testator's daughter to have, hold, occupy, use, and enjoy his said mansion-house, park, garden, &c., pictures, plate, furniture, &c. for life; upon farther trust, to lay out, from rents and profits, all he should think necessary to keep the mansion-house, &c. in repair; then

to pay the daughter an annuity of 600*l.* for life, for whom he also charged the estate with 10,000*l.*) and to apply the surplus in discharging the incumbrances, from which he excepted the mansion-house, &c. ; he gave the trustee 200*l.* a year above all charges ; and after charges paid, limited the estate over : the daughter occupied the house till her death ; afterwards the trustee lived in it. The daughter held to have an equitable life-estate in the house, &c., as excepted from the general devise to the trustee ; who therefore, upon account, was not allowed for rates and taxes paid, and expence of the garden defrayed by him during her life ; but allowed for them afterwards, because, under this will, necessary for him to occupy, either himself or by a servant ; allowed for necessary expence of procuring a thing to be done, which turned out to be reasonable, though he might have come to the court to see whether it was proper ; not allowed for costs of a suit against the daughter, voluntarily paid by him, even though she was entitled to them from the estate ; nor for a park-keeper upon the trust estate, because used as his own servant. *Fountaine v. Pellet*, 1 Ves. 337.

2. Testator appointed his daughter-in-law his sole executrix, to have and enjoy all his real and personal estate, all the goods, cattle, chattels, (enumerating several other articles of personal property) during her life, but not to diminish or commit waste on the lands ; and his next heir at law to enjoy the same after her death. An estate for life only in the whole, both real and personal estate ; with remainder to the heir at law. *Gwynne v. Mudock*, 14 Ves. 488.

3. Devise of " all my said manors, lands, tenements, and effects, real and personal," to A. for life ; and after his decease to his issue male, and the heirs male of such sons successively one after another, with remainder to A., " and in default of his issue male *as before*," then over to B. ; " and in default of his issue male *as before*," then to the plaintiff. A. held entitled for life, with remainder to his first and other sons in tail male ; B. to take in remainder in the same manner, and that the plaintiff was entitled to the ultimate remainder in fee. *Macnamara v. Lord Whitworth, Cooper*, 241.

4. Devise to testator's wife, and after her decease, to the heirs of her body, share and share alike ; and in default of issue to be lawfully begotten by him, to be at her own disposal. A. dies, and leaves six children by his said wife. Held, that the wife took an estate for life only ; and that each of the six children took an estate in fee simple in remainder, expectant on the determination of the mother's life-estate, in one sixth part, as tenant in common. *Gretton v. Haward*, 1 Mer. 448.

5. Devise of freehold fee simple estates to trustees, during the life and lives of the children, &c. of S. M., in trust to apply the rents for their maintenance ; and after the decease of such child and children, to the lawful issue of such child and children, &c. (as before.) Held, that all the nine took equitable interests for their lives and the life of the survivor ; and that on the decease of the survivor, the estate would go over to the issue of the four born in the testator's lifetime, by purchase, as tenants in common in fee. *Mogg v. Mogg*, 1 Mer. 654.

### 3. Where an express estate for life is devised, though a power of disposal be given.

Devise of real and personal estate to A. and his issue lawfully begotten, to be divided as he should think fit, and if he should die without issue, remainder over, is a life-estate, with a power, and the remainder good. *Hockley v. Mawbey*, 3 B. C. C. 82. ; 1 Ves. 143.

### 4. A devise without any words of limitation.

1. Testator devised all his estate to his wife ; in case of death happening to her, he desired his executors to take care of the whole for his daughter.

The wife shall take only an estate for life, with remainder in fee to the daughter. *Nowlan v. Nelligan*, 1 B. C. C. 489.

2. Testator devised to his heir at law for life, remainder to R. C. for life, and to his first and other sons, remainder to R. S. and W. M. for their joint lives, and to the survivor of them. The survivor only takes an estate for life. *Ause v. Melhuish*, 1 B. C. C. 519.

3. Devise of "my copyhold estate at P., consisting of three tenements, and now under lease," &c.; but not specifying for what interest. An estate for life only passes. *Pettward v. Prescott*, 7 Ves. 450.

4. Testator devised a copyhold estate to his wife, upon trust to sell, and invest the money in the funds; and gave and bequeathed the interest and dividends to her use. He also gave and bequeathed to her all his effects, whatsoever and wheresoever, for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise to his children; accounting what they had already received in money or effects as part of their shares. The widow, executrix, entitled to the produce of the copyhold estate for life only, with a resulting trust, as to the capital, for the heir. The widow entitled to the absolute interest in the personal estate. *Wilson v. Major*, 11 Ves. 205.

5. Devise in these terms, "I give to A. my farm and lands at R., to him, his heirs and assigns for ever; and I also give to A. my farm and manor of E." An estate for life only in the latter. *Paice v. Archbishop of Canterbury*, 14 Ves. 364.

6. Estates devised in trust to sell, and the produce, together with the personal estate, the trustees were directed to pay and divide unto and between testator's son J. A. and his daughter A. S., wife of B. S., in equal moieties, share and share alike, the share of the daughter to be for her sole use; and in case of the death of either of them, leaving any child or children, to stand possessed of the moiety so given to J. A. and A. S., to and for the use and benefit of such child and children, when they should attain twenty-one, equally to be divided between them if more than one, and if only one, &c.; and until they attain twenty-one, the money to be invested in the funds, and interest applied for maintenance; and if either J. A. or A. S. should die without issue, the survivor to take. Held, that J. A. and A. S. were only tenants for life of the property, with such limitations over as in the will mentioned. *Farthing v. Allen*, 2 Mad. 310.

5. Where the general intention requires it.

Devise to A. and her heirs for ever, "in the fullest confidence that, after her decease, she will devise the property to my family," being restrained to an estate for life by decree at the rolls, the devisee was restrained from cutting timber pending an appeal. *Wright v. Atkins*, 1 Ves. & Beam. 313.

6. A case left undecided.

General disposition of all the testator's estates, real or personal, to his wife and two children, to be equally divided among them, subject to annuities, on death to devolve to his children equally; the portion of the wife, upon her death, to his children equally; upon their deaths before her, their portion to her during life, with a limitation over upon the death of all, without issue of the children: whether an estate for life, or absolute, to the wife, *quare*. *Chalmers v. Storil*, 2 Ves. & Beam. 222.

#### XIV. Construction — of the rule in *Shelly's case*.

1. When the heirs take as purchasers.

1. Heirs or issue, where intended to take distributively, must take as purchasers. 1 Ves. 149.

2. "Heir

2. "Heir male" in a will may be words of purchase. 4 Ves. 326.

2. In devises of trust-estates.

1. A limitation that will create an intail at law, will have the same effect upon an equitable estate; therefore a devise in fee to pay debts, and then to the use of A. in trust for B. for life, remainder to the heirs male of his body, is an estate tail in B. *Brydges v. Brydges*, 3 Ves. 120.

2. Devise of land to trustees in trust to pay an annuity, and subject thereto, in trust to A. for life; remainder to trustees to preserve, &c., remainder to the heirs of the body of A., remainder to testator's right heirs, and the residue of testator's personal estate to be laid out in land, and settled to the same uses; held, that A. was entitled to an estate tail in the lands to be purchased. *Austen v. Taylor*, 1 Eden, 361.; *Amb.* 376.

3. The testator devised to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste; after his decease to the use of the heirs male of his body, severally, successively, and in remainder. This is an estate tail in A. *Jones v. Morgan*, 1 B. C. C. 75.

4. Residuary trust by will, to apply the rents and profits for A. during his life, and afterwards for the heirs of his body, if any, and in default of such issue, over, an estate tail in the real estate; and the absolute interest in the personal. *Elton v. Eason*, 19 Ves. 73.

3. The rule not applied to the word "issue," with words of limitation, unless the general intent require a different construction.

Devise of an estate at A. to J. H. for life, remainder to the issue male of J. H. and to his and their heirs, share and share alike; and for want of such issue, to the issue female of J. H. and to her and their heirs, share and share alike; and for want of such issue, over. Of an estate at B. to J. H. for life, remainder to the issue male of his body, and to their heirs; and for want of such issue, over: with a proviso to charge the premises for such person as would take next in remainder, in case J. H. or his issue alienate, &c. — J. H. had two daughters, and suffered a recovery of the estate at B. Held, that he took an estate tail, and that the proviso was repugnant to the estate. *King v. Burchell*, 1 Eden, 424.; *Amb.* 379.

4. The rule not applied where the estates are of different natures.

Devise to trustees (after payment of taxes, &c.) to pay the residue of rents and profits to C. S. for life, remainder to the use of the heirs male of the body of C. S. C. S. has only an estate for life, not an estate tail. *Shapland v. Smith*, 1 B. C. C. 75.

5. The rule not applied where a trust is created, and a conveyance directed.

Devise to trustees, of money to be laid out in land, and to be settled as counsel should advise, in trust for A. and his issue in tail male, to take in succession and priority, and the interest of the money, till laid out, to be paid to A., his sons, and issue. Held, that A. should only have an estate for life in the lands to be purchased, with remainder to his first and other sons. *White v. Carter*, 2 Eden, 366.; *Amb.* 670.

**XV. Construction — what words create a joint tenancy, or tenancy in common, and cross-remainders.**

1. What words create a joint tenancy.

1. Bequest to two without words of severance: they take jointly. *Stuart v. Bruce*, 3 Ves. 632.

2. Residue bequeathed to two: they take a joint interest. An agreement for severance as to the whole may be inferred from their conduct; dividing, as the property was received. *Crooke v. De Vandes*, 11 Ves. 330.

3. Survivorship by words in a will creating a joint interest; the intention of severance not being sufficiently clear. *Whitmore v. Trelawny*, 6 Ves. 129.

4. Joint tenancy for life: the words of severance being confined to the subsequent limitations. *Folkes v. Western*, 9 Ves. 456.

5. Devise and bequest of leasehold, freehold, and copyhold estates to trustees, their heirs, executors, &c.; upon trust to sell, and pay debts, &c.; and after payment thereof, to pay and apply the rents, &c. to A. for life; and after his decease, devising and bequeathing to the heir or heirs at law of B., and the heirs, executors, &c. of such heir or heirs, to whom the trustees were directed to convey and assign accordingly. Co-heiresses of B., being also the co-heiresses of the devisor, take, not as co-parceners, by descent, but as joint tenants, by purchase, and therefore subject to survivorship. *Swaine v. Burton*, 15 Ves. 365.

6. Devise to trustees in trust to sell and purchase other estates to be settled. Those entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until a sale. Therefore a specific performance was decreed of an agreement for partition against an objection to a title under a fine by a person who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the estate; binding the trustees; though it may be questionable, whether they could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson v. Lane*, 17 Ves. jun. 101.

## 2. What words create a tenancy in common.

1. Though the words, share and share alike in a will, generally create a tenancy in common, they cannot do so where there is an express joint tenancy. *Armstrong v. Eldridge*, 3 B. C. C. 215.

2. Words of survivorship in a will shall not defeat the effect of words importing a tenancy in common; but shall be referred to some time, as the death of the tenant for life; or even to the death of the testator, though a construction not to be adopted, if there can be any other. *Russel v. Long*, 4 Ves. 551.

3. Tenancy in common under the words equally divided. 10 Ves. 569.

4. Devise to A. and B. "between them." These words constitute a tenancy in common. *Lashbrook v. Cock*, 2 Mer. 70.

5. Devise of freehold fee simple estate in possession to all and every the child and children of S. M. for life, and after the decease of such child and children to the lawful issue of such child and children to hold to such issue, his, her, and their heirs as tenants in common; and in default of such issue, over. S. M. had nine children, four born in the testator's lifetime, and five after his decease. Held, that all the nine took under this devise as tenants in common in tail with cross remainders. 1 Mer. 654.

## 3. What words create cross-remainders.

1. In a devise of real estate, where a limitation over is not to take effect till a failure of issue of all the devisees in tail, and then the whole is to go over, an inference arises that, in the mean time, the several devisees in tail are to succeed each other. But the question of survivorship cannot arise with respect to personal property, when a share once vests, though liable to be devested on a contingency. *Skey v. Barnes*, 3 Mer. 945.

2. Testator devised "all his manors, messuages, lands, &c. to trustees in trust for A. for his life, with remainder to his first and other sons in tail male; and for want of such issue he devised all the same manors, &c. to his daughters and grand-daughters *respectively* during their lives, and after their decease to the heirs male of their bodies, to take as tenants in common; and on failure of such issue, he devised the remainder of his whole estate to his own right heirs." This devise will create cross remainders amongst the daughters and grand-daughters. *Staunton v. Peck*, 2 Cox, 8.

3. To

3. To the first and other sons in tail male, and for want of such issue, to the daughter and daughters, her and their heirs as tenants in common; and for want of such issue, to three nieces, and their several and respective heirs for ever, as tenants in common; and for want of such issue, to the testator's right heirs. As to the estate of the nieces, the prior limitations having failed, and the implication of cross remainders, *quære*. *Green v. Stephens*, 12 Ves. 419.

4. Execution of a direction by will to convey lands to be purchased by raising cross remainders among more than two upon the intention, by implication, without regard to the words, "several and respective," in the limitation to the heirs, distinction upon this subject between devises by a general description, to a class of persons not ascertaining the number, and to individuals named. *Green v. Stephens*, 17 Ves. 64.

5. A testator having devised his real estates to be settled on his two daughters, in equal proportions undivided, for their lives, with remainder to their issue severally and separately in tail general, with cross remainders over; the court thought that the settlement should contain not only cross remainders as between the children of the two daughters, but also as between the two families. *Horne v. Barton, Cooper*, 257.

## XVI. *Construction — what words create a condition, and make lands liable to debts and legacies, and enable persons to sell lands.*

### I. What words create a condition:

1. Devise "if A. or B. shall marry into the families of C. or D. and have a son, then I give my estate to that son; if they shall not marry, then to E.," A. and B. married, but not into the favoured families: the marriage is a condition precedent, which they have their whole lives to perform, and E. has no claim till after their deaths. *Randall v. Payne*, 1 B. C. C. 55.

2. Words of survivorship added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent. 3 Ves. 450.

3. In this case an absolute term of ninety-nine years limited to J. C. amongst other limitations of a real estate under a will, was with reference "to the true construction of the several parts of the will," considered not as an absolute term, but as determinable on the death of J. C. *Coryton v. Helyar*, 2 Cox, 340.

4. Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease, as she should think proper. The wife made no disposition of the estate. The children take no interest in the estate under the will. *Crossling v. Crossling*, 2 Cox, 396.

5. Testator devised his real estate to the eldest of his three natural daughters, and her husband, for their joint lives, and that of the survivor; remainder to her sons successively in tail male; remainder to the second and her husband, and issue male, in the same manner; remainder to the youngest, or such person as she should first marry (if under twenty-one, with consent of trustees), for their joint lives, and that of the survivor, with similar remainders; he also gave a rent-charge, limited in the same manner, to the second, her husband and issue male; and gave a similar rent-charge to the youngest, until she shall marry (under and with the restriction above-mentioned,) or for her life; and when she shall marry as aforesaid, upon the same trusts; and having given the second 10,000*l.* on her marriage, he gave the youngest a legacy of 10,000*l.*, payable, 5000*l.* upon her marriage (with such consent as aforesaid), and 5000*l.* two years after. Upon



her marriage, without consent, the condition being established against the husband, does not affect her estate for life in the rent-charge. *Stackpole v. Beaumont*, 3 Ves. 89.

6. Devise in fee and bequest of personal estate to A., and in case of his death under twenty-one, without leaving issue, to B.: codicil affirming the will in all respects except by directing that A. shall not be entitled till twenty-five; A. dying between the ages of twenty-one and twenty-five without issue, B. has no title. *Scott v. Chamberlaine*, 3 Ves. 302. 491.

7. Devise to A. and her heirs; but if she dies under twenty-one, and unmarried, to B. and her heirs; A dies in the life of the testator, under twenty-one, and without issue, but having been married; the heir is entitled. *Chitty v. Chitty*, 3 Ves. 545.

8. A codicil expressed in the event of the testator's death, before he joins his wife, was executed after their separation in the West Indies upon his voyage for England. That voyage being prevented by accident, he joined her; they lived together there and in England, having returned together; and the testator having afterwards gone to Corsica, and thence to Lisbon, died there. The codicil was held to be contingent, and did not take effect under the circumstances. *Sinclair v. Hone*, 6 Ves. 607.

9. Construction of a will, confining a clause of survivorship, not leaving issue, to the death of the tenant for life. *Jenour v. Jenour*, 10 Ves. 562.

10. Conditional limitation over, if the first devisee should refuse or neglect to comply with the conditions; viz. within six months after the testatrix's death to release all demands upon her as executrix of A. or otherwise, established; the failure arising from the act of the first devisee, as heir at law, contesting the will; and the union of the character of executrix, with that of devisee over, is no objection. *Simpson v. Vickers*, 14 Ves. 341.

11. Construction of a residuary clause, after a bequest to the testatrix's younger children, "but in case I shall have but one child living at the time of my decease," or all but one die under twenty-one and unmarried, to another family; not a condition; and therefore established in the event of the testatrix's death, having never had a child. *Murray v. Jones*, 2 Ves. & Beam. 313.

12. Words of apparent condition controlled by the context. *Ibid.* 320.

13. Devise of real estate in trust to sell, and out of the money to pay debts, &c., and with the surplus to maintain and educate the daughter of the testatrix until twenty-one or marriage. But if she should die unmarried under twenty-one, all such money as should remain in the hands of the trustees, or such parts of the real estates as should remain unsold (if any) to be to the use of A. The daughter lives to attain twenty-one. The real estate remaining unsold at her death goes to her personal representative. *Ashby v. Palmer*, 1 Mer. 296.

14. Devise and bequest of lands and furniture to A. H., testator's wife for life, and after her death to H. L., and her assigns for life, in case she continued single and unmarried; and after her decease unto such person, &c. as she should by deed or will appoint; and for want of appointment to A. L., and to M. L. their heirs, &c. as tenants in common; but in case the said H. L. should marry in the lifetime of A. H., and with her consent, or after her death, with the consent of J. T. and T. L., or the survivor (signified in writing); then H. L. and her assigns should enjoy the lands and furniture in the same manner she would have done if she had continued single and unmarried. A. H. the testator's wife, and also J. T. and T. L. died. H. L. took possession of the estate and married. Held, that H. L. took an estate for life, with a power of appointment, subject, as to her life-estate only, to the condition of her remaining sole and unmarried, which was a condition subsequent; and as the compliance with it became impossible by the act of God, her estate for life became absolute, and she might execute the power of

of appointment. Specific performance decreed against a purchaser of the fee from H. L., but without costs, a fair objection having been made to the title. *Aislabie v. Rue*, 3 Mad. 256.

2. What words make lands liable to debts and legacies.

1. "After paying debts" amounts to a charge for debts, for which very little is sufficient, the court leaning that way. 1 Ves. 440.

2. Where testator combines real with personal generally, the real is subject to all the burdens of the personal. *Ibid.* 444.

3. No difference between debts and legacies in an implied charge upon real estate by will. 3 Ves. 551.

4. Devise after payment of debts, the debts are charged. *Shallcross v. Finden*, 3 Ves. 738.

5. A general charge of debts and legacies upon all the real estates of the testator, not annulled by a subsequent power to sell a particular estate only, and apply the produce to the same purpose; but that estate was first applied. *Coxe v. Basset*, 3 Ves. 155.

6. The amount of the personal estate cannot be used as an assisting medium to discover whether the testator meant to charge his real estate with his debts. *Stephenson v. Heathcote*, 1 Eden, 43.

7. A provision by will, for payment of interest of debts, held not to extend to a debt by simple contract. *Tait v. Lord Northwick*, 4 Ves. 816.

8. Devise of land to be sold; money produced by the sale charged with simple contract debts on the intention, though doubtful. *Kidney v. Coussmaker*, 1 Ves. 486.

9. Devise of land to be sold; money produced by the sale charged with simple contract debts on implied intention. *Kidney v. Coussmaker*, 2 Ves. 267.

10. Real estates devised, held liable to simple contract debts, under a direction in the beginning of the will, that debts and funeral expenses should be first paid; that which descended to the heir by the failure of the devise, to be first applied. *Williams v. Chitty*, 3 Ves. 545.

11. Simple contract debts not charged upon real estate by a will, first devising, that all his debts and funeral expenses might be satisfied and paid by his executors, all the real estate being specifically devised. Assets marshalled. *Powell v. Robins*, 7 Ves. 209.

12. Under a charge of debts, creditors by simple contract may, by marshalling, follow devised estates; if no descended estates, or they have been applied. 12 Ves. 154.

13. Devise to pay debts by bond, mortgage, or simple contract, shall not pay an annuity only promised by letters. *Jameson v. Skipworth*, 1 B. C. C. 34.

14. After a devise of freehold and leasehold interests, charged with incumbrances that affected the testator's real estate, he bequeaths to the same devisee all the rest of his real and personal estates, adding, "and I do hereby order and direct my said son to pay off my just debts." This is an obligation on the son, to pay all the debts of testator, in respect of the property given him, and discharges a chattel interest bequeathed to another. *Cary v. Cary*, 2 Sch. & Lef. 188.

15. A. after a general devise of his freehold property to trustees, upon trust to raise by sale or mortgage to pay debts and legacies, devises his house and demesne, (which was freehold,) to his wife for life, at a rent below the actual value; she keeping the same in repair, and not to alien except to the persons in remainder; and then devises the residue of said property, subject to the payment of his debts and legacies aforesaid, and also the remainder after the death of his wife, to B. in fee. The intention of the testator was, that the charge of debts and legacies should not affect the life-estate devised to his wife. *Birmingham v. Kirwan*, *Ibid.* 444. 448.

16. Testator

16. Testator begins his will, "as to all my worldly estate, I give, devise, and bequeath as follows:" he gives first household furniture to his wife; then he goes on to give, devise, and bequeath particular sums as legacies to his younger children, with maintenance; and concludes by giving, devising, and bequeathing all and singular his real and personal estate, not therein disposed, to his son the defendant; the legacies to the children held to be a charge on the real estate, in aid of the personal. *Hassel v. Hassel*, Dick. 527.

17. Legacies were charged on a real estate, under a *videlicet*; then a legacy given out of the personal estate; afterwards other legacies without any fund named; the subsequent legacies are not charged upon the land. *Hone v. Medcraft*, 1 B. C. C. 261.

18. Legacies charged on real estates, shall remain so charged, notwithstanding they are ordered so first to be paid out of the residue of the personal estate, if the personal estate prove deficient. *Minor v. Wickstead*, 3 B. C. C. 627.

19. A charge of legacies held a charge of annuities. 7 Ves. 402.

20. Legacies and annuities charged upon a mixed fund of the personal estate, and the produce of real estate under a direction for sale. A different disposition of the whole, by a codicil, failing as to the real estate, for want of a due execution, the charge remains upon the real estate. *Sheddon v. Goodrich*, 8 Ves. 481.

21. Trust of a term by will, to pay the several legacies "hereby given," and also "the several other legacies hereinafter bequeathed." The subsequent part of the will contained a few small legacies; and a codicil, unattested, reciting that the legacies, given by the will to the testator's daughters, were not an adequate provision, gave each of them a farther legacy, "in addition to the said legacies" given them respectively by the will. The legacies by the codicil are not charged upon the real estate. *Bonner v. Bonner*, 13 Ves. 379.

22. A bequest of an annuity, charged upon the testator's leasehold interest "during the term of the lease," extends to and is a charge upon every renewal obtained by the devisee of the leasehold interest. *Winslow v. Tighe*, 2 B. & B. 195. The annuitant must contribute to renewal fines in proportion to his interest. *Ibid*.

### 3. Distinction between devise charged, and devise on trust.

Distinction between a devise charged with debts, and on trust to pay debts. The former a beneficial devise, subject to the particular purpose, the latter limited to the particular purpose, and therefore the interest not exhausted, a resulting trust for the heir. 1 Ves. & Beam. 272.

### 4. What debts and legacies are charged.

1. Land devised in trust to pay debts and legacies, charged with all that the ecclesiastical court would establish. 1 Ves. 411.

2. Real estate under a charge by a will duly attested, liable to debts afterwards contracted, and legacies by an unattested instrument. 8 Ves. 495.

3. The reason that a charge of debts and legacies upon real estate by a will duly executed, covers future debts and legacies, though by an unattested instrument, is their fluctuating nature. 12 Ves. 37.

### 5. Copyhold liable as well as freeholds.

1. Under a general charge for payment of debts, copyhold estate is liable as well as freehold estate. *Coombes v. Gibson*, 1 B. C. C. 273.

2. Under a general charge for payment of debts, where the testator has freehold and copyhold estates, the copyhold is liable. *Kentish v. Kentish*, 3 B. C. C. 257.

3. So where it is for children. *Fike v. White*, *Ibid*. 286.

4. After a general direction, that debts, funeral, and testamentary charges shall

shall be paid, and a bequest of the personal estate subject to the payment of those charges, the testator, in case his personal estate should not be sufficient to discharge "the same," charged his freehold estates with payment "thereof;" and "subject thereto," gave all his freehold and copyhold estates, which he had surrendered or intended to surrender, to the use of his will. The copyhold estates charged. *Noel v. Weston*, 2 Ves. & Beaun. 269.

6. Equity of personal estate to be exempt.

The distinction between a direction to sell real estate out and out for payment of debts, and a charge for payment of debts is exploded, as to any effect in exempting the personalty. In either case, the residue, if undisposed of, goes to the heir, unless there be a disposition made, demonstrative of an intent that it shall change its nature, and become personal. *McClelland v. Shaw*, 2 Sch. & Lef. 538.

7. Equity of next of kin against the heir, on the personal estate being exhausted for purposes to which the real was devised.

Testatrix directed her real estate to be sold, and all her estate to be converted into money for the purposes of her will; the will was satisfied without touching the real; no equity for the next of kin against the heir. *Chitty v. Parker*, 2 Ves. 271.; 4 B. C. C. 411.

8. Preference of creditors to legatees under a charge for payment of debts and legacies.

Distinction between creditors and legatees under a charge of debts and legacies. The former are to be paid in preference. 12 Ves. 154.

9. Validity of the preference of particular creditors.

Vide *Cooper*, 45.

10. Land devised for sale, from what time considered as sold.

Estate devised on trust to be sold with all possible diligence, or in reasonable time, considered as sold from testator's death. 1 Ves. 367.

11. Practice relating to the sale.

Where an estate is devised charged with debts, it shall be ordered to be sold, though the heir be abroad, and the devisee insane. *Williams v. Whinnyates*, 2 B. C. C. 399.

12. What words enable persons to sell lands.

Testator devises to A. and B. (whom he appoints his executors), upon trust to sell for such purposes as he shall hereafter appoint, and then directs his debts to be paid by his executors. Under this devise A. and B. are authorised to sell for payment of debts. *Barker v. Duke of Devonshire*, 3 Mer. 810.

XVII. *Construction—what words create a contingent remainder.*

A case in which a devise was held a limitation of the reversion.

Devise, after limitations in strict settlement, in default of such issue, then to the devisor's next heir at law: a limitation of the reversion, not a contingent remainder to the heir, at the time of failure of issue, as a purchaser. *O'Keefe v. Jones*, 13 Ves. 413.

### XVIII. Executory devises — devise over after a devise in fee simple.

#### 1. Origin and nature of executory devises.

Executory devise is in its nature equitable; and becomes legal estate only by application of the statute of uses, which executes every species of interest that a court of equity would before; and that has been extended to cases not in contemplation of the statute. 1 Ves. 255.

#### 2. Validity of executory devises, whether affected by the ends of their creation.

The purpose of accumulation no objection to an executory devise. 4 Ves. 317. 320. 338.

#### 3. Devise over after a devise must vest.

Devise to A. for ever, that is, if he shall have a son or sons who shall attain twenty-one, but if A. shall die without son or sons to inherit, that the son of B. shall inherit; this is a fee in A. with an executory devise to the son of B. *Heath v. Heath*, 1 B. C. C. 147.

#### 4. Within what time an executory devise must vest.

1. Every executory devise is good that does not tend to a perpetuity; i. e. that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates. 4 Ves. 331.

2. Executory devises not to be governed by the rules of law, as to common law conveyances; but the question is, whether they are to happen within a reasonable time, or not. *Ibid.* 328.

3. Limits of executory devise. 9 Ves. 131.

4. Testator may give a life-estate, to be appointed by the survivor of one thousand persons. 11 Ves. 145.

5. Limits of executory devise, twenty-one years after lives in being, with the period of gestation. 12 Ves. 232.

6. The rule, as to executory devise, allowing any number of lives in being, a reasonable time for gestation, and twenty-one years, is now the clear law. 4 Ves. 319.

7. Since the revolution, judges have disapproved of extending executory devise; but there is no instance of a limitation of the number of lives. *Ibid.* 332.

8. The number of contingencies for an executory devise, not material, if they are to happen within the limits allowed by law. *Ibid.* 327.

9. In executory devise, the time of gestation may be taken both at the beginning and the end. 11 Ves. 149.

10. Reason for allowing the twenty-one years after lives in being, for executory devise. 4 Ves. 337.

11. Reasons for allowing the ten months and twenty-one years after lives in being, to postpone the vesting of an executory devise. *Ibid.* 327.

12. No limited number of lives, for the purpose of postponing the vesting of an executory devise. *Ibid.* 313.

13. Executory devise, which may postpone the vesting beyond lives in being, and twenty-one years, &c. cannot be supported upon the possibility that the estate may vest sooner. 1 Ves. 134.

14. Devise in trust for a son of the testator's nephew A. at the age of twenty-four; if he hath no son, to a son of the testator's great-nephew B.; but, if neither have a son, then to a son of the testator's great-niece's daughter, taking his name: whoever should take, not to be put in possession of any of the testator's effects until twenty-four, nor the executors to give up their trusts "till a proper intail be made to the male heir by him." An executory trust in tail, for an only son of A. *en ventre* at the testator's death; not

not void for uncertainty, nor too remote. *Blackburn v. Stables*, 2 Ves. & Beam. 367.

5. A devise after a general failure of heirs or issue, void.

1. To testator's wife and her heirs, but in case of her decease without issue, to the eldest son of his brother, too remote. *Bigge v. Bensley*, 1 B. C. C. 187.

2. Testator gave the accumulation of rents and profits till A. should attain twenty-one, to be laid out, and the trustees to permit A. to receive the interest during his life; then he gives the money to the issue male of A.; and in default, to those whom the plaintiffs represented. The issue male of A. would have taken as purchasers, therefore the limitation is too remote. *Knight v. Ellis*, 2 B. C. C. 570.

3. Devise and bequest, in trust to pay the income to A. for his use during his life, with remainder, in default of issue, to B. for his use during his life; remainder, in default of issue, to C. for life, in the same manner; remainder over. The remainder, after the limitation to A. for life, void, as too remote; and A. being heir at law and residuary legatee, his title to the real and personal estate was established. Whether the express estate for life would be enlarged by implication, *quære*. *Boehm v. Clarke*, 9 Ves. 580.

4. Testatrix gave all her estate, real and personal, to her daughter and her heirs, and half the navigation money for her natural life; and in case she dies without issue, all to be divided between four nephews and nieces, named; the part of one only for life, and to be divided between the survivors. The limitation over too remote, there being no expression or circumstance to limit the generality of the words to a failure of issue at the time of the death. As to what property it extends to, *quære*. *Barlow v. Salter*, 17 Ves. 479.

**XIX. Executory devises — devise of a freehold to commence in futuro.**

1. Within what time such devise must vest.

Vide *fi* Ves. 145.

2. A devise over for life on failure of issue of the first devisee, is valid.

"After failure of issue male of the testator," under particular circumstances, means, "issue by that marriage," and is too remote. *Lytton v. Lytton*, 4 B. C. C. 441.

**XX. Executory devises of terms for years.**

The words "dying without issue," sometimes restrained to the death of a person *in esse*.

The words "if he shall happen to die without issue," may be so construed by the context of the will as to mean children: and in that case the remainder over will not be too remote. *Attorney-general v. Bayley*, 2 B. C. C. 553.

**XXI. Of other matters relating to executory devises.**

Of trusts of accumulation.

1. Devise of real estates of the annual value of near 5000*l.*, and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000*l.*, to trustees and their heirs, &c. upon trust, during the lives of the testator's sons A., B., and C., and of his grandson D., and of such other sons as A. now has or may have, and of such issue as D. may have; and of such issue as any other sons of A. may have, and of such sons as B. and C. may have, and of such issue as such sons may have as shall be

be living at his decease, or born in due time afterwards, and during the life of the survivor to receive the rents and profits, and from time to time invest the same, and the produce of timber, &c. in other purchases of real estates; and, after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendant then living of A. in tail male; remainder to the second, &c., and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons, to whom a prior estate is limited, of A. successively in tail male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B. and C. as tenants in common in tail male in the same manner, with cross remainders; or if but one male lineal descendant, to him in tail male; remainder to the trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed, that the trustees should stand seised upon the failure of male lineal descendants of A., B., and C. as aforesaid, upon trust to sell and pay the produce to his majesty, his heirs and successors, to the use of the sinking fund; the accumulation, till the purchases or sales can take place, to go to the same purpose; with a direction, that all the persons becoming entitled shall use the surname of the testator only. The trusts of the will were established. *Thellusson v. Woodford*, 4 Ves. 227.

2. See 4 Ves. 227. Devise of real estates of the annual value of near 5000*l.* and other estates, directed to be purchased with the residue of the personal estate, amounting to above 600,000*l.*, to trustees and their heirs, &c. upon trust during the lives of the testator's sons A., B., and C., and of his grandson D., and of such other sons as A. now has or may have, and of such issue as D. may have, and of such issue as any other sons of A. may have, and of such sons as B. and C. may have, and of such issue as such sons may have as should be living at his decease, or born in due time afterwards, and during the life of the survivor to receive the rents and profits, and from time to time to invest the same, and the produce of timber, &c. in other purchases of real estates; and after the death of the survivor of the said several persons that the said estates shall be divided into three lots; and, that one lot shall be conveyed to the eldest male lineal descendant then living of A. in tail male; remainder to the second, &c., and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited of A., successively in tail male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B. and C. as tenants in common in tail male in the same manner, with cross remainders; or, if but one such male lineal descendant, to him in tail male; remainder to trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed, that the trustees should stand seised, upon the failure of male lineal descendants of A., B., and C., as aforesaid, upon trust to sell, and pay the produce to his majesty, his heirs and successors, to the use of the sinking fund: the accumulation, till the purchases or sales can take place, to go to the same purpose; with a direction, that all the persons becoming entitled shall use the surname of the testator only. The decree, establishing the trusts of the will, was affirmed by the house of lords upon appeal. *Thellusson v. Woodford*, 11 Ves. 112.

3. Before the statute 39 & 40 Geo. 3. c. 98. accumulation might have been co-extensive with, but could not exceed the limits of executory devise; viz. until

until an unborn child of a person in being attained twenty-one; but limitation to vest only in the first descendant of a person in being who might attain twenty-one, too remote. 2 Ves. & Beam. 61.

4. Testator, after making a provision for the maintenance of his children, gives "all the rest, residue, and remainder of his real and personal estate to his son, T. W. G., to be a vested interest on his attaining the age of twenty-one;" and "if he shall happen to die before twenty-one, then to his daughter E. G., with remainders over. The rents and profits are to accumulate until T. W. G. attains twenty-one, or dies under that age. *Glanvill v. Glanvill*, 2 Mer. 38.

## XXII. Jurisdiction of courts of equity in relation to devises.

### Correction of mistake.

1. Mistake in a will and codicil as to the amount of a fraud, out of which younger children were to be provided for, rectified on the evident intent of the testator. *Brackenbury v. Brackenbury*, 2 Eden, 275.; Amb. 474.

2. Where testator expresses himself incorrectly, the court will effect the intent by supplying words. *Dodson v. Hay*, 3 B. C. C. 404.

## DEVISE OF PERSONAL PROPERTY.

### I. What instruments shall be considered as wills.

1. Deeds.
2. Deeds, testamentary in their nature, are often required to be proved as such.
3. A letter to an attorney containing instructions for a will.
4. Miscellaneous.

### II. What instruments shall not be considered as wills.

1. An incomplete or unfinished testamentary paper.
2. Written statement of what bystanders "understood" to be testator's meaning.
3. Miscellaneous.

### III. What may be bequeathed.

Whether a heritable bond in Scotland may be disposed of by will.

### IV. Of bequests to attesting witnesses.

The stat. 25 Geo. II. extends to all wills and codicils.

### V. Revocation of wills.

1. By cancelling a codicil of exclusion, corresponding to an interlineation in the will, omitted to be erased.
2. Effect of a revocation upon a mistaken supposition.
3. Effect of a codicil revoking a legacy "of 50*l*." whereas it was 100*l*.
4. Implied revocation, by marriage and birth of a child.
5. A legacy is not revoked by testator's marriage with legatee.
6. A case in which the gift of the general residue only, and not of the articles enumerated, was revoked by a codicil.



## VI. In relation to the probate.

1. Prerogative probate, when requisite.
2. How far conclusive.

## VII. Construction — general rules.

1. Force of introductory words.
2. Application *cy pres* of a bequest for an infant's advancement in a particular line.

## VIII. Construction — what words describe the legatee, and things bequeathed.

1. The words "all my clothes and linen whatsoever."
2. The words "my house, and all that shall be in it at my death."
3. The words "all my property in A. except" a particular chose in action described.
4. The words "all debts due to me."
5. The words "all my waggon-ways, rails, staiths, and all implements, utensils, and things."
6. The words "all I am possessed of."
7. The words "all debts due and owing to me at the time of my death."
8. The words "cabinet of curiosities."
9. The words "all in Suffolk."
10. The words "my house and all that is in it."
11. The words "all my estates in law and equity."
12. The word "and" construed "or," *et vice versa*.
13. The words "child," "children."
14. The words "after-born children."
15. The words "younger child."
16. The words "seventh or youngest child."
17. The word "cousins."
18. The word "descendants."
19. The word "effects."
20. The words "other effects."
21. The words "furniture at X.," which was afterwards removed.
22. The words "furniture, and stock of carriages and horses, and other live and dead stock."
23. The words "goods and chattels."
24. The words "household furniture."
25. The word "issue."
26. The words "issue of a deceased child."
27. The word "money."
28. The words "next of kin."
29. The words "personal estate."
30. The word "relations."
31. The words "poor relations."
32. The words "my nearest surviving relations in my native country, Ireland."
33. The words "to such as would then be entitled under the statute of distributions."

34. The

34. The words "legal representative."
35. The words "personal representatives."
36. Implication of the word "respectively."
37. The word "securities."
38. The word "servant."
39. The words "survivors or survivor."
40. The word "wife."
41. Residuary bequest to "the said A. C," there being two persons of that name, and both specific legatees.
42. The words "he paying thereout," create a charge.
43. The words "I return to A. his bond," is not a release but a legacy.
44. Words *primâ facie* equivalent to pass future interests in personal estate, are to have that effect, unless controlled by the context.
45. In relation to mistake or uncertainty in the thing bequeathed.
46. Plate and linen misdescribed, as in his house in S.
47. Bequest extended to debts of every description, from the explanation of a similar bequest by another clause.
48. Legacy of a debt; the debt being mistaken, the actual debt shall pass.
49. Whether the legacy shall be of sterling money or currency.
50. Mortgage money.
51. Money arising from real estate, may pass under the description of personal estate.
52. By what words money to be laid out in land shall pass.
53. Contract for a purchase, generally: by a devise of the real estate, before the purchase is completed, the money will pass.
54. General words held to include money in trust to be invested in land and settled, though particularly charged on the estates devised.
55. Charge, by will, on real estate of simple contract debts of another person, considered as a legacy.
56. Stock legacies.
57. An unlimited bequest of the interest of stock, passes the principal also.
58. Bequest restrained in extent to a partial disposition, notwithstanding the general words "personal estate."
59. To confine the objects of a testator's bounty to the period of distribution, is, in the construction of wills, a rule adopted from necessity.
60. Bequest by implication.
61. Interest.
62. Words releasing bond debts, held not to include a bond subsequent to the date of the will.
63. Admissibility of parol evidence to enlarge a specific bequest.
64. Effect of mistaking a legatee's christian name.
65. Effect of a wrong description of a legatee.
66. Substitution of one daughter's name for another.
67. Admissibility of parol evidence to ascertain a legatee whose name has been mistaken.

68. Bequest to six grandchildren, omitting the name of one, and repeating that of another.
69. Admissibility of parol evidence, to show that the number of the favoured persons was mistaken.
70. Bequest to a natural child *en ventre sa mere*, without reference to any one as the father.
71. Gift of 100*l.* to the four children of A. to be equally divided, considered as four legacies.
72. Bequest to such children as A. shall appoint, goes, in default of appointment, to all equally.

**IX. Construction — what words shall pass the absolute interest.**

1. Bequest to A. for her and her children's use.
2. Bequest to A., or, in case of his death, to his issue.
3. Bequest to A., and in case of her death, to B.
4. Bequest to A. for life, and at her decease, to B.
5. Bequest to A., and, in case of her death, to the children of B.
6. Dividends to A. for life, and after her death, the principal to be paid according to her appointment.
7. Where the words applied to real would create an estate-tail.
8. The rule that personalty limited in tail, vests absolutely in the first tenant in tail, when not applicable.
9. Devise to trustees to pay the produce to A., without limiting the duration of the interest.
10. Effect of the death of persons who were to exercise a discretion over the bequest.
11. A case in which the legatee took the absolute interest, not a power of disposition merely.
12. A case in which a legacy, given in trust during infancy, passed absolutely.
13. A bequest held an absolute legacy, not an annuity.
14. A bequest held an annuity, not an absolute legacy.
15. A gift of stock in long annuities, *primâ facie* means so much a year.
16. Indefinite bequests of dividends.
17. The capital of the residue passed by implication, though the interest and dividends only were expressly disposed of.
18. Specific bequest for life of things *quæ ipso usu consumuntur*.
19. Miscellaneous cases.

**X. Construction — what words create a life-interest.**

1. Bequest to the use of A., and, in case of her decease, to the use of her children.
2. Bequest to A. and B., to be distributed to their children by their wills.
3. Bequest to the solè use of N. or of her children for ever.
4. A legacy to B. "on the same conditions, on his attaining twenty-one."
5. Bequest to A., and on his death, to his next of kin, in a course of administration.

6. Effect

6. Effect of a direction for an inventory, restraining a bequest of furniture, &c. to an interest for life.
7. A bequest held an interest for life only, with a limited power of disposition.
8. Devise to one for life or absolutely, with directions that he shall dispose of it to another at his death.
9. Miscellaneous cases.

**XI. Construction — what words create a joint tenancy, or tenancy in common.**

1. Joint tenancy.
2. Tenancy in common.

**XII. Construction — what words create a charge.**

A miscellaneous case.

**XIII. Construction — what words create a condition.**

1. Marriage with consent.
2. The condition of not marrying within twelve months from the death.
3. The condition of having a child.
4. The condition of giving security within such a time not to marry B.
5. Condition to claim within a specified time.
6. Proof of a life, through a specified medium.
7. The condition of "notifying to executors a willingness to release claims," how broken.
8. Condition for maintenance.
9. Condition for payment of debts.
10. The condition of being put out an apprentice.
11. Bequest of money to be laid out in land.
12. Legacy to C. held contingent on A.'s surviving B.
13. A legacy upon an express contingency, which never happened, failed, notwithstanding the apparent intention in favour of the legatee.
14. The case of a condition broken by taking the benefit of an insolvent act.
15. In relation to the case where the condition becomes impossible by the act of God.
16. A limitation over upon the death of a party, in case he became entitled, which he never did.
17. "If D. should not be alive," not a condition.
18. A case of a contingency with a double aspect.
19. A case where a legatee was held bound to keep down the interest of a mortgage only, not to pay renewal fines.
20. Other cases.

**XIV. Construction — what words create an alternative.**

To use the furniture of a house, or accept a bequest to purchase furniture.

**XV. Construction — what words create a vested, what a contingent, interest.**

1. The case of a vested bequest, transmissible to children.
2. Vide in tit. VESTING.

**XVI. Within what period a bequest of personalty must vest.**

1. Examples of void limitations.
2. Examples of valid limitations.

**XVII. Construction — with reference to trusts of accumulation.**  
Miscellaneous.**XVIII. Construction — what words create a limitation over.**

A case where the subsequent words were held not to control a previous limitation over, which therefore was too remote.

**XIX. Construction — in relation to money to be laid out in land.**

1. Where it shall be laid out.
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3. Whether it shall pass as real or personal.

**XX. Construction — in relation to intestacy.**

1. A sum directed to be disposed of according to any instructions testator might leave in writing; and none found.
2. Property excepted as hereinafter disposed of to A., which it was not.
3. From revoking the share of a residuary legatee.
4. Miscellaneous cases.

**XXI. Construction — in relation to the residue.**

1. Residuary clause passes all personalty that is not disposed of.
2. The general residue of personalty comprehends every thing not otherwise effectually disposed of.
3. Whatever is not well given by the will, falls into the residue.
4. Under residuary bequest to legatees in proportion to their legacies, all, even of rings, entitled.
5. Relations took shares in the residue, notwithstanding specific bequests by codicil.
6. Where no direction is given as to surplus interest, and the capital is made payable at a future time, the surplus interest falls into the residue.
7. A particular fund held part of the residue.
8. What bequest shall be residuary.
9. Construction of a residuary disposition, as embracing the general, and not limited to a special residue.
10. Whether a mere residuary bequest amounts to a disposition of the legacy.
11. Construction of a residuary clause, as comprehending a legacy given upon a contingency, which did not happen.
12. Words in a residuary clause held referable to a contingency.

13. Legacy

13. Legacy of a specific sum, as a residue, but miscalculated; the residue being larger shall pass.
14. What not included within an exception out of a residuary bequest.
15. Amount of the shares of the residuary legatees, in a miscellaneous case.
16. Miscellaneous cases.
17. "Specifically," construed "particularly."
18. With reference to conversion.
19. Whether the executor or the next of kin shall take. Vide in tit. USES and TRUSTS.

## XXII. Construction — miscellaneous cases.

1. Legatee held entitled to the produce of securities bequeathed, concerted in testator's lifetime.
2. Power to appoint the whole fund to the survivor of children.
3. Power to exclude from a partnership.
4. A deed of appointment held sufficient indication of intention that property should continue personal.
5. A case where a residence at L. beyond a year was held not to entitle to the continuance of a weekly payment.
6. Bequest for the improvement of the city of Bath.
7. A bequest construed as a direction to lay out the money in an annuity.
8. Annuities "in the order they are now mentioned."
9. Charitable bequest.
10. Annual sum not confined to the minority of legatee.
11. Release.
12. Property held subject to the uses of a settlement.
13. A bequest for the poor of a parish, held not within the meaning of a local act.
14. Bequest of the debt which shall be owing on a particular day, taken as it stood on that day.
15. The income only, not the capital, held disposed of.
16. The disposition—held to be in favour of the younger children, excluding the eldest.
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## XXIII. Of the survivorship of accrued shares.

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## XXIV. Of specific and pecuniary legacies.

1. The leaning of the court is against specific legacies.
2. What legacies are specific.
3. What legacies are pecuniary.
4. Legacy is ambulatory; but a specific bequest is fixed as much as a devise of land.
5. A specific legacy cannot, in a subsequent part of the will, be charged with payment of debts and legacies.
6. Distinction between the specific bequest of a debt, and legacies out of it.

**XXV. When legacies shall be accumulative ; when not.**

1. When they shall be accumulative.
2. When not.

**XXVI. What shall be an ademption of a legacy ; what not.**

1. What shall be.
2. What shall not be.
3. A codicil, ratifying a will, does not set up an adeemed legacy.

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1. When it shall lapse.
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1. What words shall be sufficient to create a charge ; what not.
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1. Time of payment in ordinary cases.
2. Time of payment, where legacies are given out of the residue.
3. Time of payment, in the case of a residue bequeathed to children payable at twenty-one.
4. Time of payment, in the case of a defeasible legacy.
5. Time of payment, of a legacy at a particular age, and one legatee attaining it.
6. Time of payment, in miscellaneous cases.
7. Of the mode of payment, where the legacy is bequeathed in a foreign coin.
8. Of the mode of payment, in miscellaneous cases.
9. Where a legacy is given over in default of claim.
10. The case of a defeasible legacy payable at a particular time.
11. Out of what fund a legacy shall be payable.
12. To whom a legacy shall be paid.
13. Voluntary bond payable in preference to legacies.
14. In the case of married women.
15. Where a legacy is payable out of land, and the legatee dies before the time of payment.
16. Of presumptive payment.
17. In what cases the court will order legacies to be raised or secured.
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19. What

19. What appropriation shall be valid.
20. What appropriation shall be invalid.

**XXXI. In what cases the personal estate shall be first applied.**

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1. Legacies and annuities out of personal estate, decreed to abate in proportion.
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3. Legatee must refund on the assets proving deficient.
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1. Right of a specific legatee against the executor's pawnee.
2. Right of a legatee against the executor's voluntary donee.
3. Distinction between specific and pecuniary legatee, in the case of assets pledged, or disposed of.
4. In the case of the depreciation of a specific legacy wrongfully withheld.
5. On a *devastavit* by the executor, a specific legatee.
6. Right of legatees to stand in the place of specialty creditors paid out of the personal estate, against estates descended.
7. On a mortgagee exhausting the personal estate.
8. Lien of residuary legatee on the specific fund.
9. In the case of a fund of investment rising in value.
10. Right of a legatee to prosecute a decree for an account.
11. In relation to a surplus.
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13. Miscellaneous.

**XXXV. Of the satisfaction of debts and portions, by legacies.**

1. General rule.
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**XXXVII. Miscellaneous points relative to bequests.**

1. Bequest towards liquidating the national debt.
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I. ~~What~~ instruments shall be considered as wills.

## 1. Deeds.

A deed may operate as a will. *Habergham v. Vincent*, 4 B. C. C. 353.; 2 Ves. jun. 204.

## 2. Deeds testamentary in their nature, are often required to be proved as such.

Deeds testamentary in their nature, often required to be proved as such. 1 Ves. 411.

## 3. A letter to an attorney, containing instructions for a will.

A letter to an attorney containing instructions for a will, established as a will. *Habberfield v. Browning*, 4 Ves. 200.

## 4. Miscellaneous.

C. by his will devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common in fee. He had afterwards another daughter L. He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took the minutes of this second will in writing; but before it was prepared, the testator died. These minutes were proved in the spiritual court as a testamentary paper. This paper being proved in the spiritual court is sufficient to pass the copyhold estate. But it is so totally void as to the freehold, that it will not put L. to her election under which will she will take; and she, therefore, will take her share of the freeholds under the first will, as well as the 15,000*l.* under the second. *Cary v. Askew*, 1 Cox, 241.

II. ~~What~~ instruments shall not be considered as wills.

## 1. An incomplete or unfinished testamentary paper.

1. If it appears upon a will of personal estate, that something more is intended to be done, and the party is not arrested by sickness or death, the usual declaration at the beginning, that it is his will, is not sufficient. 9 Ves. 249.

2. An unfinished testamentary paper of no effect; the party having lived eight days afterwards. *Griffin v. Griffin*, 4 Ves. 197.

3. Where a testatrix made her will, disposing of real and personal property, and signed and sealed it, and a clause of attestation in the common form was subjoined, to which there was no subscription of witnesses, and the will was found at her death wrapped in an envelope, on which was written, "I have signed and sealed my will, to have it ready to be witnessed the first opportunity I could get proper persons;" held, the instrument appearing to be incomplete (something more having been intended), was not a good will as to the personal property. *Walker v. Walker*, 1 Mer. 503. Parol evidence admitted as to the circumstances of the papers, and the intention of the testatrix. *Ibid.*

## 2. Written statement of what bystanders "understood" to be testator's meaning.

A paper writing signed by the executors and others, purporting to be an acknowledgment of what they *understood* to be the will of the testator when he was unable to speak, although proved in the spiritual court as a testamentary paper, yet will not operate as a codicil in the court of chancery, and the bill claiming legacies under such an instrument will be dismissed. *Gawler v. Standerwick*, 2 Cox, 16.

## 3. Mis-

## 3. Miscellaneous.

Testator having bequeathed his personal estate to his wife, with a contingent disposition to any child she might be ensient with, by an instrument executed in the East Indies, during his last illness, empowers A. and B. to invest any gold-dust, &c. which he had, in bottomry, as they should think most advantageous, and deliver the same over to his wife, or her assigns, she running all risk. Held, that this instrument, though it had been proved in the ecclesiastical court, was merely an act *inter vivos*, and not a revocation of the will. *Pigott v. J'Anson*, 1 Eden, 469.

## III. What may be bequeathed.

Whether a heritable bond in Scotland may be disposed of by will.

Heritable bond in Scotland, whether disposable by will, referred to the master to certify the *lex loci*. *Glover v. Shethoff*, 2 B. C. C. 33.

## IV. Of requests to attesting witnesses.

The statute 25 Geo. 2. extends to all wills and codicils.

Legacy to a subscribing witness to a will, though of personal property only, void under the statute 25 Geo. 2. c. 6. extending to all wills and codicils. *Lees v. Summersgill*, 17 Ves. jun. 508.

## V. Revocation of wills.

1. By cancelling a codicil of exclusion, corresponding to an interlineation in the will, omitted to be erased.

Where a testator interlined his will, to except the plaintiff, who was named a legatee under it, with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil, without doing the same with the interlineation of the will; the court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended. *Utterson v. Utterson*, Cooper, 40.

2. Effect of a revocation upon a mistaken supposition.

Testator by his will gave legacies to A. and B., describing them as grandchildren of C., and their residence in America: by a codicil he revoked these legacies, giving as a reason, that the legatees were dead: the fact not being true, they were held entitled, upon proof of identity. *Campbell v. French*, 3 Ves. 321.

3. Effect of a codicil, revoking a legacy of "50*l*." whereas it was 100*l*.

A testator by codicil revoked the legacy of 50*l*. bequeathed to his sister. The only legacy given to her was 100*l*. given by the will: as to the effect of the codicil, *quære*. *Lord Carrington v. Payne*, 5 Ves. 404.

4. Implied revocation, by marriage and birth of a child.

1. Marriage and birth of a child, an implied revocation of a will of personal property. 1 Ves. & Beam. 397.

2. Vide in tit. DEVISE of REAL PROPERTY.

5. A legacy is not revoked by testator's marriage with legatee.

Marriage of a testator with a legatee, is not a revocation of the legacy. *Eubank v. Hallowell*, 2 B. C. C. 220.

6. A case in which the gift of the general residue only, and not of the articles enumerated, was revoked by a codicil.

Testator bequeathed as follows: "As to my leasehold house in L., and all my household goods and furniture there and at S., and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estates, &c. I give and bequeath the same to A." By codicil he revokes the bequest "of the residue" to A., and gives "the residue of his said personal estate" to B. The gift of the general residue only, and not of the articles enumerated, is revoked by this codicil. *Clarke v. Butler*, 1 Mer. 304.

### VI. In relation to the probate.

1. Prerogative probate, when requisite.

To get money out of court, however small the amount, a prerogative probate is necessary. *Thomas v. Davies*, 12 Ves. 417.

2. How far conclusive.

1. Probate not conclusive; not being refused, except in a plain case. *Sinclair v. Hone*, 6 Ves. 607.

2. Probate being granted as of a will and codicil, is conclusive as to the fact of their being distinct instruments. *Baillie v. Butterfield*, 1 Cox, 392.

### VII. Construction — general rules.

1. Force of introductory words.

Bequest of the testator's fortune in India, not extended, under the general words "temporal estate," in the introductory part of the will, to property in England, part remitted from India between the will and the death, and some in its passage to England at his death. *Sadler v. Turner*, 8 Ves. 617.

2. Application *cy pres* of a bequest for an infant's *advancement* in a particular line.

If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way, as if it was to put him into orders, and he became a lunatic. 5 Ves. 463.

### VIII. Construction — what words describe the legacies, and things bequeathed.

1. The words "all my clothes and linen whatsoever."

Legacy of "all my clothes and linen whatsoever," only passes body, not table or bed linen. *Hunt v. Hunt*, 3 B. C. C. 311.

2. The words "my house, and all that shall be in it at my death."

Securities for money do not pass by goods in testator's custody. *Green v. Symonds*, 1 B. C. C. 129. n.

3. The words "all my property in A. except" a particular chose in action described.

Bequest of "all my property in A. except" a particular chose in action described in the will. Other choses in action found in A. (such as mortgaged deeds, bonds and bankers' receipts) do not pass, notwithstanding the exception. *Vaughan v. Brook*, 1 Sch. & Lef. 318. Bank notes would have passed; they being *quasi* cash. *Ibid.* 319.

4. The words "all debts due to me."

Money at a banker's held to pass under a bequest of all debts due to the testator. *Carr v. Carr*, 1 Mer. 541. n.

5. The

5. The words "all my waggon-ways, rails, staiths, and all implements, utensils, and things."

Testator gave all his waggon-ways, rails, staiths, and all implements, utensils, and things, at his death used or employed together with, or in or for the working, management or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust, to be held or enjoyed with the collieries. Decree by Lord Rosslyn, that under this bequest, and upon the circumstances, money due from the fitters and others, and in the Tyne bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock in trade, passed. 3 Ves. 212. That decree affirmed, upon a re-hearing, by Lord Eldon, but with considerable doubt. *Stuart v. Marquis of Bute*, 11 Ves. 627.

6. The words "all I am possessed of."

Construction of a very inaccurate will, that the words "and all I am possessed of," were confined to a specific bequest of stock immediately preceding; meaning all interest in that fund; and did not comprise the general residue; which was, by a subsequent clause, expressly disposed of in a different manner. *Wilde v. Holtzmeyer*, 5 Ves. 811.

7. The words "all debts due and owing to me at the time of my death."

Under a bequest of "all debts due and owing to the testator at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator after the date of his will, and lent by him to the obligor, was held to pass; the day stipulated for the re-investment being passed at the time of his death; therefore not comprehended in the residuary devise enumerating (among other things) "his government stocks and funds." *Essington v. Vashon*, 3 Mer. 434.

8. The words "cabinet of curiosities."

Diamonds and pearls made up for wear, will not pass by a devise of a cabinet or collection of curiosities, consisting of coins, medals, *gems, and oriental stones*, and other valuable things. "Valuable things" must mean things *ejusdem generis*. *Cavendish v. Cavendish*, 1 Cox, 77.; 1 B. C. C. 467.

9. The words "all in Suffolk."

A bond being at the testator's house in Suffolk, does not pass by the words in his will, "I give all in Suffolk;" the bond having no locality. *Moore v. Moore*, 1 B. C. C. 127.

10. The words "my house and all that is in it."

Under a bequest of "my house and all that shall be in it at my death," cash passes; not promissory notes and securities. Whether bank notes should be considered cash for this purpose, *quære*. 11 Ves. 662.

11. The words "all my estates in law and equity."

"All my estates in law and equity" in a will, will pass personal to be laid out in land. 1 Ves. 204.

12. The words "and" construed "or," *et vice versa*.

1. Testator gave legacies to his three children, payable after the death of his executrix, and directed, that if any of the children should die unmarried, and without issue, before the death of the executrix, the legacy should go to the surviving children. One of the daughters married, but died without issue in the lifetime of the executrix. Her legacy survived to the other children. *Hepworth v. Taylor*, 1 Cox, 112.

2. Bequest to two persons or their children, held to give the children an interest

interest by way of substitution only; not concurrent. *Crooke v. De Vandes*, 9 Ves. 197.

13. The words "child," "children."

1. A legacy to the children of A. does not extend to a child in *ventre sa mere*. S. C. 2 B. C. C. 33.; S. P. *Cooper v. Forbes*, 2 B. C. C. 68. But the point doubted, lord chancellor's opinion being rather contrary. *Clarke v. Blake*, 2 B. C. C. 320.

2. Legacy to the children of a deceased sister means children living at the testator's decease. *Viner v. Francis*, 2 B. C. C. 658.

3. Where a legacy is to be divided among children at a given time, those born before the time of division shall take. *Pulsford v. Hunter*, 3 B. C. C. 416. But where the gift is general, all shall take. *Hughes v. Hughes*, 3 B. C. C. 352. 434.

4. Under a legacy to the children of A., those born before the time of distribution are entitled to share; unless a time of distribution is expressly provided, excluding those born afterwards by the necessity of a previous distribution. 15 Ves. 125.

5. Legacy given to the children of A. lawfully begotten, or to be begotten, does not extend to children born after the death of the testator. *Sprackling v. Ranier*, Dick. 944.

6. Devise to all the children of A. at twenty-one, a child born after the death of the testatrix shall take. *Congreve v. Congreve*, 1 B. C. C. 530.

7. Bequest to the children of testator's daughter, to the number of four, of the sum of 1000*l.* each, if more, the 4000*l.* to be divided between such as should be living at testator's death; but if his daughter should die without issue, then over. A child by another husband, born after testator's death, cannot take, and the bequest over is good, being not a limitation over, but an absolute legacy. *Salkeld v. Vernon*, 1 Eden, 64.

8. Testator's wife being ensient, he gave his estate to trustees, to apply profits for the use of the child during infancy, and at twenty-five, to the child in fee; but in case the child should die before twenty-five, without issue, remainder over; the child was still-born. Afterwards testator made a codicil, affirming his will, and died without issue; forty-three weeks after his decease the widow is brought to bed of a son; this son cannot take the estate, which goes to the devisees over. *Foster v. Cooke*, 3 B. C. C. 347.

9. Gift of a residue to the children of A. By a codicil a sum was set apart to secure annuities. A child born after testator's death, shall not take. *Hill v. Chapman*, 3 B. C. C. 391.

10. A specific sum given to the six children of A. A. had six children at the time; one more was born after the will, but before the making of a codicil, she shall not take a share with the six born before. *Sherer v. Bishop*, 4 B. C. C. 55.

11. The testator gave to A. B.'s children "50*l.* to every child he hath by his wife, to be paid them as they shall come of age." There were eleven children at the date of the will; thirteen at the testator's death, and three born afterwards. The thirteen children living at the death of the testator are entitled to their legacies, but not those born afterwards. *Ringrose v. Bramham*, 2 Cox, 384.

12. Testator gave to each and every of his children, born or thereafter to be born, and who should be living at the time of his death, 5000*l.* a-piece, to be paid at their ages of twenty-one, &c. with interest from the day of his death. A child in *ventre sa mere* is entitled to a legacy of 5000*l.*, but the interest is to be computed only from the death of the testator. *Rawlins v. Rawlins*, 2 Cox, 425.

13. Legacies in trust for all grandchildren then in existence by name, to sons at twenty-three, daughters at twenty-one, mesne interest for education; surplus to accumulate with survivorship; residue for all the grandchildren generally

generally for their benefit, "as aforesaid;" by codicil, a fund set apart to pay life annuities; grandchild born after testator's death not entitled to a share of the residue; into which the fund under the codicil falls after the purpose answered. *Hill v. Chapman*, 1 Ves. 405.

14. Legacy by a grandfather in trust for the five children by name, and all and every the child and children of his son, equally at twenty-one, or upon marriage of the daughters, with power to advance money for putting out all and every or any of the sons to business. The first attaining twenty-one is entitled to receive his share then. *Prescot v. Long*, 2 Ves. 620.

15. Testator directed his children generally to be maintained during the life of his wife, but distributed the property after her death in words which would not compromise after-born sons; they were held entitled to the former provision. *Matchwick v. Cock*, 3 Ves. 609.

16. Under a disposition by will to the children of A. and B. payable at twenty-one or marriage, with a limitation over upon failure of issue in the lives of A. and B., it was held that all the children without restriction were entitled; and an apportionment being directed, and the interest ordered to be paid to those who had attained twenty-one, children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest. *Mills v. Norris*, 5 Ves. 335.

17. Bequest to the children of A. born or to be born, as many as there might be, at twenty-one or marriage, with survivorship, and a limitation over upon the death of all, &c. vested in those living, when one is entitled, to the exclusion of those born afterwards. *Whitbread v. Lord St. John*, 10 Ves. 152.

18. Legacy to the three children of A. the sum of 600*l.* each. Four children all born before the date of the will, entitled to 600*l.* each. *Gawey v. Hibbert*, 19 Ves. 125.

19. Testator gives to each of his sister's children "whether now born or hereafter to be born, the sum of 2000*l.* each, payable at twenty-one," and directs his executors to appropriate a fund for payment of those legacies, the interest of such fund to be paid to his sister, until the legacies become payable. This is an intention which the court will not carry into effect, in favour of children born after the death of the testator, as well as those living at the time of his death, by directing such a fund to be impounded, as will probably be sufficient to answer the purpose. *Deffis v. Goldschmidt*, 1 Mer. 417.

20. Bequest of residue after death of testator's wife, to five of his children, and to the son of my son John Tebbs, or his other children that are living: held to pass shares to children of the son, born after testator's death, and before the death of his wife. *Tebbs v. Carpenter*, 1 Mad. 290.

21. A direction for maintenance, in general terms, comprehending all children, not restrained by the bequest of the capital in terms limited to those living at the date of the will. *Freemantle v. Taylor*, 15 Ves. 363.

22. A bequest of a residue to be divided equally "amongst all the children of my late cousin E. L. and my cousin P. F. and their lawful representatives," is a bequest to the children of E. L. and to P. F. himself, and not to the children of P. F. *Lugar v. Harman*, 1 Cox, 250.

23. Devise to A. and his wife for life; and after the death of the survivor, upon trust to sell and apply the produce to and among all and every the issue, child or children of A., by his said wife, and their representatives equally: the fund belongs to the children surviving the testator, but the issue of a daughter, who died in the life of A. are entitled as representatives against the claim of their father as administrator. *Horsepool v. Watson*, 3 Ves. 383.

24. Testator gave legacies with maintenance, to his two illegitimate children, naming them, by C. B. and to all the other children he might have by her, 6000*l.* each, and after other bequests, the residue among his said children.

children. By codicil, he directed maintenance of another child born since ; also interlining his name with those of the other children in the first part of the will only. That child entitled only to maintenance, and a share of the residue, not to the legacy of 6000*l*. *Arnold v. Preston*, 18 Ves. 288.

25. Bequest of stock to trustees in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces that should be then living, "to wit, the said J. B. *or*, her children, and the said P. B. *or*, his children, and D. L. *or*, his children, and P. L. *or*, his children, and S. G. *or* her children." Under this bequest, a nephew not expressly named, is not entitled to any share. And the fund is equally divisible among such nephews and nieces, *and* their children as were living at the time of the death of A. *Eccard v. Brooke*, 2 Cox, 213.

26. Residuary bequest to A. "in case she should have legitimate children ; in failure of which," to go over. A. having only one child born alive, who died before her, entitled absolutely. *Wall v. Tomlinson*, 16 Ves. 413.

27. Legacy to the children of the late C. K. who shall be living at testator's decease. C. K. being dead at the date of the will, leaving illegitimate children (of whom three were living at the death of the testator), and not having, at the date of the will, nor having ever had, any legitimate children, the three illegitimate children were held to be entitled. *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419.

#### 14. The words "after-born children."

' Residue bequeathed to A. and "all the other children hereafter to be born" of B., at their respective ages of twenty-one. Those born after one attains that age, are excluded. *Gilbert v. Boorman*, 11 Ves. 238.

#### 15. The words "younger child."

1. Legacy to the seventh or younger child of A. A. had six children at testator's death, and had had another, who died soon ; afterwards, the plaintiff was born, who was the seventh child living, but eighth in order of birth ; held, he did not bear the description, and decreed in favour of the youngest child. *West v. Lord Primate of Ireland*, 3 B. C. C. 148.

2. Construction of a will ; that under a bequest to the younger children of A., an only surviving younger child was, upon the whole will, entitled ; and the second, having become the eldest, was excluded. *Lady Lincoln v. Pelham*, 10 Ves. 166.

#### 16. The words "seventh or youngest child."

Legacy to the "seventh *or* youngest child of A." A. had six children at the testator's death, and had another who died at the age of two months. Afterwards the plaintiff was born, and was the seventh child living, but the eighth in order of birth. Other children were born afterwards. Under these circumstances, the youngest child is entitled to the legacy, and not the plaintiff. *West v. Lord Primate of Ireland*, 2 Cox, 258.

#### 17. The word "cousins."

Testator bequeathed the residue of his personal estate as follows : "As to the residue of my fortune, I will and desire that the descendants or representatives of each of my first cousins, deceased, partake in equal shares and proportions with my first cousins, now alive." The residue is divisible *per stirpes* amongst the first cousins, who were living at the testator's death, and such of the descendants of his first cousins who died before him, as were next of kin of the deceased first cousins, and living at the time of the death of the testator. *Rowland v. Gorsuch*, 2 Cox, 187.

#### 18. The word "descendants."

Legacy to the descendants of A. and B. equally ; all descendants, grand-children

children as well as children, take *per capita*. Butler v. Stratton, 3 B. C. C. 367.

19. The word "effects."

The word "effects" in a will restrained to articles *ejusdem generis* with those specified, though the consequence was a residue undisposed of. Rawlins v. Jennings, 13 Ves. 39.

20. The words "other effects."

A residuary bequest in general terms. Revocation, by a codicil, as to "plate, linen, household goods, and other effects (money excepted.)" The exception, the restrained construction, in general, of the words, "other effects," viz. *ejusdem generis*. Stock, therefore, which does not pass under the word "money" was included, with leasehold and all personal, except money and bank notes. Hotham v. Sutton, 15 Ves. 319.

21. The words "furniture at X.," which was afterwards removed.

Testator bequeathed to his wife his furniture at D. C. and at W. He afterwards removed part of the furniture at D. C. to B. S. Held, that furniture at B. S. did not pass. Heseltine v. Heseltine, 3 Mad. 276.

22. The words "furniture, and stock of carriages and horses, and other live and dead stock."

Under a bequest of the use of a house, with all the furniture and stock of carriages and horses, and other live and dead stock for life, plate passed; wine and books did not. Porter v. Tournay, 3 Ves. 311.

23. The words "goods and chattels."

1. "Goods and chattels" will pass all personal estate; but after "furniture," &c. are restrained to articles *ejusdem generis*. 11 Ves. 666.

2. By devise of all testator's goods and chattels in and about his dwelling-house and out-houses at A. at his death; held, that running-horses passed. Lady Gower v. Lord Gower, 2 Eden, 201.; Amb. 612.

24. The words "household furniture."

Question, whether plate, china, and linen were comprised in a bequest of household furniture. Kelly v. Powlet, Dick. 359.

25. The word "issue."

1. Under a legacy to the issue of A. all descendants are entitled; and take *per capita* as joint tenants. Davenport v. Hanbury, 3 Ves. 257.

2. Bequest "to each and every the child and children of my brother and sisters, which shall be living at the time of my death; but if any child or children of my said brother or sisters shall happen to die in my lifetime and leave issue, then the legacy or legacies hereby intended for such child or children so dying, shall be for his, her, or their issue." The issue take only by substitution. Therefore only the issue of such children as were living at the date of the will, are entitled in the event of the death of their respective parents, during the testator's lifetime. Christopherson v. Naylor, 1 Mer. 320.

26. The words "issue of a deceased child."

Bequest of residue of personal estate, to be divided into sixteen parts, and five parts to be paid to testator's daughter R. on her attaining her age of twenty-eight years or day of marriage; provided his said daughter should marry with the approbation of his executors, and the remaining eleven parts to be divided amongst his other four children; but in case any of his said children should die before their shares should become payable, such shares should be paid to and amongst the children who should be then living, and the issue of a deceased child or children (if any) *per stirpes* and not *per capita*, at the same times as their original shares were made payable. A. survived



survived the testator, and married at the age of eighteen, without consent, and died at the age of twenty, leaving a daughter. The court held, that she forfeited her share by her marriage, but that her daughter was entitled to a share as the "issue of a deceased child." *Hemings v. Munckley*, 1 Cox, 38.

#### 27. The word "money."

1. Vide 15 Ves. 319.

2. Bequest of "all the testator's money in the bank of England," held to pass stock in the funds. Testator having never had any cash in the bank. *Gallini v. Noble*, 3 Mer. 691.

#### 28. The words "next of kin."

1. Gift of residue to be divided among the next of kin, share and share alike, shall be divided among surviving brothers, nephews, and nieces, (representing deceased brothers and sisters). *Philips v. Garth*, 3 B. C. C. 64.

2. Residuary clause, "to be divided amongst my next of kin, as if I had died intestate." A bequest to the next of kin; as they would take under an intestacy; and the widow is not one of the "next of kin" in the ordinary sense, or in the sense in which the testator used the words. *Garrick v. Lord Camden*, 14 Ves. 372.

#### 29. The words "personal estate."

Properly, nothing is the personal estate of a testator that was not so at his death; he may so express himself as to show something else intended; but where there is nothing but a direction to sell land, with an application of the money to a particular purpose, there is no instance of holding the surplus after that purpose answered, to form part of the personal estate, so as to pass by the residuary bequest. 1 Ves. & Beam. 415.

#### 30. The word "relations."

1. By a bequest to a relation, those within the statute of distribution alone shall take. *Green v. Howard*, 1 B. C. C. 31.

2. Gift of residue to persons related to the testator, confined to persons within the statute of distributions. *Rayner v. Mowbray*, 8 B. C. C. 234.

3. Gift of a residue to A. for life, remainder to B. for life, then to be divided among his sister's relations, mere intestacy, and shall go to relations living at his death. *Masters v. Hooper*, 4 B. C. C. 207.

4. Legacy for a mourning ring to each of the testator's relations by blood or marriage, confined to the statute of distributions, and to those who have married persons entitled under it. *Devisine v. Mellish*, 5 Ves. 529.

5. Residuary bequest to the testator's daughter for life, and to her children at their ages of twenty-one; and after the decease of his daughter, and of her children under that age, to go and be distributed among his relations in a due course of administration. Great-nephews and great-nieces, the next of kin of the testator at the death of the daughter, entitled, against the claim of the personal representatives of the daughter, the sole next of kin at the death of the testator, and of the representatives of nephews and nieces who died in her life, insisting that she was excluded by the will. *Jones v. Colbeck*, 8 Ves. 38.

6. Bequest of residue to testator's wife for life, with a direction to dispose of the residue amongst *his relations*, in such manner as she should think fit. Appointment to relations not being next of kin, void, and the residue decreed to be distributed amongst those who were next of kin to the testator, at the time of *his* death. *Pope v. Whitcombe*, 3 Mer. 689.

#### 31. The words "poor relations."

Legacy to executor to be distributed amongst the poor relations of testator

tator. A relation who was poor at the time of testator's death, but became rich before distribution, not entitled. *Mahon v. Savage*, 1 Sch. & Lef. 111.

32. The words "my nearest surviving relations in my native country, Ireland."

Residue by will given "to my nearest surviving relations in my native country, Ireland;" brothers and sisters living, held exclusively entitled against nephews and nieces; but sisters resident in America not excluded. *Smith v. Campbell*, 3 Ves. & Beam. 275.

33. The words "to such as would then be entitled under the statute of distributions."

A fund is given after the death of J. H. to such persons as J. H. shall appoint, and in default of appointment "to such persons as would then by virtue of the statute of distributions be entitled to the testator's personal estate, in case he had died intestate." There being no appointment, the funds shall go to such persons as were the next of kin of the testator at the time of his death. *Herrington v. Harte*, 1 Cox, 131.

34. The words "legal representatives."

Gift of residue to certain persons, and if they should die in the lifetime of testatrix, to their legal representatives; one died: his next of kin shall take, not his executor beneficially, nor his residuary legatee. *Bridge v. Abbott*, 3 B. C. C. 224.

35. The words "personal representatives."

C. F. compounded with his creditors. His widow, by her will, left a fund to pay the residue of the debts to the compounding creditors, or their personal representatives. The administratrix of a deceased creditor is entitled beneficially to this bequest, and not the next of kin or residuary legatee of the creditor. *Evans v. Charles*, 1 Anst. 128.

36. Implication of the word "respectively."

Bequest to executors of 4000*l.* in trust to pay one-half of the interest to A. and the other half to B. during their lives, "and as their lives drop and expire, I direct that the principal and interest be reserved and equally divided among their children when they shall severally attain twenty-one." The entire principal vests in the children of B., on their severally attaining twenty-one. *Smith v. Streatfield*, 1 Mer. 358.

37. The word "securities."

Stock included in a will under the word "securities;" legacies being charged for which the securities, properly so called, were not sufficient. *Dicks v. Lambert*, 4 Ves. 725.

38. The word "servant."

Under a general bequest to servants, a coachman, provided with the carriage and horses by a job-master, according to the usual course of that business, not entitled. *Chilcot v. Bromley*, 12 Ves. 114.

39. The words "survivors or survivor."

Residuary bequest to the testator's nephews and nieces *per stirpes* equally for their lives; and after the death of either, that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child, that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares, but upon the death of last survivor without

out a child, his shares, both original and accrued, are undisposed of, notwithstanding another has left a child. *Millson v. Awdry*, 5 Ves. 465.

40. The word "wife."

Money bequeathed to be laid out in land to be settled upon the testator's nephew A. for life; remainder to the wife of A. for life; with remainders in tail to the sons and daughters of A. by such wife; A. was not married till after the death of the testator: held to extend to a second wife. *Peppin v. Bickford*, 3 Ves. 570.

41. Residuary bequest to "the said A. C." there being two persons of that name, and both specific legatees.

Residuary bequest to "the said A. C." there being two persons of that name, (A. C. of St. J. and A. C. of H.) both of whom were specific legatees. Held, from the manifest intent of the testator, apparent on the face of the will, that the former was entitled. *Fox v. Collins*, 2 Eden, 107.

42. The words "he paying thereout," create a charge.

On the point whether legacies were a charge created, and whether vested and transmissible. See *Seal v. Tichener*, Dick. 444.

43. The words "I return to A. his bond," is not a release but a legacy.

"I return to A. his bond" in a will, is not a release, but a legacy; and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland v. Adair*, 3 Ves. 231.

44. Words *primâ facie* equivalent to pass future interests in personal estate, are to have that effect, unless controlled by the context.

Words *primâ facie* equivalent to pass future interests in personal estate, to have that effect, unless controlled by the context. 11 Ves. 389.

45. In relation to mistake or uncertainty in the thing bequeathed.

1. 10,000*l.* provided by settlement for one daughter or younger son; 15,000*l.* if more. There being but one daughter, the father, by a will under a power reserved to him, appoints the time of payment, and the application of the interest of the 15,000*l.* provided for her by settlement, and gives her the farther sum of 5000*l.*; she was held entitled to 20,000*l.* *Phipps v. Lord Mulgrave*, 3 Ves. 613.

2. Testatrix, reciting that she was possessed of 12,700*l.* three *per cent.* consolidated bank annuities, standing in her name, gave and bequeathed the same, or so much of such bank annuities as should be standing in her name at her death. At the date of her will, and at her death, she had near 15,000*l.* in that fund, besides other stock. The excess, beyond the sum mentioned, did not pass. *Hotbam v. Sutton*, 15 Ves. 319.

3. D. being possessed of 4000*l.* four *per cent.* bank annuities, by his will gave parts of it to a number of persons; he then made a codicil, in which he said, "I find willed away only 5600*l.* four *per cent.* bank annuities, and I have there at present 6000*l.* I give the interest of the remaining 400*l.* to F." It appeared that he had disposed of only 3200*l.* of the stock by his will. F. shall take the whole residue of the stock, under the bequest in the codicil. *Danvers v. Manning*, 1 Cox, 203.

4. Testatrix bequeaths all her personal estate to trustees, in trust to sell, and out of the produce to pay all debts, "and in the next place to pay to A. 300*l.* due on bond." The testatrix owed only 120*l.* to A. upon bond; but the court decreed payment of the whole 300*l.* *Whitfield v. Clemment*, 1 Mer. 402.

5. Legacies, and a residue given in bank stock; testator had no bank stock,

stock, but had three *per cent.* consols, which would satisfy the legacies that way, and leave a residue; taken so by consent. *Finch v. Inglis*, 3 B. C. C. 420.

46. Plate and linen misdescribed, as in his house in S.

Legacy of all testator's plate and linen in his house in S. (with the lease) to his wife; he had but one set of plate and linen, which was usually removed with the family from house to house. The plate happened to be at B., the country-house, at his death, yet it passed to the wife. *Laud v. Devaynes*, 4 B. C. C. 537.

47. Bequest extended to debts of every description, from the explanation of a similar bequest by another clause.

Bequest of the debts, that shall be due at the death of the testator, by mortgages, bonds, or open accounts, from certain persons, extended, from the explanation of a similar bequest by another clause, to debts of every description; therefore including judgments. *Stenhouse v. Mitchell*, 11 Ves. 352.

48. Legacy of a debt; the debt being mistaken, the actual debt shall pass.

Legacy of a debt; the debt being mistaken, the actual debt shall pass. *Williams v. Williams*, 2 B. C. C. 87.

49. Whether the legacy shall be of sterling money or currency.

No fund being provided for legacies, they shall be in the currency of the country where given. *Pierson v. Garnet*, 2 B. C. C. 38.

50. Mortgage-money.

Testatrix, mortgagee of an estate, of which her brother was tenant for life, and having his bond for some arrears of interest, bequeathed to him the arrears of her mortgage on his estate; likewise a bond from him in her possession; half of the mortgage-money was paid before the will; the principal mortgage-money does not pass. *Hamilton v. Lloyd*, 2 Ves. 416.

51. Money arising from real estate, may pass under the description of personal estate.

Money arising from real estate may pass under the description of personal estate upon the intention. 8 Ves. 592.

52. By what words money to be laid out in land shall pass.

1. Money to be laid out in land will, by a slight expression of the person entitled to it, pass either as personal or real estate. *Pulteney v. Darlington*, 1 B. C. C. 223.

2. Money to be laid out in land, will pass by the words "lands, tenements, and hereditaments whatsoever and wheresoever." *Rashleigh v. Master*, 9 B. C. C. 99.

53. Contract for a purchase, generally: by a devise of the real estate, before the purchase is completed, the money will pass.

Contract for a purchase, generally; by a devise of the real estate, before the purchase is completed, the money will pass. 10 Ves. 613.

54. General words held to include money in trust to be invested in land and settled, though particularly charged on the estates devised.

Devise by very general words, "all messuages, lands," &c. and all other his real and personal estate, including money, in trust, to be invested in land and settled; though particularly charged on the estates devised. *Green v. Stephens*, 17 Ves. 64.

## 55. Charge, by will, on real estate of simple contract debts of another person, considered as a legacy.

Charge, by will, on real estate of simple contract debts of another person considered as a legacy, carrying interest from the death of the testator at 4*l.* per cent. *Short v. Westby*, 16 Ves. 398.

## 56. Stock legacies.

Legacies being given in stock, then others without that addition, then others with a direction to sell stock, makes them all stock legacies. *Danvers v. Manning*, 2 B. C. C. 18.

## 57. An unlimited bequest of the interest of stock, passes the principal also.

An unlimited bequest of the interest of stock, passes the principal also. *Stretch v. Watkins*, 1 Mad. 253.

## 58. Bequest restrained in extent to a partial disposition, notwithstanding the general words "personal estate."

A will restrained in point of extent to a partial disposition by a particular enumeration, and a reference to other instruments, notwithstanding the general words "personal estate." *Holford v. Wood*, 4 Ves. 76.

## 59. To confine the objects of a testator's bounty to the period of distribution, is, in the construction of wills, a rule adopted from necessity.

To confine the objects of a testator's bounty to the period of distribution, is, in the construction of wills, a rule adopted from necessity. 1 Ball & Beatty, 486.

## 60. Bequest by implication.

Bequest by implication. *Wainwright v. Wainwright*, 3 Ves. 558.

## 61. Interest.

Interest of a residue goes with the capital, but not the interest of particular legacies. *Leake v. Robinson*, 2 Mer. 384.

## 62. Words releasing bond-debts, held not to include a bond subsequent to the date of the will.

Testator gave to his son "all sum and sums of money due to me from him on bond or bonds, or any other security." The son was indebted to testator by bond at the date of the will, and afterwards became indebted to him by another bond. The bequest does not include the subsequent bond. *Smallman v. Goolden*, 1 Cox, 329.

## 63. Admissibility of parol evidence to enlarge a specific bequest.

Testator possessed of 7000*l.* navy bills, recites it and gives them by the will; he had bills to a much larger amount at his death. *Quære*, what shall pass. *Pitt v. Jackson*, 2 B. C. C. 51.

## 64. Effect of mistaking a legatee's christian name.

1. Though the christian name of the legatee was mistaken in the will, the legacy was established upon the description and evidence, notwithstanding great delay in filing the bill. *Smith v. Coney*, 6 Ves. 42.

2. Legacy to the testator's "namesake, Thomas, the second son of his brother John." John had no son of the name of Thomas; but his second son's name was William, who was held entitled. *Stockdale v. Bushby*, Cooper, 229.

## 65. Effect

65. Effect of a wrong description of a legatee.

A wrong description of a legatee will not defeat a legacy given to him by name. *Standen v. Standen*, 2 Ves. 589.

66. Substitution of one daughter's name for another.

Testator left a residue to the children of his sisters, Estrella and Reyna. Estrella had children; Reyna had none, and had changed her name and become a nun professed; but he had a third sister, Rebecca, who had children. This is not sufficient to substitute the name of Rebecca, instead of that of Reyna. *Del Mare v. Rebello*, 3 B. C. C. 446.

67. Admissibility of parol evidence to ascertain a legatee whose name has been mistaken.

1. Annuity bequeathed to testator's brother Edward for life, remainder to his children by his present wife. At date of the will he and his wife were dead; and their children had other legacies under it; and testator had only one brother, Samuel, whom he had been in the habit of calling Edward and Ned. His children held to be entitled upon these circumstances. *Parsons v. Parsons*, 1 Ves. 266.

2. Testator gave 100*l.* in trust to pay the interest to A. till her daughter B. shall attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother A. This legacy decreed to the daughter at the age of twenty-four. *Clarke v. Norris*, 3 Ves. 362.

68. Bequest to six grandchildren, omitting the name of one, and repeating that of another.

Legacies were given to six grandchildren by their christian names, but the name of one was omitted, and that of another repeated. All shall take. 1 B. C. C. 20.

69. Admissibility of parol evidence, to show that the number of the favoured persons was mistaken.

Testator bequeathed 500*l.* to "each of the daughters of C. if both or either of them should survive D." At the date of the will and the death of the testator, C. had three daughters, all of whom survived D. The three daughters are entitled to 50 *l.* each. *Scott v. Fenoulhett*, 1 Cox, 79.

70. Bequest to a natural child *en ventre sa mere*, without reference to any one as the father.

Bequest to the child of which an unmarried woman was then ensient, without reference to any person as the father, held good; the object of the bequest being sufficiently pointed out by the description. *Gordon v. Gordon*, 1 Mer. 141.

71. Gift of 100*l.* to the four children of A., to be equally divided, considered as four legacies.

Gift of 100*l.* to the four children of A., to be equally divided, considered as four legacies. *Molesworth v. Molesworth*, 3 B. C. C. 5.

72. Bequest to such children as A. shall appoint, goes, in default of appointment, to all equally.

Legacy to A. for life, then to such children as she should appoint; in default of appointment, it shall go equally. *Wilts v. Boddington*, 3 B. C. C. 95.

**IX. Construction — what words shall pass the absolute interest.****1. Bequest to A., for her and her children's use.**

Bequest to A., for her and her children's use. A transfer decreed to A. *Robinson v. Tickell*, 8 Ves. 142.

**2. Bequest to A., or in case of his death, to his issue.**

Devise to A., or in case of his death, to his issue, absolute in the parent. *Turner v. Moor*, 6 Ves. 557.

**3. Bequest to A.; and in case of her death, to B.**

Bequest to A., and in case of her death, to B., held an absolute interest in A. *Hinckley v. Simmons*, 4 Ves. 160.

**4. Bequest to A. for life, and at her decease, to B.**

Bequest of the interest of the remainder of personal estate, after payment of debts and legacies, to A. S. U. for life, and at her decease, to C. C., passes an absolute interest to C. C., subject to the prior life-interest of A. S. U. *Clough v. Wynne*, 2 Mad. 188.

**5. Bequest to A., and in case of her death, to the children of B.**

Residuary bequest in trust for the use and benefit of A., and in case of her death, to be equally divided between the children of B. Payment decreed to the executor of A., as having taken the absolute interest. *Omanney v. Bevan*, 18 Ves. jun. 291.

**6. Dividends to A. for life, and after her death, the principal to be paid according to her appointment.**

Legacy in trust to be laid out in stock; the dividends, as they come due, to A. for life; and after her decease, to pay the principal according to her appointment by will or otherwise; with power to her to purchase with it an annuity, with the approbation of the trustees, but not to sell it. A. has an absolute power of disposition, and her bill was held a sufficient indication of her intention to take the whole; making a formal appointment or writing unnecessary. *Irwin v. Farrer*, 19 Ves. 86.

**7. Where the words applied to real would create an estate-tail.**

1. Testator gives all his real and personal estates "to A. and his male issue, and for want of male issue after him, to B. and his male issue." These words give to A. the absolute interest in the personal estate. *Donn v. Penny*, 1 Mer. 20.

2. Testator directs 20,000*l.*, which he had in the 3 *per cents.*, to be firmly fixed, there to remain during the life of his wife, for her to receive the interest; and after her death, to be in the same manner firmly fixed on the infant W. C., "to be so secured that he may only receive the interest during his life; and after his decease, to the heir male of his body, and so on in succession to the heir at law, male or female;" with a direction, "that the principal sum is never to be broken into, but the interest only to be received;" his intent being "that there should always be the interest, to support the name of Cobb as a private gentleman." Though the intention be manifest to give only a life-interest to W. C., yet, there being nothing to show that the words "heir male" were not used in a strict technical sense, held, that W. C. took the absolute interest, the words being such as would create an estate-tail of freehold property. *Secus*, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere *designatio personæ*. Held, the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint

straint of alienation, which, in the case of land, would not prevent the creation of an estate-tail. *Britton v. Twining*, 3 Mer. 176.

8. The rule that personalty limited in tail, vests absolutely in the first tenant in tail, when not applicable.

An annuity given to testator's wife for life, and then, after certain interests, to remain to the testator's eldest son and the heirs male of his body; remainder to his (testatrix's) next eldest son and his heirs male: the eldest and two other sons died, leaving the wife. This is not personal estate, vesting absolutely in the eldest son, nor does it vest in the fourth son as an executory devise; but the annuity being exhausted, sinks into the residuary estate of the testator. *Turner v. Turner*, 1 B. C. C. 316.

9. Devise to trustees to pay the produce to A., without limiting the duration of the interest.

Devise to trustees to pay the produce to A., without limiting the duration of the interest, is an absolute gift of the principal. *Elton v. Shepherd*, 1 B. C. C. 532.

10. Effect of the death of persons who were to exercise a discretion over the bequest.

Legacy to A.; but if the executors, after named, shall think it more for his advantage to have it placed out, and to pay him the interest for life, as they in their discretion shall think fit, empowering them accordingly; and directing, that after his decease the said sum should be divided among his children, and for default of children, over. One of the executors being dead, and the others having renounced, the legacy was held to be absolute in the legatee; who had taken the benefit of an insolvent act. *Keates v. Burton*, 14 Ves. 434.

11. A case in which the legatee took the absolute interest, not a power of disposition merely.

Bequest of personal property in trust for A. (a married woman), for her separate use, with a power of disposing by will (except to particular persons); and in case she dies without a will, I give all that may remain at her decease to B.; followed by a gift of "all the rest and residue" to A., who is appointed executrix. A. takes the absolute interest in the property, not a power of disposing merely; and the gift to B. of "all that may remain at her decease," is void for uncertainty. *Bull v. Kingston*, 1 Mer. 314.

12. A case in which a legacy, given in trust, during infancy, passed absolutely.

Legacy to trustees, to be put out upon security, the interest to be paid to A.; and in case she marry or die, the interest to be paid to B. in trust for her till she come to the age of twenty-one. Held, that B. was absolutely entitled to the legacy. *Hale v. Beck*, 2 Eden, 229.

13. A bequest held an absolute legacy, not an annuity.

Bequest to the testator's wife of "200*l.* per year, being part of the monies I now have in bank security, entirely for her own use and disposal," together with all his household furniture and effects: interests for life being expressly given to other persons. An absolute interest to the wife in bank stock, sufficient to produce 200*l.* a year; not a mere annuity for her life. *Rawlings v. Jennings*, 13 Ves. 39.

14. A bequest held an annuity, not an absolute legacy.

Bequest of an annuity of 200*l.* for the use of A. and her children, to be paid out of the general effects until it is convenient to the executors to invest 5000*l.* in the funds, in lieu thereof for her and their use, and to the longest liver,



liver, subject to an equal division of the interest, while more than one alive. Held an annuity, not an absolute legacy. *Innes v. Mitchell*, 6 Ves. 464.

15. A gift of stock in long annuities, *primâ facie* means so much a year.

A gift by will of stock in long annuities, *primâ facie* means so much a year. *Stafford v. Horton*, 1 B. C. C. 482.

16. Indefinite bequests of dividends.

Indefinite bequests of the dividends, gives the absolute property of stock. *Page v. Leapingwell*, 18 Ves. 463.

17. The capital of the residue passed by implication, though the interest and dividends only were expressly disposed of.

The capital of the residue passed by implication, though the interest and dividends only were expressly disposed of. *Philips v. Chamberlaine*, 4 Ves. 51.

18. Specific bequest for life of things *quæ ipso usu consumuntur*.

A specific bequest for life of things *quæ ipso usu consumuntur*, is a gift of the property, and there can be no limitation over after a life-interest in such articles; but if included in a residuary bequest for life, they must be sold, and the interest enjoyed by the tenant for life. 3 Mer. 194.

19. Miscellaneous cases.

1. Bequest of stock in trust for the use, exclusive right and property of A., but should she happen to die, then in that case among her children; another legacy of stock to A., to be paid her as soon as possible, or in the event of her death, among her children; another legacy of stock to B., and in case of her death, among her children. All these legacies held absolute in the respective mothers. *Webster v. Hale*, 8 Ves. 410.

2. A bequest of the balance of my account, with "the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the income arising therefrom to be for her sole use and benefit," is an absolute interest, and not a life-estate merely. The prior gift of the sum is not limited by the subsequent mention of its produce, and the direction as to trustees is not restrictive. *Adamson v. Armitage*, Cooper, 283.

3. Testator gives "all his stock of cattle, horses, and carriages," to his wife absolutely; and gives his farm, "and stock and crop thereon," to his said wife during widowhood. Held, the live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause. *Randall v. Russell*, 3 Mer. 190.

4. A residue of personal estate, and the produce of real estate, was directed by will to be divided equally amongst the testator's sons, J. L., E. P. L., B. L., and G. L., share and share alike, as tenants in common, and to the issues of their several and respective bodies lawfully begotten; but in case of the death of any or either of them, without issue lawfully begotten, living at the time of his or their respective deaths, then the part or share of him or them so dying to go to the survivors and survivor equally, share and share alike, and to the issue of their several and respective bodies, lawfully begotten. Held, that the bequests to the four sons passed absolute interests; but that, on the death of one of such sons without issue, his share survived to his brothers. *Lyon v. Mitchell*, 1 Mad. 467.

#### X. Construction—what words create a life-interest.

1. Bequest to the use of A., and, in case of her decease, to the use of her children.

Bequest to the use and behoof of A., and in case of her decease, to the use

use and behoof of her children, share and share alike; held a life-interest only in A.; the capital to her children after her decease. *Lord Douglas v. Chalmer*, 2 Ves. 501.

2. Bequest to A. and B., to be distributed to their children by their wills.

Gift to testator's two daughters to be distributed to their children by their wills, raises an estate for life in the daughters, by implication. *Ramsden v. Hassard*, 3 B. C. C. 236.

3. Bequest to the sole use of N. or of her children for ever.

Testator gave 500*l.* "to the sole use of N. or of her children for ever." N. took an interest for life in the 500*l.*, and it belonged to her children after her death. *Newman v. Nightingale*, 1 Cox, 341.

4. A legacy to B. "on the same conditions, on his attaining twenty-one."

Bequest to A. for life; then to her children for maintenance, and to be equally divided among them on their arriving at twenty-one, followed by a legacy to B. "on the same conditions, on his attaining the age of twenty-one." The legacy to B. construed in the same manner as the other, viz. for life only, &c. *Longdon v. Simpson*, 12 Ves. 295.

5. Bequest to A., and on his death, to his next of kin, in a course of administration.

Bequest to A., and on his death, to his next of kin in a course of administration, does not vest the property absolutely in A.; but after his death it goes to his next of kin, as designated objects of the testator's bounty. *Brandon v. Robinson*, 1 Rose, 200.

6. Effect of a direction for an inventory, restraining a bequest of furniture, &c. to an interest for life.

Effect of a direction for an inventory, restraining a bequest of furniture, &c. to an interest for life. *Southey v. Lord Somerville*, 13 Ves. 486.

7. A bequest held an interest for life only, with a limited power of disposition.

Bequest of all money, stock, &c. and all other personal estate, to the sole use of the testator's wife for life, to be at her full, free, and absolute disposal during her life, without being liable to any account; and after her decease, certain articles specified, and 500*l.*, according to her appointment by will; in default of appointment, to fall into the residue, which was disposed of. An interest for life only, with a limited power of disposition. *Bradley v. Westcott*, 13 Ves. 445.

8. Devise to one for life or absolutely, with directions that he shall dispose of it to another at his death.

Devise to one for life or absolutely, with directions that he shall dispose of it to another at his death, operates as an immediate devise without any such disposition. 1 Ves. 271.

#### 9. Miscellaneous cases.

1. Bequest of money in the funds to A. in trust for B. an infant, and for such younger son or sons as B. shall have, equally to be divided between them; and in case there shall be but one younger son, then the whole to him. B. takes only a life-interest; subject to which the younger children take the whole. *Garden v. Pulteney*, 2 Eden, 323.; *Amb.* 499.

2. Devise of all the rest, residue and remainder of estate, both real and personal,

personal, unto A., to be placed out at interest until her age of twenty-one years or day of marriage, and then the whole thereof, together with the interest accumulated thereon, to be paid to her, to and for her use during her natural life; and from and immediately after her decease, unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike; and in default of such issue, or of the death of A. before twenty-one or day of marriage, then over, is an estate for life in A. *Jacobs v. Amyatt*, 4 B. C. C. 542.

3. Construction of a will, and several very inaccurate codicils, upon a disposition of the personal estate, as to the interest, whether absolute or for life; as to the extent, whether general or specific, and exempt from debts. *Coxe v. Bassett*, 3 Ves. 155.

4. Trust, by will, as to the residue of real and personal estate, for a nephew and his heirs, to pay him the interest for life; with power to the trustees, in case they should see it would be for the benefit, to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary; but in case no part should be advanced, the residue to be divided among the nephew's issue; with a limitation over, if he should leave no issue. The nephew is entitled, not to the absolute property, but for life only; and no advancement having been made, an inquiry was directed, whether his circumstances required advancement. *Robinson v. Cleator*, 15 Ves. 526.

5. Bequest of residue of real and personal estate to L. J., to be placed at interest until twenty-one or marriage, and then the whole, with the accumulation, to be paid to her, to and for her use during her life; and after her decease, unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike; and for default of such issue, or in case of the death of the said L. J. before twenty-one or marriage, such residue to J. C. and his heirs for ever. Held to pass only an estate for life to L. J. in the residue of the personal estate, and not to her separate use; and she being married, and her husband a bankrupt, proposals were directed for a settlement upon her and her issue. *Jacobs v. Amyatt*, 1 Mad. 376. n.

## XI. Construction — what words create a joint-tenancy, or tenancy in common.

### 1. Joint tenancy.

1. A legacy given to two or more persons, without words of severance, makes a joint-tenancy; a remainder of two-thirds given to and amongst the children of A. and B.; they took as tenants in common; but the other third being to the children of C., they took as joint-tenants. *Campbell v. Campbell*, 4 B. C. C. 15.

2. A legacy or residue, bequeathed to two without words of severance, is a joint interest; and cannot be taken in common under the effect of a previous disposition of the interest with words of severance, viz. "to be equally divided." *Crooke v. De Vandes*, 9 Ves. 197.

3. "I give to my two sisters A. and B., the residue of my personal estate;" held to be a joint-tenancy. *Keys v. Luffkin*, Dick. 392.

4. Gift of a residue to trustees to pay interest to four persons for life, and after death of survivor, to divide the principal among the children; two died: the interest shall be paid to the other two. *Armstrong v. Eldridge*, 3 B. C. C. 215.

5. Testator leaves a residue in trust for four; two die: the survived shares shall survive as well as the original ones. *Worlidge v. Churchill*, 3 B. C. C. 465.

6. See 7 Ves. 535. Upon appeal, the decree was varied, according to the judgment of the lord chancellor; that though by the residuary disposition

tion to the testator's two sons, and the survivor, their or his heirs, executors, &c., they took as joint-tenants the leasehold and personal estate embarked in trade, upon all the circumstances, the transactions for twelve years, as between themselves a severance was to be implied, both as to the profits and the capital. *Jackson v. Jackson*, 9 Ves. 591.

## 2. Tenancy in common.

1. Legacy to two jointly and between them, they are not joint-tenants; and one dying, the legacy does not survive. *Perkins v. Baynton*, 1 B. C. C. 118.

2. Bequest to be equally divided share and share alike: they take in common; and no survivorship. *Bolger v. Mackell*, 5 Ves. 509.

3. Bequest in the form of a letter to the testator's mother and sisters, expressed thus: "to be divided amongst you." A tenancy in common among those living at that time, and the shares of those who died in the testator's lifetime, lapsed. *Akerman v. Burrows*, 3 Ves. & Beam. 54.

4. Legacy of 10,000*l.* to two sisters, to be equally divided when they should arrive at twenty-one, is a tenancy in common; and one dying under twenty-one, her share shall go to her representative. *Jolliffe v. East*, 3 B. C. C. 25.

5. Gift of a share over to children of testator's cousins, share and share alike, at their ages of twenty-one, is a tenancy in common; and one dying, her share lapses. *Martin v. Wilson*, 3 B. C. C. 324.

6. Testatrix gave stock to trustees on trust to pay the dividends to her niece for life, and after her decease, that the stock should be equally divided among the brother and four sisters of the testatrix, and in like manner to the survivors or survivor of them. The niece was residuary legatee. This is a tenancy in common between those alive at the death of the niece and the representatives of such as died in her life. *Roebuck v. Dean*, 2 Ves. 265.

7. Devise to the devisor's wife for life; and after her decease, unto and among all and every their children, in such manner and proportions as she should in her life or by will appoint; empowering her to sell, and receive the interest for life; and appointing after her decease both principal and interest to and among their children, in such proportions as aforesaid. All the children having died in the life of their mother, who died without appointment, were held entitled as tenants in common to several estates of inheritance. *Casterton v. Sutherland*, 9 Ves. 445.

8. A survived share will not survive again without express words. *Ex parte West*, 1 B. C. C. 575.

## XII. Construction — what words create a charge.

### A miscellaneous case.

Testator gave to his wife the third part of all his property that should become due to him after his decease; then, after giving some legacies, he gave all the residue of his estate in general words, subject to the payment of all his debts, funeral expences and legacies, upon trust to collect the same residuary estate, and pay the same to certain persons. The wife is entitled to a third of the personal estate, subject to the debts, but not to the legacies. *Reed v. Addington*, 4 Ves. 575.

## XIII. Construction — what words create a condition.

### 1. Marriage with consent.

By will, the principal of certain legacies was given to two daughters, to be paid on marriage, with the consent of the executors, and on the death of either without having married with consent, her legacy to go to the survivor. By a codicil it was provided, that if either of the daughters died before  
twenty-

twenty-five or marriage, with consent, the legacy of such daughter should go to the survivor. One daughter married before twenty-five, without consent. Held, that she was not entitled to the legacy. *Quære*, whether a second marriage with consent, would entitle her to the legacy. *Malcolme v. O'Callogan*, 2 Mad. 349.

2. The condition of not marrying within twelve months from the death.

The testator bequeathed a legacy to his daughter, to be paid within twelve months after his decease; but if she should marry A., then he revoked the legacy. She remained unmarried till about fourteen months after the testator's death, and then married A. They obtained a decree for the legacy. *Osborn v. Brown*, 5 Ves. 527.

3. The condition of having a child.

Under a bequest of stock, in trust to pay the dividends to M. H. H., the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said M. H. H. until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over in default of such issue, to the nephews and nieces of the testator living at the death of M. H. H. The dividends are payable to M. H. H., although she has no child. *Hammond v. Neame*, Swanst. 35.

4. The condition of giving security within such a time not to marry B.

Bequest of residue, in trust, in case A. shall, within six months after the testator's decease, give security not to marry B., then, and not otherwise, to pay to the children of A.: with a proviso to go over, if she shall refuse or neglect to give security. A condition precedent. The six months are exclusive of the day of the testator's death; therefore, as he died on the 12th of January, between eight and nine in the evening, a security given on the 12th of July, about nine in the evening, was held sufficient. *Lester v. Garland*, 15 Ves. 248.

5. Condition to claim within a specified time.

1. Testator gives 500*l.* without any interest in trust for A. provided the same should be claimed within five years after his death. But in case the same should not be claimed within five years, then he gave the same without interest as aforesaid to B. Not being claimed by A. within the time prescribed, this legacy was held payable to B. with interest from the expiration of the five years. *Careless v. Careless*, 1 Mer. 384.

2. Devise to R., subject to the payment of legacies of 200*l.* each to the testator's three nephews, to be paid as soon as the legatees should arrive in England, or claim the same; provided they should arrive or claim within three years; if two only should arrive or claim within the time aforesaid, each to have 250*l.*; if only one, 400*l.*; the remainder in either case to fall into the residue of his estate; and if neither should arrive or claim within the time aforesaid, then 500*l.* (part thereof,) to fall into the residue of his estate. Held, the condition not performed by one of the legatees arriving in England, and making his claim after the time specified, although ignorant, till then, of the will, or of the testator's death, and no advertisement for legatees. *Burgess v. Robinson*, 3 Mer. 7. — The 500*l.* having been invested in stock in pursuance of an order made on the application of the defendant, the trustee, the plaintiff, who was entitled thereto, not having appeared or consented to such investment; held, nevertheless, an appropriation, and the plaintiff entitled to the stock and all benefit accrued from the rise thereof. 3 Mer. 9.

6. Proof of a life, through a specified medium.

Legacy, reciting the probability that the legatee was not living, upon express condition that he shall return to England, and personally claim of the executrix, or in the church porch; if he shall not so claim within seven years,

years, to be presumed dead, and the legacy to fall into the residue. — The legatee not having returned, and dying abroad within seven years, the legacy was held not due; the existence of the legatee, though appearing otherwise, being to be proved by the particular means described, and therefore not within the cases from the civil law, where the end being obtained, the means were not essential. *Fulk v Houlditch*, 1 Ves. & Beam. 248.

7. The condition of “notifying to executors a willingness to release claims,” how broken.

Legacy from B. to A. on condition that he notified to his executors his willingness to release his claims. Held, that he had forfeited his right to it, by filing a bill for redeeming a mortgage. *Vernon v. Bethell*, 2 Eden, 110.

8. Condition for maintenance.

Testator gave his wife 400*l.* a-year in addition to 500*l.* a-year under her settlement, in consideration of the expence and care she would incur in the maintenance of their children; she must maintain them, when at home; but is not to be charged with education, or maintenance at school. *Collier v. Collier*, 3 Ves. 33.

9. Condition for payment of debts.

Devise upon trust by mortgage, or out of the rents and profits to pay debts, and afterwards to raise portions for the testator's daughter, such portions to become due and be considered as vested at the expiration of two years next after my decease if my debts shall be then paid. This is a condition precedent to the portions becoming vested, and one of the daughters having died while her portion remained unpaid, upon a question between her representatives and the persons who would be entitled in the event of the portion not having become vested in her lifetime, an inquiry was directed as to the time when the debts were or might have been paid. *Bernard v. Montague*, 1 Mer. 422.

10. The condition of being put out an apprentice.

Legacy for the board and education of an infant, until he shall be fit to be put out apprentice, and then a farther sum with him as an apprentice fee: the infant having attained nineteen, and not having been put out, was held entitled to the legacy. *Barton v. Cooke*, 5 Ves. 461.

11. Bequest of money to be laid out in land.

Money bequeathed to A. to remain at interest, or to be by him laid out in real estates, to go with other estates devised. A. being tenant in tail of the real estate, and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will. The court inclined in favour of the disposition, upon the ground that A. might have called for the money as absolute owner; but it was established upon the option to continue it personal estate. *Amler v. Amler*, 3 Ves. 583.

12. Legacy to C. held contingent on A.'s surviving B.

Legacy to A. if he be living, and in case of his death before B., to C., is contingent, viz. if A. survives B. *Hodges v. Peacock*, 3 Ves. 735.

13. A legacy upon an express contingency, which never happened, failed, notwithstanding the apparent intention in favour of the legatee.

A legacy upon an express contingency, which never happened, failed, notwithstanding the apparent intention in favour of the legatee. *Holmes v. Cradock*, 3 Ves. 317.

14. The case of a condition broken by taking the benefit of an insolvent act.

Bequest of an annuity, with condition to fall into the residue, upon signing an

an instrument, agreeing to sell, assign, charge or dispose of, or empower any person to receive, &c. in the most comprehensive terms. The condition broken by taking the benefit of an insolvent act. *Shee v. Hale*, 13 Ves. 404.

15. In relation to the case where the condition becomes impossible by the act of God.

Bequest of 30,000*l.* South Sea annuities to trustees in trust to pay the dividends to A. until an exchange of certain lands shall be made between him and B., and then the capital to be equally divided between them. B. dies before the time limited by the will for making the exchange expires. Held, that A. is absolutely entitled to the whole legacy. *Lowther v. Cavendish*, 1 Eden, 99.; *Amb.* 356.; 3 *Toml. P. C.* 186.

16. A limitation over upon the death of a party, in case he became entitled, which he never did.

Legacy in trust to pay the interest to the separate use of A. for life; and after her decease, as to the capital, for her children; if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons. Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established, as distinguished from the case of express condition. *Pearsall v. Simpson*, 15 Ves. 29.

17. "If D. should not be alive," not a condition.

Testatrix gave 1000*l.* to D., but if D. should not be alive, and there be certain intelligence thereof, the testator willed, that the same should be divided between A. and B. D. appeared to have been alive at the time of the will, but died in the lifetime of the testator. A. and B. are entitled to the 1000*l.* *Parry v. Boodle*, 1 *Cox*, 183.

18. A case of a contingency with a double aspect.

Testator gave the residue of his personal estate to trustees to the use of B. during his life, and to the lawful heirs of his body after his demise; but in case of his dying without issue of his body, *after his decease*, "I give all such residue to O." This creates a contingency with a double aspect, and in the event of B. leaving no child, the limitation to O. is good. *Trotter v. Oswald*, 1 *Cox*, 317.

19. A case where a legatee was held bound to keep down the interest of a mortgage only, not to pay renewal fines.

Testator gave his personal estate to his mother for life, remainder to his children, on condition that his mother should see the fines for renewal of a lease, and the interest of a mortgage, paid, and be consulted as to the manner of raising the fines, that she may give her approbation as she may think proper, she is only to keep down the interest. *Buckeridge v. Ingram*, 2 Ves. 652.

#### 20. Other cases.

1. Devise on condition of paying 500*l.* in six months, upon trust to pay the interest to the deviser's wife for life; and after her death, the principal, according to her appointment in writing, with witnesses, whether sole or married, provided she shall lease her dower within six months; and in case of her marriage without consent of the trustees, one moiety to go over: the wife, who took other interests under the will, died within the six months, not having married, nor released dower. The 500*l.* did not vest in her. *Croft v. Slee*, 4 Ves. 60.

2. Bequest to the testator's wife, if living at his decease, provided she continued his widow; but if she should die before his decease, or afterwards marry again, then and in either of such cases to his father, "if he shall be living

living at the time of my decease, or of such marriage as aforesaid; and in case he shall not be then living, I give and bequeath the same to my brother." The father survived the testator, but died before the marriage of the widow. Upon her marriage the brother entitled. *Pyle v. Price*, 6 Ves. 779.

3. Legacy held, upon the wording of the will, to be conditional, and the condition not being performed, the legatee not entitled to the legacy. *Pink v. De Thuissey*, 2 Mad. 157.

#### XIV. Construction — what words create an alternative.

To use the furniture of a house, or accept a bequest to purchase furniture.

The testator having given his wife the option to occupy his house at a certain rent, and if she should choose to do so, declared she should have the use of the furniture; by codicil, revoking the bequest of an annuity to her, gave her a legacy to provide furniture, in case she should not choose to occupy his house, or for any other purpose she should think proper. She occupied the house and furniture till her death; and her executor was held entitled to the legacy. *Isherwood v. Payne*, 5 Ves. 677.

#### XV. Construction — what words create a vested, what a contingent, interest.

The case of a vested bequest, transmissible to children.

Legacy of the residue, the interest to be paid to testator's sisters for life; in case any of them should die leaving issue, to transfer the principal of her share to her children at twenty-one; one of the sisters died in the life of the testator; her children are entitled. *Reeder v. Ower*, 3 B. C. C. 340.

#### XVI. Within what period a bequest of personalty must vest.

##### 1. Examples of void limitations.

1. Bequest of the residue to his daughter and her issue, and for want of such issue, over; the limitation over too remote, and therefore void. *Salkeld v. Vernon*, 1 Eden, 64.

2. Bequest of 100*l.* to A. to be improved till he should attain the age of twenty-one, and in case he should die before twenty-one, or afterwards without issue, then the money to be equally divided between the testator's son and daughter. The limitation over is too remote. *Gray v. Shawne*, 1 Eden, 153.

3. Bequest of money to A. upon condition, that he should pay an annuity to B., and in case B. should die without issue, then to be equally divided amongst such of the testatrix's relations which should at that time be living. The bequest over is too remote. *Destouches v. Walker*, 2 Eden, 261.

4. Bequest of personal estate to A. during his life, and if he has no heirs, then over. The bequest is void, as too remote. *Bodens v. Lord Galway*, 2 Eden, 297.; *Amb.* 478.

5. Devise to A. and the lawful heirs of his body, if he shall have any; if he shall die without, certain sums over: this is too remote. *Attorney-general v. Hird*, 1 B. C. C. 170.

6. Bequest that a legacy shall pertain to B. after the death of A. without lawful issue, too remote, and vests absolutely in A. *Glover v. Strethoff*, 2 B. C. C. 33.

7. Interest of residue of personal given by will, to a woman for life; then the residue to her nieces; if they die without issue over; the last limitation over is too remote; and on death of the aunt, the nieces take the whole. *Everest v. Gell*, 1 Ves. 286.

##### 8. Bequest



8. Bequest of personal estate, after a contingent limitation in tail, which did not take effect, established. *Phipps v. Lord Mulgrave*, 3 Ves. 613.

9. Residue of personal estate bequeathed to children of the testator's two daughters, their executors, &c. with a limitation over, in case both his said daughters should die without issue, a vested interest in the grandchildren, and the limitation over is too remote. *Rawlins v. Goldfrap*, 5 Ves. 440.

10. Bequest of personal property to A. for life, and after her decease to her children, when at the age of twenty-seven respectively; and in the event of her not leaving any child or children, or of the death of all under the age of twenty-seven, over. The limitation over too remote. 8 Ves. 24.

11. Devise and bequest to A. and the heirs of his body, with a limitation over, if he has no such heirs. An estate tail in the real estate, an absolute interest in the personal, the limitation over being void. But thus expressed, "if he leaves no such heirs," it would be good, as confined to the time of the death, and not after an indefinite failure of issue, according to the distinction in *Forth v. Chapman*. *Crooke v. De Vandes*, 9 Ves. 197.

12. As to the effect of a direction by will, that personal property shall go with a settled estate, as far as the rules of law and equity will permit, *quære*. 11 Ves. 280.

13. Devise for life, and in default of issue, to another for life; and in default of his issue, remainder over: the limitation over void, as to the personal property, either as too remote, or an estate by implication. 17 Ves. 484.

14. A limitation by will of personal estate, after the death of N. S. without lawful issue, is too remote and void. *Jeffery v. Sprigge*, 1 Cox, 62.

15. Testator gave 1000*l.* to M. and the issue of her body, and in default of such issue, he gave the said 1000*l.* to be equally divided between the daughters then living of I. and E. his wife. This devise takes in daughters of I. and E. born after the testator's death, and therefore the limitation is too remote. *Jee v. Audley*, 1 Cox, 324.

16. Devise of an estate, charged with two legacies to A. and B., and in case A. or B. die without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, &c. Held, that the legacy lapsed, the contingency on which it was given over, being too remote. *Massey v. Hudson*, 2 Mer. 130. *Quære*, if it had been to the survivor only, and not to his executors, &c. in which case it seems that the survivor might have taken, as a personal benefit, the failure of issue being construed to be restricted to a dying without issue in his lifetime; *quære*, also, if the limitation over had been immediate on the death; in which case it seems that it would have vested in the survivor, and not have lapsed by the death of A. in testator's lifetime. *Ibid*.

17. Bequest of personalty to A. for life, and after A.'s decease to the heirs male of A.'s body lawfully begotten, for ever; and for want of such issue, to B. for life, &c. A. takes the absolute interest, and the bequest over to B. is void. *Tothill v. Pitt*, 1 Mad. 488.

## 2. Examples of valid limitations.

Bequest to the testator's two natural sons, with survivorship upon the death of either before twenty-one, and without issue; but in the event of both dying without issue, over; the interest beyond maintenance to be added yearly to the principal, for their benefit, to be paid when they attain twenty-one. The limitation over upon the death of both, established. As to the accumulation, a vested interest, and the payment only postponed. *Kirkpatrick v. Kilpatrick*, 13 Ves. 476.

## XVII. Construction — with reference to trusts of accumulation.

### Miscellaneous.

Devise of personal, and of rents and profits of real, in trust to accumulate, and

and be laid out in land, to be conveyed with the real to the youngest or only son of the trustee at twenty-one; held a vested interest by executory devise in an only surviving son, and not to wait till the death of the father; but liable to be divested by birth of another son. The trustee survived his son several years, and received the rents and profits till his death, but never laid them out in land, as directed: those accrued after the son made his will, held to be an equitable interest in land, and therefore to pass by it. *Perry v. Phillips*, 1 Ves. 251.

### XVIII. *Construction — what words create a limitation over.*

A case where the subsequent words were held not to control a previous limitation over, which therefore was too remote.

Bequest of money to testator's wife, and the issue of her body, and failing such issue, to such of his heirs whom she should appoint by written will. Held, that the subsequent words did not control the previous limitation, and therefore that a bequest over of the money was void, as being too remote. *Howatson v. Ives*, 2 Eden, 216.

### XIX. *Construction — in relation to money to be laid out in land.*

#### 1. Where it shall be laid out.

1. Whether a bequest to be laid out in land in a particular parish, shall, if land cannot be procured there, be laid out elsewhere, *quære*. 10 Ves. 610.

2. Bequest to be laid out in land, pointing to a particular estate: if that fails, it may be laid out in other land; the particular direction being only the mode of executing the primary intention for a purchase. 10 Ves. 618.

#### 2. How it shall be settled.

Money given to be laid out in land for a place of retirement for testator's sister, "to be for ever entailed on her issue." The husband of one of the daughters of the sister entitled to a third as tenant by curtesy. *Dodson v. Hay*, 3 B. C. C. 404.

#### 3. Whether it shall pass as real or personal.

Vide 1 B. C. C. 223.

### XX. *Construction — in relation to intestacy.*

#### 1. A sum directed to be disposed of according to any instructions testator might leave in writing; and none found.

Testator gave real estates to be sold, and the produce to be considered as part of his personal estate; and thereout and out of his personal estate gave legacies to his next of kin, heir, and others: he gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate, and to be disposed of in manner following: he then gave legacies, and some estates specifically, and other legacies out of his said trust-moneys and personal estate; and gave his executor 1000*l.* to be disposed of according to any instructions he might leave in writing, and gave all the residue of his goods and chattels, personal estate and effects whatsoever, subject to debts, legacies, &c. No instructions being found, the heir is entitled to the 1000*l.* *Collins v. Wakeman*, 2 Ves. 688.

#### 2. Property excepted as hereinafter disposed of to A., which it was not.

Plate excepted from bequest of personal to wife, after her decease over, and recited to be "hereinafter given to daughter," but not farther noticed; undisposed of. *Frederick v. Hall*, 1 Ves. 396.

## 3. From revoking the share of a residuary legatee.

Testator gives the residue of his personal estate to his three children, A., B., and C., share and share alike, as tenants in common, and not as joint tenants; but, by a codicil, revokes C. from being one of his residuary legatees, and gives her a pecuniary legacy instead. Held, that this third does not belong to the two other residuary legatees, but shall go according to the statute of distributions. *Creswell v. Cheslyn*, 2 Eden, 123.; 3 Toml. P. C. 246.

## 4. Miscellaneous cases.

1. Testator gave the interest of the four *per cent.* bank annuities then standing in his name, together with the interest of a certain sum of money then in the hands of his bankers, which he directed to be invested in the same stock, to his wife, with a power of disposing of one-third of the said property after her decease. "And," as to the rest and residue of his estate, after "payment of the said bequest to his wife; viz. two-thirds of the property he should die possessed of, he gave the same as follows: first, to the children of A. 60*l.* of the four *per cents.* consolidated bank annuities. Also, to the eldest of such children 30*l.* per annum for life, and to his lawful heir, payable out of interest." He then made a similar bequest in favour of the children of B., and he appointed his said wife and C. to be executors of his will; and he declared his intention, "that if the residue of his said property, after payment of the children of B., was not sufficient to pay the specified annuities of 30*l.*, the residue should be equally divided as above specified." The money in the hands of the bankers having been invested in the four *per cents.*, the whole of that sum was 5306*l.* Under these circumstances, it was decided, 1. That the children of A. and B. *respectively* were entitled only to 60*l.* stock, and that the residue of the fund, after satisfying the two sums of 60*l.* and the two annuities of 30*l.* was undisposed of. 2. That the testator having by his will professed to dispose of the *whole* of the property, although (according to the aforesaid construction) he had *not in fact* done so, yet this was not sufficient to exclude the executors from taking *beneficially* as such. 3. That the interest given to the wife in one-third of the residue did not prevent her taking her share of the remaining two-thirds under the statute of distributions. *Oldham v. Carleton*, 2 Cox, 400.

2. A testator gave the residue of his personal estate to trustees, in trust for his daughters A. and B. equally for their lives for their separate use, and afterwards for their children; and in case of the death of either of them, without leaving any issue who should become entitled to her share, upon trust to pay or transfer 500*l.* bank annuities, part of such moiety to C., and the interest of the last-mentioned moiety to be paid for the separate use of the survivor of A. and B. during her life, in the same manner as her original moiety, and after the death of the survivor of A. and B. the remainder of the moiety of the one first dying without issue, and the original moiety of the survivor to be in trust for the children of the survivor, in the same manner as their original moiety; and after the death of the survivor of A. and B. without leaving issue, who should become entitled, he bequeathed one equal half-part of all the residue of the said trust-moneys to D. absolutely, and the other equal half-part thereof to C. — The name of C. was afterwards struck out by the testator. — B. died without issue. — Held, that the 500*l.* bank annuities was undisposed of, and belonged to the testator's next of kin. *Skrymsher v. Northcote*, 1 W. C. C. 248.

## XXI. Construction — in relation to the residue.

1. Residuary clause passes all personalty that is not disposed of.

Residuary clause passes all personal property that is not disposed of, as  
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by lapse, contended upon the particular expressions to have been separated, and not intended to pass with the residue. *Cambridge v. Rous*, 8 Ves. 12.

2. The general residue of personalty comprehends every thing not otherwise effectually disposed of.

The general residue of personal property comprehends every thing not otherwise effectually disposed of, and no difference whether a legacy falls into it by lapse, or as void at law; the next of kin therefore excluded by an express bequest of the residue. 15 Ves. 416.

3. Whatever is not well given by the will, falls into the residue.

With regard to personal estate, whatever is not well given by the will, falls into the residue. It is immaterial how it happens that any part is undisposed of, whether by the death of a legatee, or by the remoteness and consequent illegality of the bequest. 2 Mer. 392.

4. Under residuary bequest to legatees in proportion to their legacies, all, even of rings, entitled.

Under a residuary bequest to the legatees in proportion to their legacies, all legatees, pecuniary and specific, even of rings, &c. not expressly, or by implication excluded, were held entitled; so annuitants, if they had not been excluded upon the construction of the whole will. *Nannock v. Horton*, 7 Ves. 391.

5. Relations took shares in the residue, notwithstanding specific bequests by codicil.

Testator gave a residue to relations named in his will: he made a codicil which he directed to be taken as part of his will; and a second, by which he gave legacies, but gave no such direction; in this codicil there were legacies given to two of his relations; they shall take shares of the residue. *Sherer v. Bishop*, 4 B. C. C. 55.

6. Where no direction is given as to surplus interest, and the capital is made payable at a future time, the surplus interest falls into the residue.

Where no direction is given as to surplus interest, and the capital is made payable at a future time, the surplus interest falls into the residue. *Leake v. Robinson*, 2 Mer. 384.

7. A particular fund held part of the residue.

Legacy of a particular fund to A. for life, then to testator's residuary legatees; residue to B. and C. as tenants in common, the particular fund is part of the residue. *Pitt v. Benyon*, 1 B. C. C. 589.

8. What bequest shall be residuary.

Bequest of "all other unbequeathed goods and chattels" is residuary, notwithstanding a subsequent bequest to the same person of debts due to the testator. *Bennet v. Batchelor*, 1 Ves. 63.

9. Construction of a residuary disposition, as embracing the general, and not limited to a special residue.

Construction of a residuary disposition, as embracing the general, and not limited to a special residue. *Crooke v. De Vandes*, 9 Ves. 197.

10. Whether a mere residuary bequest amounts to a disposition of the legacy.

Whether a mere residuary bequest amounts to a disposition of the legacy, *quære*. But where the testator declares, that, on the happening of the condition,

condition, the legacy shall fall into the residue, this is an express disposition. *Lloyd v. Branton*, 3 Mer. 117.

11. Construction of a residuary clause, as comprehending a legacy given upon a contingency, which did not happen.

Construction of a residuary clause, as comprehending a legacy given upon a contingency, which did not happen. *Bird v. Le Fevre*, 15 Ves. 589.

12. Words in a residuary clause held referable to a contingency.

Construction of words in a residuary clause, as having reference to a contingency, which had not taken place, and therefore no restriction on a preceding absolute bequest. *Forbes v. Ball*, 3 Mer. 437.

13. Legacy of a specific sum, as a residue, but miscalculated; the residue being larger, shall pass.

Legacy of a specific sum, as a residue, but miscalculated; the residue being larger, shall pass. *Danvers v. Manning*, 2 B. C. C. 18.

14. What not included in an exception out of a residuary bequest.

Testator gave all the residue of his personal estate to his wife, except such parts as should be in and about his house; which parts he gave to his son, and directed the household furniture to go as heir-looms; and gave all arrears of rent which should be due to him at his death, to his son. A bond to secure an old arrear of rent, and cash, both found in an iron chest, in which the steward kept the cash arising from the rents, belong to the residuary legatee. *Jones v. Lord Sefton*, 4 Ves. 166.

15. Amount of the shares of the residuary legatees, in a miscellaneous case.

Testatrix directed all her estate to be turned into cash; if amounting to 20,000*l.* to go thus; if less, in similar proportions: then subject to some legacies, debts, &c. the residue of her estate in sixteenths, two to her mother for life, the others to different persons absolutely: she then made three residuary legatees: the shares given are only of the 20,000*l.*, subject to the charges; all beyond that goes to the residuary legatees. *Green v. Scott*, 1 Ves. 282.

#### 16. Miscellaneous cases.

Gift of residue, "to be divided among legatees in proportion to the legacies bequeathed by this my will," restricted upon construction of the whole will, to general pecuniary legatees, in exclusion of legacies payable out of a specific fund *in futuro*, and of legacies given by codicil. *Henwood v. Overend*, 1 Mer. 23.

#### 17. "Specifically" construed "particularly."

General residuary disposition of real and personal estate "not hereinbefore specifically disposed of," held to comprehend specific legacies lapsed: the word "specifically" being construed "particularly." *Roberts v. Cook*, 16 Ves. 451.

#### 18. With reference to conversion.

A legacy out of the produce of a copyhold estate, directed to be sold, failing, was held to pass by the residuary clause against the heir, the object being a general conversion out and out. *Kennel v. Abbott*, 4 Ves. 802.

#### 19. Whether the executor or the next of kin shall take.

The residue declared to belong to the next of kin. *Wilson v. Wombwell*, *Dick*. 477.

## XXII. Construction — miscellaneous cases.

1. Legatee held entitled to the produce of securities bequeathed, concerted in testator's lifetime.

Mortgages and other securities being devised to Pembroke Hall, Cambridge, some of which had been called in by the testator, and others paid voluntarily, and laid out by the testator; the money so called in and paid, declared to belong to the college, with interest, from one year from the testator's death, at *4l. per cent.* *Attorney-general v. Parkin*, Dick. 422.

2. Power to appoint the whole fund to the survivor of children.

Devise of personal for life, then among all children of devisee, in such shares and manner, for such interest, with such survivorship, and to vest at such time as devisee for life should by deed or will appoint; in default of appointment of the whole or part, equally; if but one, to that one, payable at twenty-one; nevertheless the shares of any attaining twenty-one in life of devisee for life to be vested; but payment to be postponed till her death; that clause vesting an interest at twenty-one held to relate only to the case of default of appointment; and one of two children being dead without issue after twenty-one, and without receiving any share, that circumstance will not prevent an appointment of the whole fund to the survivor. *Boyle v. Bishop of Peterborough*, 1 Ves. 299.

3. Power to exclude from a partnership.

Testator, after giving life-interests in stock to each of his daughters, afterwards the principal among his grandchildren, in pursuance of a power in articles of partnership, appointed his executors to carry on the trade in his room, with power to dissolve, or nominate any other person; and gave them his share of the capital, and all freehold and leasehold, in trust to carry on the trade as long as they should think fit; and after expiration of partnership to sell the estates, and with the produce and profits of the trade, and all the rest of his estates, form a fund to accumulate twelve years; then among the grandchildren living; by codicil he substituted his partner, who was his son-in-law, in the room of one executor removed; and desired, that if his executors should continue trade, and his grandsons T. and J. should attain twenty-one, his executors would nominate each a partner for a quarter, when executors should think fit, with legacies at the same time, to sink into the estate, if they should decline the partnership, or die before twenty-one; executors to advance any farther sum they might want to carry on trade; the rest of his property among all the grandchildren except T. and J. By another codicil he left it entirely in discretion of the executors to appoint J. or not; if they should not think proper, his legacy to be void; T. and J. both entitled to be partners, and to their legacies at twenty-one, one executor, their father, being for admitting them, the other two against it; but if all had without fraud, united in declaring J. unfit, they might have excluded him; in which case he could have taken nothing under his devise. *Wainwright v. Waterman*, 1 Ves. 311.

4. A deed of appointment held sufficient indication of intention that property should continue personal.

Testator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estate; the money not having been laid out, the crown, on failure of heirs, has no equity against next of kin to have it laid out in real estate in order to claim by escheat; the devisees on becoming absolutely entitled have the option given by the will; and a deed of appointment by one, a feme covert, was held sufficient indication of her intention that it should continue personal,

sonal, against her heir claiming it, as ineffectually disposed of for want of her examination. *Walker v. Denne*, 2 Ves. 170.

5. A case where a residence at L. beyond a year was held not to entitle to the continuance of a weekly payment.

Testator directed that his wife should have liberty to occupy his house for a year, provided she continues so long in L.; then, by a distinct clause, he directed his executors to pay her a guinea a week during her stay at L.; her residence there beyond the year does not entitle her to a continuation of the weekly payment. *Walker v. Watts*, 3 Ves. 132.

6. Bequest for the improvement of the city of Bath.

Bequest for the improvement of the city of Bath, construed to mean improvement carrying on under an act of parliament, not by private persons. *Howse v. Chapman*, 4 Ves. 542.

7. A bequest construed as a direction to lay out the money in an annuity.

Bequest of a sum of money, in trust to lay it out, upon government or other securities, in the purchase of an annuity for life. Held, a direction to lay it out in an annuity for life; the will making several dispositions of stock, both as to the dividends and the capital. *Bayley v. Bishop*, 9 Ves. 6.

8. Annuities "in the order they are now mentioned."

Annuity, part out of the general assets, part specific, upon the intention, out of funds, some perpetual, others temporary, to be divided equally between A., B., and C., and their heirs, or the survivor of them, "in the order they are now mentioned." A perpetual annuity, limited only with reference to the temporary funds.

#### 9. Charitable bequest.

Trust, by will, to pay the income to the testator's wife for life; enjoining her to co-operate with his trustees in carrying his wishes into execution; and directing her, with the advice and assistance of his trustees, to lay out one moiety in promoting charitable purposes, as well of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as his wife shall judge most worthy and deserving objects, giving a preference always to poor relations. The object is charity in general, with a preference, but not confined to poor relations; the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the control, of the trustees. *Waldo v. Caley*, 16 Ves. 206.

10. Annual sum not confined to the minority of legatee.

Bequest of an annual sum to be raised "for the support of the children of J. H. to be paid them from time to time, as their necessities require without regard to their father or mother." This cannot be confined to the minority of the children. *Alexander v. McCulloch*, 1 Cox, 391.

#### 11. Release.

It is not a good plea to a bill filed by one residuary legatee (to whom with others, the debts due from a concern in which the testator had been a partner with one of his legatees, had been bequeathed) against the others, for an account of monies due from the partnership to the testator, charging the defendant with owing the concern various sums of money, having possession of the partnership books; that all the monies due from the partnership to the testator at the time of his death, consisted wholly of money lent by him to

to the defendant; and that (as the fact was) the testator had, by his will, forgiven and released the defendant from all monies lent and advanced by him during his lifetime, the release by the devise being treated as referring to specific sums advanced independently of the partnership debts. *Hanson v. Hanson*, 4 Price, 168.

## 12. Property held subject to the uses of a settlement.

J. B., tenant for life, remainder to W. B. for life, remainder to J. B. in fee. During the life of J. B., houses on the estate insured by him, were burnt-down, and insurance money paid to J. B., which was placed in the funds in his name. J. B. by his will, devised the estate to R. S. W. in fee, and his personal estate to W. B. W. B. applied part of the insurance money in repairing a house upon the estate. The insurance money unapplied, remained standing in J. B.'s name. W. B. by his will, stated the circumstances as to the fund so standing in his brother's name, and bequeathed the residue of his personal property. Held, that the insurance money unapplied, was subject to the uses of the settlement, and passed to R. S. W., the devisee of J. B. *Norris v. Harrison*, 2 Mad. 268.

## 13. A bequest for the poor of a parish, held not within the meaning of a local act.

Bequest of money to trustees to pay the interest and dividend to the poor of a certain parish. Held, not within the meaning of a local act of parliament, which vested all estates and monies held in trust for the benefit of the poor of the parish, and not otherwise specifically appropriated, in the guardians of the poor in that parish. *Attorney-general v. Freeman*, 1 Dan. 117.

## 14. Bequest of the debt, which shall be owing on a particular day, taken as it stood on that day.

Bequest of the debt, which shall be owing on a particular day, taken as it stood on that day; and not affected by consignments from the West Indies, on account, since the death of the testator, which happened previous to the day specified. *Innis v. Mitchell*, 6 Ves. 461.

## 15. The income only, not the capital, held disposed of.

Construction of an obscure will: 1st, That the income only, not the capital, was disposed of; 2dly, That the disposition was in favour of the younger children excluding the eldest. *Sansbury v. Read*, 12 Ves. 75.

## 16. The disposition — held to be in favour of the younger children, excluding the eldest.

*Ibid.*

## 17. Other cases.

1. Testatrix by codicil gave to A. the legacy given by her will to the children of B. "as I know not whether any of them are alive, and if they are well provided for:" though they are living, B. is entitled; the construction being, that if they are living they are well provided for. *Attorney-general v. Ward*, 3 Ves. 327.

2. *Carey v. Askew*, 1 Cox, 241.

3. *Collet v. Lawrence*, 1 Ves. 268.

4. *Ellis v. Ellis*, 1 S. & L. 2.

5. *Fordyce v. Ford*, 2 Ves. 536.

6. *Holloway v. Holloway*, 5 Ves. 399.

7. *Jennings v. Gallimore*, 3 Ves. 147.

8. *Duke of Manchester v. Bonham*, 3 Ves. 61.

9. *Middleton v. Messenger*, 5 Ves. 136.

10. *Norris v. Harrison*, 2 Mad. 268.

11. *Oldham v. Carleton*, 2 Cox, 400.

12. *Penn v. Barclay*, 14 Ves. 122.

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13. *Rose*



13. *Rose v. Rose*, 17 Ves. 347.
14. *Saville v. Lord Scarborough*, 1 W. C. C. 239.
15. *Sisson v. Shaw*, 9 Ves. 285.
16. *Smith v. Fitzgerald*, 3 Ves. & Beam. 2.
17. *Stebbing v. Walkey*, 1 Cox, 250.
18. *Wadley v. North*, 3 Ves. 364.

### XXIII. Of the survivorship of accrued shares.

*Vandergucht v. Blake*, 2 Ves. 534.

### XXIV. Of specific and pecuniary legacies.

#### 1. The leaning of the court is against specific legacies.

1. The inclination of the court is against specific legacies. The construction must be upon the face of the will, before the account of the effects is considered, to see whether that affords a foundation. 4 Ves. 568.

2. Leaning against specific legacies. Unless specific, interest only from the end of a year after the testator's death, notwithstanding a direction to pay as soon as possible. *Webster v. Hale*, 8 Ves. 410.

3. Bequest of the money due upon a note held specific, upon the intention; but the inclination of the court is against specific legacies, and to hold it a general legacy, with reference only to the security, as the fund first to be applied to it. *Chaworthy v. Beech*, 4 Ves. 555.

#### 2. What legacies are specific.

1. Residuary disposition of all the testator's real and personal estate in Jamaica, in trust, to be remitted to England, was held specific, and not to include a debt originally upon bond and judgment in Jamaica, and afterwards farther secured by bond and judgment in England, under which it was received, and being considered undisposed of, was applied in the first instance to the debts, &c. *Nisbett v. Murray*, 5 Ves. 149.

2. Testator reciting that he had about 7000*l.* navy bills, gave them to A.; he had at the time about the sum, but they were afterwards sold, and other navy and victualling bills bought; at his death he had 3400*l.* navy bills, but a large quantity of victualling bills, which are considered as the same in the market: this is a specific legacy, and only the navy bills which he had at his death, can pass. *Pitt v. Lord Camelford*, 3 B. C. C. 160.

3. Bequest of stock: if the testator has it at the time, it is specific; and any act destroying it proves an intention to revoke. If a ring or a picture bequeathed cannot be found, that cannot be rectified. 3 Ves. 310.

4. Testatrix gave nine legacies of 1000*l.* each, part of 14,500*l.* South Sea annuities; and as to the residue of the said fund and all other her personal estate, including such of the said legacies as should lapse by death, before they should be transferrable, upon trust to convert into money such part of her residuary personal estate as shall not consist of South Sea annuities, and invest such money with any money belonging to her at her decease in said fund of South Sea annuities, and from time to time invest the dividends, &c. of all such South Sea annuities as shall constitute her residuary personal estate in the same fund, till the youngest of said legatees shall, or would, if living, have attained twenty-one, and then to transfer the whole of such South Sea annuities to said nine legatees equally, with such survivorship as their original shares. The nine legacies of 1000*l.* each only are specific; the remainder of the South Sea annuities is part of the general personal estate. *Richardson v. Brown*, 4 Ves. 177.

5. Testator gave to his sister the interest of 300*l.* upon bond for life, and after her decease, to her daughter the interest due upon the said bond at her death, with the principal. The legacy is specific; and there being among other bonds, one of the exact amount, it was held to refer to that, though

though an insolvent security, and the interest in arrear before the death of the testator. *Innes v. Johnson*, 4 Ves. 568.

6. "Of my stock," or "in my stock," or "part of my stock," will make a legacy specific. *Ibid.* 750.

7. Legacies declared specific upon clear words, and an abatement of the general legacies directed. *Barton v. Cooke*, 5 Ves. 461.

8. Devise in trust to sell, but not for less than 10,000*l.*, and to pay several sums amounting to 7800*l.*, and the overplus monies arising from the sale, to A. A specific legacy of 10,000*l.*, and the sale producing less, A. and the others to abate. Legacies to charity void by the statute 9 Geo. 2. c. 36. fell into the general residue. *Page v. Leapingwell*, 18 Ves. 463.

9. Testatrix gives "to the minister, &c. of A. 5*l.* per annum bank long annuities; to the minister, &c. of B. 5*l.* per annum like bank annuities; to the treasurer of C. and D. 100*l.* long annuities stock, each; to the governors of E. 100*l.* long annuities stock; and 30*l.* per annum, further part of my bank long annuities," upon trust to apply the interest and dividends to and for the use of L. D. till she attains twenty-one, and then to transfer "the said 30*l.* per annum bank long annuities" to the said L. D. She then gives to W. C. 150*l.* bank long annuities stock, and 10*l.* per annum, "further part of my long annuities," in trust for H. G. By a codicil, reciting, "Whereas I may have made a wrong calculation of the value of my fortune in the funds at the time of my decease," she directs, that in case of deficiency, it may be deducted out of the residue, as she would have all her legacies paid to the full. The testatrix was, at the time of her death, possessed of only 385*l.* long annuities, and her personal estate was insufficient to pay her debts. Upon a question whether the treasurer of C. was entitled to a legacy of 100*l.* long annuities stock, or only to 100*l.* to be raised by the sale of stock to that amount; held, that it was a specific legacy of so much stock, and decreed accordingly. *Attorney-general v. Grote*, 9 Mer. 316.

### 3. What legacies are pecuniary.

1. Bank annuities directed by the will to be purchased out of personal estate, to be considered as pecuniary legacies. *Gibbons v. Hills*, Dick. 324.

2. Legacy of 3400*l.* in the three *per cents.* the dividends to be divided, &c. to an hospital, is pecuniary, not specific. *Bishop of Peterborough v. Mortlock*, 1 B. C. C. 565.

3. Legacies of South Sea annuities (though testator had more than sufficient of the stock to pay them), held pecuniary, not specific. *Simmons v. Vallance*, 4 B. C. C. 346.

4. Bequest to be paid out of a specific security which failed, held general upon the circumstances. *Roberts v. Pocock*, 4 Ves. 150.

5. Legacy of "1000*l.* out of my reduced bank annuities," held pecuniary; the court leaning against holding a legacy specific, unless clearly intended. The court would not take into consideration the evidence of the value of the stock at the date of the codicil by which the legacy was given, nor an erasure of a legacy to the same person by the will, but decided upon the words of the codicil. *Kirby v. Potter*, *Ibid.* 748.

6. Legacy general, notwithstanding an appropriation of part of the property. *Raymond v. Brodbelt*, 5 Ves. 199.

7. Bequest of personal estate not held specific merely from being combined with a devise of land. *Howe v. Earl of Dartmouth*, 7 Ves. 137.

8. After a legacy of stock in the 4*l.* *per cent.* consolidated bank annuities, a legacy to the same persons of "an additional sum of 2000*l.* more to be paid out of the 4*l.* *per cents.*" &c. was held pecuniary: as the *primâ facie* construction; which is to be controlled only by plain inference from the rest of the will upon solid and rational grounds; not by conjecture upon slight circumstances. *Deane v. Test*, 9 Ves. 146.

9. Legacy of "200*l.* 4*l.* *per cent.* consolidated bank annuities," not specific.

cific. The general assets therefore liable to make up the deficiency of the fund. *Wilson v. Brownsmith*, 9 Ves. 180.

10. Legacies to one younger child of "the sum of 12,000*l.* of my funded property to be transferred in his name, or employed as it shall appear most beneficial." To another, "the sum of 12,000*l.* in every respect the same." To a third, "the sum of 12,000*l.* to be enjoyed by him in every respect" as the former: the residue, real and personal, to the eldest son. The legacies to the younger children pecuniary, not specific: the fund, if deficient, to be equally divided among them. *Lambert v. Lambert*, 11 Ves. 607.

11. Legacy of 5000*l.* sterling, or 50,000 current rupees," afterwards described as "now vested in" the East India Company's bonds, and sometimes mentioned as "the said sum of 5000*l.* sterling," held not specific, but general; as a demonstrative legacy, with a fund pointed out; a construction to be favoured for a natural child, as giving a provision in all events: the will also giving one legacy clearly specific, viz. "the sum of 3348*l.*," which said sum is in two bills, described as then laying for acceptance. *Gillsuame v. Adderley*, 15 Ves. 384.

12. Legacy of 50*l.* for a ring, not specific; therefore carrying interest with other pecuniary legacies. *Apreece v. Apreece*, 1 Ves. & Beam. 364.

13. Upon the words of the will, legacy decreed, though the fund out of which it was directed to be paid, failed. *Mann v. Copland*, 2 Mad. 223.

4. Legacy is ambulatory; but a specific bequest is fixed as much as a devise of land.

Legacy is ambulatory; but a specific bequest is fixed as much as a devise of land. 1 Ves. 260.

5. A specific legacy cannot in a subsequent part of the will be charged with payment of debts and legacies.

A specific legacy cannot, in a subsequent part of the will, be charged with payment of debts and legacies. 1 Sch. & Lef. 339.

6. Distinction between the specific bequest of a debt, and legacies out of it.

Distinction between the specific bequest of a debt, and legacies out of it. *Smith v. Fitzgerald*, 3 Ves. & Beam. 2.

## XXV. When legacies shall be accumulative; when not.

### 1. When they shall be accumulative.

1. Where legacies are given by different instruments (whether will or codicil, or two codicils) to the same persons, they will in general be accumulative. *Foy v. Foy*, 1 Cox, 163.

2. The same legacy given by different instruments, shall be cumulative. *Baillie v. Butterfield*, 1 Cox, 392.

3. Legacies to the same persons by different instruments, generally presumed additional, unless contrary intent appears; of which simple repetition, if exact, is sufficient proof. *Moggridge v. Thackwell*, 1 Ves. 464. 472.; 7 Ves. 36.

4. Legacies to the same persons by distinct instruments, accumulative; subject to be repelled by internal evidence; as where the same sum is given for the same cause; whether by the mere equality of amount, *quære*. *Benyon v. Benyon*, 17 Ves. 34.

5. Where a legacy is given in a will, and another in the codicil, to the same legatee, he shall take both. *Ridges v. Morrison*, 1 B. C. C. 271. S. P.; *Hooley v. Hatton*, 1 B. C. C. 390.

6. Where one of the legacies is in the will, and the other in the codicil, both shall pass. 1 B. C. C. 389.

7. A larger legacy given to the legatee in the same will, after a less, he shall take both. *Curry v. Pile*, 2 B. C. C. 225.

8. Double legacies, though of equal amount, with circumstances of difference, as in the times of payment of annuities, half yearly and quarterly, accumulative ; not, if exactly similar, though by different instruments. *Currie v. Pye*, 17 Ves. 462.

9. Where a testamentary instrument, incomplete as a will, appears on the face of it to be intended as a substitution for a former complete will ; the legacies given by the latter only, shall take effect, notwithstanding both instruments are proved in the spiritual court. But where a former will makes a charge of legacies, *generally* on land, and a subsequent will giving legacies, is not attested so as to affect the land ; yet the general charge of the former shall include the legacies given by the latter. Otherwise, where the charge is made of particular legacies. *Jackson v. Jackson*, 2 Cox, 35.

10. Where a larger legacy by a codicil, was held not to be a satisfaction of a legacy by the will. *Hooley v. Hutton*, Dick. 461.

11. Bill to be paid two legacies of 200*l.* each, *quære*, whether the last was in satisfaction of the first ; held, that it was not. *Stevens v. Vaughan*, Dick. 572.

12. Testator gives to his executor an annuity of 200*l.* charged on his real estate, and payable at certain specified periods. By a codicil, attested by two witnesses only, he gives him another annuity of 100*l.* "payable as mentioned in his will." Held, that the executor was entitled to both, the latter annuity being payable out of his personal estate. *Wright v. Lord Cadogan*, 2 Eden, 239. ; *Amb.* 468. ; 1 Toml. P. C. 486.

13. The testator, by his will, provided a maintenance for his second son, out of the real estate ; he then gives large legacies to his younger children, with maintenances : the second son is entitled to both the maintenances. *Clive v. Walsh*, 1 B. C. C. 146.

14. Bond to pay an annuity till a legacy recited to have been bequeathed by the last will of obligor to obligee, should be paid ; by a previous will he had given a legacy, but that was revoked by a subsequent will, and a less legacy given, payable six months after testator's death, "over and above the annuity which I have secured to him for his life," the annuity and bond were assigned by the obligee "as some provision for his mother, to be received by her during the life of the obligor, as fully and beneficially as it could have been by the obligee ;" the bond and assignment were put into the possession of the testator, and continued so till his death ; the legatee is entitled to the legacy with interest, if not paid at the time ; and also to the annuity for his life, in trust for his mother. *Crosbie v. Murray*, 1 Ves. 555.

15. Legacy by will, the same sum given by codicil to the same person upon a contingency, was held additional. *Hodges v. Peacock*, 3 Ves. 735.

16. Double legacies by two instruments upon the intention. 5 Ves. 382.

## 2. When not.

1. Small circumstances will raise an inference against double legacies. 5 Ves. 384.

2. Two legacies of equal sums being given to the same legatee, and in the same will, the legatee shall take one only. *Garth v. Meyrick*, 1 B. C. C. 30.

3. Where a second codicil is a mere repetition of a former (with the addition of a single legacy,) the legacies are not doubled. *Coote v. Boyd*, 1 B. C. C. 521.

4. There being several codicils to a will, some of which were bare repetitions of former ones ; these were declared to be mere substitutions, and the legatee entitled only to take under the one. *Campbell v. Radnor*, 1 B. C. C. 271.

5. A thousand pounds a year was given to the wife by will, in lieu of dower, but if she marry again, 100*l.* a year in lieu of all other benefits; she marries and elects her dower, she shall not have the 100*l.* a year. *Boynton v. Boynton*, 1 B. C. C. 445.

6. The rule, that legacies to the same persons by different instruments, shall be accumulative, repelled by internal evidence of an intended substitution. *Allen v. Callow*, 3 Ves. 289.

7. The rule, that legacies to the same persons by different instruments, shall be accumulative, repelled by internal evidence and the circumstance, that all the legatees by the first instrument, were legatees in the second, except those who were dead, or had quitted the testator's service. *Barclay v. Wainwright*, 3 Ves. 462.

8. Two annuities of equal amount in the same will, to the same person, held not accumulative. *Helford v. Wood*, 4 Ves. 76.

9. A claim of double legacies by two instruments, a will and a codicil, repelled by the internal evidence and circumstances. *Osborne v. the Duke of Leeds*, 5 Ves. 369.

10. If a testator by will, gives 2000*l.* a year, by way of jointure, to any woman he might marry, and after marriage by codicil gives his wife the same jointure, she cannot claim both. 5 Ves. 382.

#### XXVI. What shall be an ademption of a legacy; what not.

##### 1. What shall be.

1. Legacy given out of a debt, which is afterwards paid to testatrix, adeemed. *Badrick v. Stevens*, 3 B. C. C. 431.

2. A bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest, or the debt bequeathed generally, *Stanley v. Potter*, 2 Cox, 180.

3. Variance in a provision made by a settlement and will may not amount to evidence of the satisfaction of a debt or covenant; but is always evidence of the satisfaction of a legacy, given as a provision. 1 Ball & Beatty, 304.

4. Where a father gives a sum to his daughter by will, and afterwards gives an equal sum as a portion, it is presumed to be an ademption. *Cookson v. Ellison*, 2 Cox, 220.

5. Parent, paying a portion, is presumed to mean to perform the gift of a legacy, unless there be sufficient evidence to repel the presumption. *Ellison v. Cookson*, 3 B. C. C. 61.

6. Gift by a brother standing in *loco parentis*, an ademption of a legacy in his will. *Monck v. Lord Monck*, 1 B. & B. 298.

7. Removal of goods (except in a case of necessity) will be an ademption of a gift of the goods by will. *Green v. Symonds*, 1 B. C. C. 129 n.

8. Two thousand pounds paid by the testator on the marriage of his daughter, with a covenant to pay 4000*l.* more on his death, an extinguishment of two legacies given by the will to his said daughter. *Clarke v. Burgoine*, Dick. 353.

9. Real estate devised to trustees to sell, and to pay the purchase money to particular persons, naming them. The testatrix afterwards sold the estate. Held to be an ademption of the specific devises. *Arnold v. Arnold*, Dick. 645.

10. Testator being indebted on a mortgage, and being possessed of 5000*l.* stock, by his will gave to A. and B. "all the stock he had in the three *per cents.*, being about 5000*l.*, except 500*l.* which he gave to C.;" and he devised other specific parts of his property to be sold, and the produce to be applied in discharge of the mortgage. Testator himself afterwards sold out 2000*l.*, part of the 5000*l.*, and paid off the mortgage with it. This adeemed the legacy *pro tanto*; and the specific legatees can have no relief from the funds

by

by the will appropriated for payment of the mortgage: and in this case A. and B. must bear the loss, and C. have her legacy entire. *Humphreys v. Humphreys*, 2 Cox, 184.

11. Specific legacy of money due on a note, received afterwards by the testatrix, and paid to a banker, with whom she had no other money; where, except 10*l.* which she drew out, it remained at her death. An ademption. *Fryer v. Morris*, 9 Ves. 360.

12. A description of a legacy from a father to his "then unmarried daughter" by a portion of equal amount afterwards advanced by him on her marriage; as equity will not, where there is contradictory evidence, reject the presumption arising from the will and marriage settlement and decide against the legal effect and operation that is to be attributed to them. *Dwyer v. Lysagat*, 2 B. & B. 156.

13. Testatrix gives 4000*l.* to trustees upon trust for his two daughters at twenty-one, and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue. By codicil, reciting this bequest, and that he is desirous of increasing the same to 5000*l.*, he revokes the gift of 4000*l.* and gives 5000*l.* upon the same trusts. By a second codicil, reciting the former, and that he is desirous of further increasing to 6000*l.*, he revokes the gift of 5000*l.*, and gives in lieu thereof 6000*l.* upon the same trusts. This is not a revocation, but substitution in each instance; and the 6000*l.* therefore is exempt from the legacy duty. *Cooper v. Day*, 3 Mer. 154.

2. What shall not be.

1. Legacies by one instrument not adeemed by a second, not relating to the first. 1 Ves. 473.

2. Where a legacy is of the value of securities, &c. though the specification be varied, the legacy is not adeemed. *Pulsford v. Hunter*, 3 B. C. C. 416.

3. Devise and legacy from an uncle to his niece, held not adeemed by an advance upon her marriage. *Brown v. Peck*, 1 Eden, 140.

4. Stock was, in contemplation of a marriage, vested in trustees for the separate use of the wife for life, and with full power for her to dispose of it by will. She made her will during coverture. She survived her husband, and afterwards took a transfer of the stock into her own name. This does not operate as a revocation of the will, or an ademption of the bequest of the stock. *Dingwell v. Askew*, 1 Cox, 427.

5. Testator gave the interest of a bill of exchange on the East India Company to his wife for life, and directed that after her death the bill should be sold, and the money divided among certain persons with survivorship in case of the death of any in her life. This bill, which constituted the bulk of the testator's property, was paid in his life: that was not an ademption of the legacy. *Coleman v. Coleman*, 2 Ves. 639.

6. Legacy of 1000*l.* not adeemed by transfer by testator of stock, into his and legatee's joint names. *Wetherley v. Dixon*, Cooper, 279.

7. E. D. by will, reciting, "that it was the wish of her mother and herself that the 500*l.* they had then out upon mortgage should be given S. A. G.;" and her family bequeaths the said 500*l.* with interest accordingly. The testatrix at the time of making her will, had a sum of 500*l.* out upon mortgage, which she afterwards called in, and applied to different purposes. The mother being dead the testatrix took out administration; and upon her death, without having altered or revoked her will, the question was, whether the legacy was adeemed; and held no ademption. *Le Grice v. Finch*, 3 Mer. 50.

3. A codicil, ratifying a will, does not set up an adeemed legacy.

Bequest over in case of the death of a legatee, before a certain period, takes effect on his death within that period during the testator's life. 1 Ves. & Beam. 388.

XXVII. ~~When~~ a legacy shall lapse; when not.

## 1. When it shall lapse.

1. Lapse by death of the legatee, in the life of the testator, though having survived the period at which the legacy was to vest, that event not being provided for. 1 Ves. & Beam. 389.

2. In order to prevent a legacy from lapsing by the legatee's death, it is necessary to substitute another legatee in his stead. 2 Cox, 120.

3. To prevent a lapse, the intention must be perfectly clear. 4 Ves. 435.

4. Money to be laid out in land, is considered as land; and the devisee dying in the life of testator, lapses. *Hutcheson v. Hammond*, 5 B. C. C. 128.

5. A legacy charged upon land to be purchased with the residue of a personal estate, will lapse by the death of the legatee before the day of payment, as if charged upon lands actually purchased. *Harrison v. Naylor*, 2 Cox, 247.

6. Legacy charged upon real estate, and payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment, and the assets cannot be marshalled. *Pearce v. Loman*, 3 Ves. 135.

7. A contingent legacy failed, the event which happened, not being provided for; and no necessary implication in favour of the legatee. *Parsons v. Parsons*, 5 Ves. 578.

8. Legacy to A., his executors, administrators, and assigns, shall not pass to the representative, A. being dead; and parol evidence to show the testator knew of A.'s death, and meant the legacy to be transmissible, refused. *Maybank v. Brooks*, 1 B. C. C. 84.

9. A. conveyed estates to trustees to sell and pay debts, afterwards to raise a fund and pay the interest of it to B. till marriage, then to pay her the principal, and to divide the residue among the plaintiffs: by will he created a charge for another daughter, residue to plaintiffs; B. dying unmarried, the sum given to her resulted to the testator, and passed by the gift of the residue. *Hewit v. Wright*, *Ibid.* 86.

10. Legacy to be paid from a farm, when A.'s son shall attain twenty-one; the farm not being carried on, the legacy falls, and shall not be paid out of the residue. *Mayott v. Mayott*, 2 B. C. C. 125.

11. J. T. bequeathed in these words: "I give to N. D. the sum of 400*l.*, which he owes me on mortgage of his estates in Shropshire; and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interests due thereon." N. D. had given the testator a bond, as a collateral security for the mortgage money. N. D. died before the testator. This is a lapsed legacy, and the executor of N. D. must pay the money. *Toplis v. Baker*, 2 Cox, 120.

12. Bequest to a son of the testator, on his accomplishing his apprenticeship, with the dividends in the mean time for maintenance; and in case he shall die, before he accomplishes his apprenticeship, then and in such case, to the other children. The legacy lapsed by the death of the legatee, having accomplished his apprenticeship, in the testator's life. *Humberstone v. Stanton*, 1 Ves. & Beam. 385.

## 2. When it shall not lapse.

1. Trust legacy cannot lapse by death of trustee. 1 Ves. 475.

2. A devise of lands in fee to B. after the death or marriage of the testator's widow, provided that B. pays 400*l.* to C. after the death or marriage of the widow. C. survives the testator, but dies in the lifetime of the widow; the legacy doth not sink. *Godwin v. Munday*, *Dick.* 551.

3. Testator, by his will, gave a legacy of 20,000*l.* to B., and by a deed-poll bearing even date with the will, declared that the said legacy was so given to B. upon the special trust and confidence, that so soon as B. should receive

receive the same, he should pay the same over to C. B. died in the lifetime of the testator. The deed-poll was not proved as a testamentary paper. This legacy did not lapse, but existed for the benefit of C. *Earl of Inchiquin v. French*, 1 Cox, 1.

### 3. Of the law of Scotland upon this subject.

By the law of Scotland, as well as of England, a legacy lapses by the death of the legatee in the testator's life. 17 Ves. 351.

## XXVIII. *When a legacy shall be void.*

A legacy to one falsely assuming a particular character.

If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the civil law is adopted, and the legacy fails. Therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described as such, but who at the time of the marriage ceremony with her had a wife living, the court, in respect of his conduct, held him not entitled; but inclined to think it would be otherwise, where, from circumstances not moving from the legatee himself, the description is inapplicable; as, where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect. *Kennell v. Abbott*, 4 Ves. 802.

## XXIX. *Of charging legacies upon the real estate.*

### 1. What words shall be sufficient to create a charge; what not.

This clause beginning a will, "first, I will and direct that all my legal debts, legacies, and funeral expences, shall be fully paid," is not sufficient alone to charge legacies on real estates specifically devised; for which the intent must be clear. *Kightley v. Kightley*, 2 Ves. 328.

### 2. Implication of a charge.

1. As to the difference between debts and legacies, in an implied charge on real estate by will, *quære*. 5 Ves. 362.

2. Charge of legacies, by implication, upon a fund arising from the accumulation of rents and profits, dividends, and interest. The other questions were not determined: first, whether the real estate was charged by implication from words which could be otherwise satisfied; and, if not, the will, directing an estate to be purchased and settled upon the testator's son, with remainders over, for which the testator afterwards contracted, and the purchase money having been paid out of the personal estate, under a power in the will for that purpose, the legatees, by marshalling, could have the benefit of the vendor's lien upon the estate for the purchase money. *Austen v. Halsey*, 6 Ves. 475.

### 3. Of the rule that land charged by attested will, is also charged by an unattested codicil.

The decisions that land charged with legacies by a will duly executed, is liable to legacies given by an unattested codicil, do not go upon a power reserved to the testator to increase the charge by a future act which cannot be, but upon analogy to the case of debts. The rule has not been extended to the case of a primary charge on land, but only to a charge in aid of personal, from the fluctuating nature of which it is necessarily uncertain. 2 Ves. 236.



## XXX. Of the payment and appropriation of legacies.

## 1. Time of payment in ordinary cases.

1. Legacy not distributable till a year after testator's death. 1 Ves. 408.

2. Contingent legacy out of real and personal estate, payable two years after the event; by codicil the testator reciting, that he found his estate would not bear that payment during the life of A., being chargeable with an annuity for her life, declared he revoked that part of his will; and that the said legacy, upon the same event, was to be paid twelve months next after the death of A., and not before. A. dying before the contingent event, the legacy is not payable till the expiration of two years after it. *Wordsworth v. Younger*, 3 Ves. 73.

3. The court will look at principles of convenience; as in the rule, that legacies shall be payable at the end of a year. 6 Ves. 539.

## 2. Time of payment, where legacies are given out of the residue.

*Quære*, where annuities are given out of a residue, and no time of payment is directed by the will, do the annuities commence before the end of one year from the testator's death? Where the time of payment is fixed by the will as in this case, the first quarter-day after the testator's death the payment must be as directed. *Storer v. Prestage*, 3 Mad. 167.

## 3. Time of payment, in the case of a residue bequeathed to children, payable at twenty-one.

Bequest of residue to all the children of A., the daughters' shares to be paid at twenty-one, the sons' at twenty-one, or to be sooner advanced with survivorship and interest for maintenance, it shall be divided when the eldest attains twenty-one, and among those then *in esse*. *Andrews v. Parkington*, 3 B. C. C. 401.

## 4. Time of payment, in the case of a defeasible legacy.

Legacy, on condition to be void in case the legatee should succeed in the event of the death of A. without issue of her body; payment decreed in the life of A., and without security. *Fawkes v. Gray*, 18 Ves. jun. 131.

## 5. Time of payment, of a legacy at a particular age, and one legatee attaining it.

Legacy of stock at a particular age. Order, upon the petition of one legatee having attained the age, for a transfer of his share to his attorney. *Hill v. Chapman*, 11 Ves. 239.

## 6. Time of payment, in miscellaneous cases.

1. Bequest of 3000*l.* on trust, to apply the dividends to the maintenance of A. until twenty-one, and afterwards to pay the whole dividends to him for life, with power to the trustees before his age of twenty-six to raise and pay, not exceeding 600*l.* towards or in order to his preferment or advancement in life, or his other occasions, as they should think proper. Upon a claim of the whole at the age of twenty-one as absolute property, inquiry directed as to circumstances, and whether they required the advancement of any and what part before he should attain twenty-six. 15 Ves. 527.

2. Testator authorised his executors, at any time before T. L. should attain the age of twenty-six years, to raise by sale of a sufficient part of certain bank annuities any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life, or other the occasion of T. L., as the said executors should think proper; and at the age of twenty-six, he gave the 600*l.* to T. L. absolutely. The executors declining to act, the court will not give this 600*l.* to T. L. before twenty-six, without referring it to the master to inquire, whether T. L.'s situation requires the 600*l.* or any part thereof, to be advanced. *Lewis v. Lewis*, 1 Cox, 162.

## 7. Of the mode of payment, where the legacy is bequeathed in a foreign coin.

Legacy in a foreign country and coin, as sicca rupees, by a will in India, if paid by a remittance in this country, the payment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance. So as to other countries. *Cockrell v. Barber*, 16 Ves. 461.

## 8. Of the mode of payment in miscellaneous cases.

1. If the testator direct the residue of his personal estate to be laid out in land, and settled to the use of daughters and their heirs, as tenants in common, with cross remainders, the residue shall not be divided, and laid out in separate purchases, though to be settled to the uses of the settlement. *Blunt v. Clitherow*, Dick. 292.

2. Devise of an annuity of 50*l.* to be purchased by executor, who, till the purchase, was to pay annuitant 40*l.* a year: executor, instead of purchasing, paid 50*l.* a year from testator's rents; annuitant entitled to 40*l.* the first year, and to 50*l.* a year afterwards; though the court might have charged executor with the over-payment from the estate; the master, on a general account, with just allowances, cannot. *Browne v. Spooner*, 1 Ves. 291.

## 9. Where a legacy is given over in default of claim.

Legacy to three persons, to be paid as soon as the legatees should arrive in England, or claim the same, provided they should arrive or claim the same within three years after the testator's death; and if they should not, part of the amount of the legacies to go over. The legatee over claiming the legacy, a reference was directed to the master, to inquire whether the three persons had arrived in England, or claimed the legacy, within the three years. *Burgess v. Robinson*, 1 Mad. 172.

## 10. The case of a defeasible legacy payable at a particular time.

When a period of payment is appointed, the subsequent failure, or breach even of an express condition annexed to a legacy, cannot affect the right to receive it. 1 Ves. & Beam. 138.

## 11. Out of what fund a legacy shall be payable.

1. Trust term in a will to raise out of real estate several sums; of which some were secured by the testator's bond and covenant; the intention being to give them as portions out of the land, not as debts or legacies, the personal estate is not applicable. *Reade v. Litchfield*, 3 Ves. 475.

2. Where there is a charge of legacies upon the real estate they shall be so charged, though they are first directed to be paid out of the residue of the personal estate, if the personal estate prove defective. *Minor v. Wickstead*, 3 B. C. C. 627.

3. Testator created a term for debts and legacies, and gave 1000*l.* to his niece, to be paid immediately after his decease, if she should be then married; if not, the interest of the said legacy to be paid her for life, to be calculated and paid to the day of her death or marriage; if she should die unmarried, the legacy to lapse for the benefit of the estate; and by codicil he gave her 200*l.* in addition to what he had given her by the will: held that the additional legacy is to be raised out of the same fund, and subject to the same conditions; and the legatee having married after the testator's death, is entitled. *Crowder v. Clewes*, 2 Ves. 449.

4. A legacy substituted for another shall be raised out of the same fund, and subject to the same conditions. 2 Ves. 450.

5. Legacy to A. of 12,000*l.* and to B. 4000*l.*; the latter sum directed to be paid out of the money in the hands of the testator's agent. At the time of the testator's death, there was a sufficient fund in the agent's hands to answer this legacy, but the general assets did not extend to the payment of

both. Legatee of the 4000*l.* held entitled to be paid by priority. *Acton v. Acton*, 1 Mer. 178.

12. To whom a legacy shall be paid.

1. Legacy given to A. to be divided between himself and his family: well paid to A. *Cowper v. Thornton*, 3 B. C. C. 90. 186.

2. Devise of money to be laid out in land to the use of A. in tail, with remainders over. The court will not direct the money to be paid to A. *Anon.* 2 Anst. 453.

13. Voluntary bond payable in preference to legacies.

Voluntary bond payable in preference to legacies. *Saunders v. Graves*, Dick. 93.

14. In the case of married women.

Where a woman who is or has been married, is entitled to a legacy, the court expects a positive affidavit that the legacy has not been in any manner settled, before it will direct payment. *Hough v. Ryley*, 2 Cox, 157.

15. Where a legacy is payable out of land, and the legatee dies before the time of payment.

A legacy payable out of land at a future day, although given with interest in the mean time, shall not be raised, if the legatee die, before the time of payment. *Gawler v. Standerwicke*, 2 Cox, 15.

16. Of presumptive payment.

Payment of a legacy presumed after above forty years without demand. *Jones v. Tuberville*, 2 Ves. 11.

17. In what cases the court will order legacies to be raised or secured.

1. Legacy payable before twenty-one, ordered to be paid out of the monies in the cause, in the name of the accountant-general, before the legatee attained that age. *West v. Welsh*, Dick. 520.

2. A legacy to be paid at the end of ten years, the executor to give security to pay it at the end of ten years, or to pay it into the bank to be placed out; and he to have the interest till the end of the ten years, and the plaintiff to apply for it. *Ferrand v. Prentice*, Dick. 568.

3. Legatee entitled to a legacy at twenty-one, with interest in the mean time, shall have it raised and secured. *Green v. Pigot*, Dick. 585.

18. In what cases the court will not order legacies to be raised or secured.

1. Legacies to be paid at twenty-one; if the infants die before, to the executor, who is appointed residuary legatee. The court will not order the legacies to be raised and secured. *Palmer v. Maysent*, Dick. 70.

2. Legacies to infants at twenty-one: the court would not order them to be secured. *Starkie v. Smith*, Dick. 520.

3. Where a sum in the stocks is left to pay the interest to A. for life, then after payment of gross sums, residue to him: the court will not permit the security to be lessened by laying out a certain sum to secure the legacies and paying the residue in money to A. *Loundy v. Bengon*, 3 B. C. C. 258.

4. Legacy charged on a reversionary fund shall not in general be raised till the person comes into possession; yet, where it is expressly directed under a power that they shall be raised as soon as (conveniently) may be, they shall bear interest from the death of the testator. *Conway v. Conway*, 3 B. C. C. 267.

5. The court will not direct a legacy to be raised out of land before the time of payment, although it will secure a personal fund for a future or contingent legatee. *Gawler v. Standerwicke*, 2 Cox, 15.

19. What

## 19. What appropriation shall be valid.

Money part of a residue was laid out by trustees (with a trifling addition in the funds; though there was a gift over in certain events, it is a good *appropriatio*. *Hutcheson v. Hammond*, 3 B. C. C. 18.

## 20. What appropriation shall be invalid.

1. The legatee, and the stocks having sunk in value; the executrix's estate shall make it good. *Cooper v. Douglas*, 2 B. C. C. 231.

2. If legacies to infants at twenty-one be placed out in annuities, and those annuities sink in point of value, infants not bound to accept those annuities in full satisfaction of their legacies. *Alcock v. Eames*, Dick. 578.

## XXXI. In what cases the personal estate shall be first applied.

1. Personal estate liable to legacies before the real, unless a contrary intention is manifested. *Attorney-general v. Downing*, Dick. 417.

2. To exempt personal estate from debts, the intention must be manifest. 3 Ves. 477.

3. To exempt the personal estate under a devise for payment of debts, the intention must appear plainly on the will; and the court cannot look to extrinsic circumstances. *Brummel v. Prothero*, 3 Ves. 111.

4. To exempt the personal estate from payment of the debts, the will must afford a necessary implication; viz. that inference that leaves no doubt upon the mind of the judge. *Hartley v. Hurle*, 5 Ves. 540.

5. To exempt the personal estate from the debts, there must be declaration, plain or manifest intention. 7 Ves. 149.

6. The personal estate can be exempt from the debts only by declaration, plain or necessary inference. 8 Ves. 305.

7. A mere charge upon the real estate, to pay debts and legacies, is not sufficient to exonerate the personal estate, unless there are words to show it was the testator's intention that the personalty should not be applied. *Samwell v. Wake*, 1 B. C. C. 144.; Dick. 597.

8. Devise of an estate subject to a mortgage, is not sufficient to exonerate the personal estate. *Astley v. Lord Tankerville*, 3 B. C. C. 545.; 1 Cox, 82.

9. To exempt the personal estate from the debts the will must show that intention by indication plain: a provision for the debts out of the real estate is not sufficient. *Bridges v. Phillips*, 6 Ves. 567.

10. Personal estate not exempted from debts, &c. by a charge upon real. *Barnaby v. Griffin*, 3 Ves. 266.

11. The personal estate not exonerated from the debts and legacies by a mere charge. Express words or plain intention upon the whole will necessary. *Watson v. Brickwood*, 9 Ves. 447.

12. To exonerate the personal estate from the testator's debt by mortgage, either express words or a plain intention must be found. 11 Ves. 186.

13. A devise to sell for payment of all debts will not exonerate the personal estate. 11 Ves. 186.

14. The personal estate being the proper and primary fund for the payment of debts and legacies, can be excepted only by express declaration, or plain and unequivocal manifestation of intention; and neither a charge, nor a direction to sell, nor the creation of a term for payment, will exempt the personal estate. *Tower v. Lord Rous*, 18 Ves. 132.

15. In the administration of assets, the personal estate, bequeathed in trust for testator's daughter, is the primary fund to pay debts charged on the real estate, there being no words or apparent intention in the will to exempt it. *Aldridge v. Lord Wallscourt*, 1 B. & B. 312.

16. In order to exonerate the personal estate from payment of debts,

will must contain express words for that purpose, or a clear manifest intention, a declaration plain or inference tantamount to express words. *Bootle v. Blundell*, 1 Mer. 193. The intention so expressed or implied must be an intention not only to charge the real estate, but to discharge the personal. *Ibid.* — The intention is not required to be so manifested, as that all persons cannot fail so with respect to it, but so as to convince the mind of the judge who has to decide upon each particular case. *Ibid.* — But it is impossible to define what circumstances are sufficient to shew the intention, which must in every case arise from the context. *Ibid.*

17. The personal estate given to the next of kin, must be applied in discharge of the testator's mortgage (not being expressly exempted), though it will be thereby exhausted. *Phillips v. Phillips*, 2 B. C. C. 273.

18. Specific disposition by will, subject to annuities and legacies, held auxiliary only; the general personal estate to be applied in the first instance. *Holford v. Wood*, 4 Ves. 76.

19. The general personal estate not specifically bequeathed, applied first in payment of all the costs, except of inquiries as to a guardian, and maintenance for a specific legatee, and then to the general legacies. *Barton v. Cooke*, 5 Ves. 461.

20. Bequest of personal estate exempt from debts by mortgage; the benefit of the exemption was confined to that legatee; and failed, the bequest having lapsed by the death of the legatee in the life of the testator. *Waring v. Ward*, 5 Ves. 670.

21. Where the testatrix had given real and personal estate to pay the legacies, and the personal was sufficient, the real estate shall descend to the heir. *Chitty v. Parker*, 4 B. C. C. 411.

22. Devise of real estate to testator's wife, her heirs, and assigns in trust by sale, of so much and such part of the premises as should be necessary to advance and raise so much money as would fully pay off and satisfy all his just debts and funeral expences, and all the residue to her for life, remainder to testator's heirs on her body begotten. Testator gave to his uncle his tobacco box; and the residue of his personal estate whatsoever, to his wife for ever, appointing her executrix. The personal estate is not exonerated from payment of debts. *Stephenson v. Heathcote*, 1 Edén, 38.

23. Devise of real estates charged with debts, &c., and of the personal estate to the same persons, there being no express words to exempt the personal estate from the payment of debts, &c.; it was held first applicable. *Dolman v. Weston*, Dick. 26.

24. Legacies to be paid at twenty-one or marriage, to infants, two of whom did not attain twenty-one, or marry; if the personal estate had been sufficient (which was not the case), it was contended that the legacy would have vested, and therefore it was proposed to throw another legacy on the real estate, in order to leave a sufficient personal fund. But the court refused so to do, and declared that the representatives of the deceased legatees were not entitled to have their legacies raised out of the real estate. *Ord v. Ord*, Dick. 439.

25. Sir R. W. reciting himself to be seised, subject to incumbrances, of an estate which was mortgaged, devised another estate for a term of twenty-one years, in aid of his personal estate, to pay bond and book debts, &c., by a subsequent clause, to pay all his debts; the personal estate and the term, shall exonerate the mortgaged estate. *Tweedale v. Coventry*, 1 B. C. C. 240.

26. Testator having two estates in mortgage, orders the debt upon the one to be paid out of his personal estate, and charges the other upon the mortgaged premises, and gives the residue of his personal estate to the persons by whose death, in his lifetime, it lapses; the mortgage debt charged upon the mortgaged premises, shall be laid out in the personalty; for, though he

exonerated the personal estate for the legatees, *non constat* he meant so to do for the next of kin. *Hale v. Cox*, 3 B. C. C. 322.

27. Devise in trust to sell for payment of debts and funeral expences, with a particular disposition of the surplus money, the personal estate not being otherwise disposed of than by the appointment of an executor, who was not one of the trustees, is first liable to the debts, &c. especially as the produce of the sale was not sufficient for them. *Gray v. Minnethorp*, 3 Ves. 103.

28. Testator devised all his real estate in trustees upon trust to sell a competent part thereof, and, in the first place, to pay and discharge all his debts and legacies; and in the next place, reimburse themselves the costs of the trust; and after such payments, settle such parts thereof as should remain unsold in manner therein mentioned; and he declared his meaning to be, that the whole money to be raised by such sale, should be deemed and taken to be part of his personal estate; and he gave all the residue of his personal estate, of what nature and kind soever, after payment of his debts, to A. The personal estate, under these directions, must be applied, in the first place, in or towards payment of the debts and legacies. *Lord Inchiquin v. French*, 1 Cox, 1.

29. Testator charged his real estate with 1000*l.* to be applied as the residue of his personal estate was thereafter directed. He then gave the residue of his personal estate, after his debts, legacies, and funeral expences were paid, to certain trustees, for the benefit of his relations in manner therein mentioned. The personal estate was deficient for payment of his debts. The 1000*l.* is payable to the trustees for the relations, without being subject to the claims of the creditors. *Killet v. Ford*, 1 Cox, 442.

30. B. devised her freehold estate to trustees, whom she also appointed executors, in trust, immediately after her decease, to sell and dispose of the same to the best advantage; the money arising from such sale, to be applied in the first place, in discharge of her funeral expences and debts; secondly, she ordered and directed several sums (mentioned in the will) to be paid to different persons named, "who were all creditors of her late husband." Then she gave pecuniary legacies to several relations, and 20*l.* each to her executors, "in compensation of trouble:" the said several sums to be paid by her executors and trustees, out of the money arising from the sale of her said lands, which "she ordered to be sold with all convenient speed after her decease," and such of the said purchase money as should remain after the paying of the said legacies, she disposed of by her will; "the said several legacies to be paid by her executors as soon as they should sell and dispose of the said lands." B. died possessed of some personal property. Held, that there is not enough on this will, to find a presumption that the testatrix intended to exonerate the personal estate. *McClelland v. Shaw*, 2 Sch. & Lef. 538.

### XXXII. In what cases the real estate shall be first applied.

1. Personal estate shall not be applied to exonerate the real, where it would defeat the intention. *Foley v. Percival*, 4 B. C. C. 419.

2. Where there is an express direction in a will that the debts, &c. shall be paid out of the real estate, the person to whom the personal is bequeathed takes it exempt. 3 Ves. 111.

3. Under a devise to sell and pay debts and funeral expences, the personal estate was exempted without any express words upon the evident intention. *Burton v. Knowlton*, 3 Ves. 107.

4. One master of both funds charges a debt, which was personal; on the real estate; his heir shall not have it exonerated by the personal estate. *Hamilton v. Worley*, 4 B. C. C. 199.

5. Though a general charge of debts upon a devised estate, will not prevent the previous application of an estate descended, yet if the devised

estate is selected and appropriated to the debts, it is liable before the estate descended: but this arrangement does not bind the creditor. *Manning v. Spooner*, 3 Ves. 114.

6. The circumstance that the residuary legatee is the first taker of the real estate, sometimes held a ground for exempting the personal. 18 Ves. 140.

7. Though the testator has charged his real estate with debts in aid of the personal, the personal may be given exempt from the debts by an unattested codicil. *Coxe v. Basset*, 3 Ves. 155.

8. The general personal estate exempted from the payment of a particular legacy. In the event of the deficiency of a particular fund appropriated to the satisfaction of certain bequests, the court, on the question of the exemption of the general personal estate, cannot advert to the fact of a sale of part of the testator's property subsequent to the will, by which the particular fund has become insufficient. *Holmes v. Wainwright*, Swanst. 24.

9. Where a testator having both freehold and copyhold estates, charges all his real estate with payment of his debts, if he has surrendered the copyhold to the use of his will; the freehold and copyhold shall be applied rateably; but if he has not surrendered the copyhold, it shall not be applied until the freehold is exhausted. *Growcock v. Smith*, 1 Cox, 397.

10. An estate descended, shall exonerate an estate charged with payment of debts. *Davies v. Topp*, 1 B. C. C. 524.

11. Although generally a descended estate shall be applied in exoneration of a devised estate (though under a charge for payment of debts), yet it shall not be so, if the devised estate be expressly pointed out, in aid of another fund provided for that purpose. *Donne v. Lewis*, 2 B. C. C. 257.

12. The rule as to the exoneration of estates descended by a devise for the payment of debt holds, even though the estate devised may be equitable assets, and the descended estates legal assets. 8 Ves. 304.

13. A mere charge upon a devised estate will not protect a descended estate from being applied first. *Ibid.* 306.

14. Question, whether the personal estate was exempted from debts, and whether there was a resulting trust in the estate devised in trust, after the trusts were executed, for the benefit of the heir at law. *Kinaston v. Kinaston*, Dick. 506.

15. Devise of real and personal estate to pay debts and legacies, the personal estate shall not pay the ancestor's mortgage or a legacy charged on land. *Lawson v. Hudson*, 1 B. C. C. 58.

16. Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator, subject to a mortgage, shall bear the burthen of that mortgage, it not being properly the debt of the testator. *Duke of Ancaster v. Mayer*, *Ibid.* 455.

17. Estate devised to be sold for payment of debts, the residue to be added to his personal estate, decreed that the personal estate shall not exonerate the real. *Webb v. Jones*, 2 B. C. C. 40.

18. There being a provision in a settlement of 5000*l.* for a younger child, at twenty-one, the father, by will, added 5000*l.* more, and charged all on a residuary real fund, which he had also made liable to debts and legacies, in aid of his personal estate; the charged estate shall not be exonerated by the personal. *Ward v. Lord Dudley*, *Ibid.* 316.

19. A. seised of a remainder in fee, expectant on an estate tail in N., limited the same to himself for life, remainder to trustees for a term of ninety-nine years, on trust, amongst other things, to raise and pay such sums of money, and to such persons as A. should by deed or will appoint; and he reserved to himself a general power of revocation, of all the uses thereby limited. A. afterwards, by deed, appointed that when the said estate tail should be spent, and the said term came into possession, the trustees should  
raise

raise 2000*l.* for W.; and covenanted, that if the estate tail should be spent in his own lifetime, then he would pay the 2000*l.* unto W.; but if not till after his death, and he should revoke the said term of ninety-nine years, then that his heirs, executors, &c. should, within a year after the estate tail should be spent, pay the 2000*l.* to W.; with a proviso, that if W. should suffer a recovery of the premises, and bar the remainder in fee, the 2000*l.* should not be payable. A. afterwards by will, revoked all the uses of the first settlement, "to all intents and purposes whatsoever, as if the same had never been limited;" and thereby devised all the said premises, "subject nevertheless to payment of the said sum of 2000*l.* to W." in manner therein mentioned. A. died, and afterwards N. died. The 2000*l.* remained a charge upon the devised premises, after the death of N., notwithstanding the revocation of the term, and the personal estate of A. was not applicable to it. *Wilson v. Lord Darlington*, 1 Cox, 172.

20. Testator devised a part of his real estates to trustees, in trust to sell and pay certain debts, mentioned in a schedule, and then devised all his personal estate to his wife, "fully and clearly exonerated from all the debts in the schedule specified;" and he settled the residue of his real estate on his wife and child in manner therein mentioned. The trust estate not being sufficient to pay the schedule debts, the settled estates must be applied in exoneration of the personal estate. *Morrow v. Bush*, 1 Cox, 185.

21. W. by his will, devised his real estate to trustees, in trust to sell and to apply the purchase money, in the first place, in payment of all the charges, and all other his debts and legacies: and as to the residue of his purchase money, to pay one moiety to his daughter M.; and to lay out the other moiety in government securities, and to pay the dividends for the maintenance of the three sons of his daughter A., until they should attain their respective ages of twenty-four years, and when they should have attained that age, he gave that moiety equally to be divided amongst them; but if they all should die under twenty-four, then he directed that such moiety should sink into and be deemed part of the residue of his personal estate, and be applied in such manner as his personal estate was thereafter given and disposed of. He then gave several specific legacies; and all the residue of his personal estate he gave to his daughter A., and to H., equally to be divided between them. The debts and legacies are payable, in the first instance, out of the purchase money of the real estate. *Webb v. Jones*, 1 Cox, 245.

22. Testator by will, limited his estate in Essex to several persons in succession, in manner therein mentioned. He then devised his estate in Suffolk to trustees, in trust to sell, and out of the purchase money to pay all his debts, legacies, and funeral expences; but in case the Suffolk estate should happen to be deficient for those purposes, then the deficiency should be made good out of the Essex estate. He then gave several specific and pecuniary legacies, and gave all his personal estate, not therein before disposed of, to his wife S.: after making this will, the testator sold the Suffolk estate, and received the purchase money. The debts, legacies, and funeral expences shall be raised out of the Essex estate, in exoneration of the personal estate. *Williams v. Bishop of Landaff*. 1 Cox, 254.

23. There being a provision in a settlement of 5000*l.* for a child at twenty-one, the father by will added 5000*l.* more, and charged all on a residuary real fund, which he had also made liable to debts and legacies, in aid of his personal estate; the charged estate shall not be exonerated by the personal estate. *Ward v. Lord Dudley*, 1 Cox, 438.

24. Testator declaring his debts should come out of the real, not the personal, gave the real to trustees, charged with some charitable legacies, and one to each trustee: by codicil, he removed one trustee, and revoked his legacy, appointing another with the same legacy: he revoked all the charitable legacies, and gave a less legacy to one of the charities mentioned



before, and other new charitable legacies, without specifying any fund: all held to be charged on the real; and therefore void as to the charitable legacies. *Leacroft v. Maynard*, 1 Ves. 279.

25. Testator devised to his son, whom he made executor, all the real estate not specifically disposed of, subject to debts generally, and legacies to daughters, and also all his personal; the son devised part of the real estate to his sister, one of the legatees, for life; remainder to her children in fee; three months after, reciting, that he was liable to her legacy by having taken upon him the execution of the will, and a former agreement to charge that legacy upon a particular part of his estate, he mortgaged the same estate which he had devised, for that legacy; and covenanted in the deed to pay it; three months after by codicil, expressing apprehensions that his personal would be deficient, he created a trust of some real estate for all his debts, of what nature or kind soever they should consist at his death, also legacies and funeral expences; held, the legacy did not become a personal debt of the son; and therefore the mortgaged estate remained charged, and was not to be exonerated by the assets. *Hamilton v. Worley*, 2 Ves. 62.

26. Testator by will duly attested, gave an annuity to his daughter, charged on his real estate in aid of his personal; by codicil not attested, he gave his real and personal estate to his mother for life; during her life the personal estate is discharged from the annuity; but it remains a charge on the real. *Backeridge v. Ingram*, 2 Ves: 652.

27. Devise of a particular estate, upon trust, to raise and pay 400*l.* to A., held an exclusive charge; not exonerated by a subsequent direction for the application of the personal estate to the debts and legacies in exoneration of the real estates before charged; which was referred to a prior charge upon the estates, expressly excepting the estate charged with the 400*l.* *Spurway v. Glynn*, 9 Ves. 483.

28. Devise in trust to sell and pay off a mortgage; and to raise another sum which the testator gave to his daughters. The personal estate, though bequeathed after payment of debts and legacies, exempted from the payment of those two sums, without express words upon the plain intention. *Hancox v. Abbey*, 11 Ves. 179.

### XXXIII. Of the abatement and refunding of legacies.

1. Legacies and annuities out of personal estate, decreed to abate in proportion.

Legacies and annuities out of personal estate, decreed to abate in proportion. *Rogers v. Millicent*, Dick, 570.

2. In the case of a devise in trust for several legatees; the death of some; and a deficiency.

Devise in trust to pay several persons 1000*l.* each; on the death of any, in case of a deficiency, the others abate. But if to pay debts and legacies, and one legatee dies, the trust is for the other legatees, if necessary, 17 Ves. 466.

3. Legatee must refund on the assets proving deficient.

Legatee decreed to refund, the assets proving deficient. *Davis v. Davis*, Dick. 32.

4. In the case of laches.

Vide 1 Amst. 112.

### XXXIV. Of the rights and equities of legatees.

1. Right of a specific legatee against the executor's pawnee.

When an executrix pledged bonds specifically bequeathed, for a debt contracted by her on her account, after the death of the testator, the pawnees

pawnees ordered to deliver them up for the benefit of the specific legatee. *Scott v. Tyler*, 724.

2. Right of a legatee against the executor's donee.

Executor advances sums of money to his daughters, *pendente lite*; to two of them on their marriage, to the others as a voluntary gift, and afterwards dies insolvent, having received assets on a bill by the legatees, the voluntary gifts were considered fraudulent; but those daughters being also legatees, they were permitted to retain in part of their legacies, subject to abatement. *Partridge v. Gopp*, 1 Eden, 163. Amb. 596.

3. Distinction between specific and pecuniary legatee, in the case of assets pledged, or disposed of.

1. Distinction between specific and general pecuniary legatee, claiming against a pledge of the assets by the executor. 14 Ves. 354.

2. Distinction between specific and residuary or general legatees, claiming against the disposition of the assets by the executor. Relief in the latter case, upon circumstances implying fraud in the legal sense; viz. an assignment, taken very soon after the testator's death from the executor for an antecedent debt from him, on his representation that the whole was left to him. 14 Ves. 361.

3. Right of pecuniary or residuary legatee to follow the assets, in case of misapplication, where a creditor or specific legatee could. *M'Leod v. Drummond*, 17 Ves. jun. 169.

4. In the case of the depreciation of a specific legacy wrongfully withheld.

1. Specific legacy of stock decreed according to the value at the time it ought to have been transferred. *Morley v. Bird*, 3 Ves. 698.

2. Specific legacy retained by the executor for assets, but was not wanted. In case of depreciation, the legatee is entitled to the original value. *Chaworth v. Beech*, 4 Ves. 555.

5. On a *devastavit* by the executor, a specific legatee.

Specific legacy to an executor, who afterwards becomes bankrupt, and commits a *devastavit*. The subject of the specific bequest being sold by his assignees, held, the produce of their lands not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the will, but that such parties are only entitled to prove to the amount of the *devastavit*. *Geary v. Beaumont*, 3 Mer. 431.

6. Right of legatees to stand in the place of specialty creditors, paid out of the personal estate, against estates descended.

Right of legatees to stand in the place of specialty creditors, paid out of the personal estate, against estates descended. Not against specific devisees, unless devised subject to debts or a mortgage. 8 Ves. 396, 397.

7. On a mortgagee exhausting the personal estate.

If a mortgagee exhausts the personal estate, the legatees shall stand in his place. *Norris v. Norris*, Dick. 542.

8. Lien of residuary legatee on the specific fund.

Lien of residuary legatee on the specific fund. 17 Ves. jun. 169.

9. In the case of a fund of investment rising in value.

If a sum of money be paid into the bank to answer a contingent legacy, and laid out in bank annuities, the legatee is entitled to the benefit of their rising. *Webb v. Webb*, Dick. 746.

10. Right

## 10. Right of a legatee to prosecute a decree for an account.

Bill by a legatee for his legacy; there had been a suit by another legatee, and a decree for account of testator's estate and payment. The plaintiff in this cause at liberty to prosecute that decree. *Sheppard v. Messider*, Dick. 797.

## 11. In relation to a surplus.

*Cordell v. Noden*, 2 Vern. 148.; that legatees are entitled to the surplus, in proportion to their legacies under the general introduction, declaring the will a disposition of all the estate, overruled. 3 Ves. & Beam. 6.

## 12. In relation to the residue.

The question, whether all the debts have been paid, not to be raised by legatees whose legacies have been satisfied, so as to impede the parties entitled to the residue of the estate. *Le Grice v. Finch*, 3 Mer. 50.

## 13. Miscellaneous.

A legatee having taken a mortgage in part-payment, subject to an agreement for payment out of the other assets and a resumption of the mortgage, was held entitled to the benefit of that agreement, accounting for the difference of interest. *Sitwell v. Bernard*, 6 Ves. 520.

## XXXV. Of the satisfaction of debts and portions, by legacies.

## General rule.

Though a legacy may release a debt where the security is uncanceled, it must clearly express the intent. *Wilmot v. Woodhouse*, 4 B. C. C. 227.

## XXXVI. Of bequests to executors, as such.

1. An executor is not entitled to his legacy without proving the will. *Reed v. Devaynes*, 3 B. C. C. 95.

2. A legacy given to a man who is appointed executor. He must prove the will in order to entitle himself to the legacy, though not made a condition by the will; but he may prove at any time, even after the hearing. *Quære*, as to the interest. *Reed v. Devaynes*, 2 Cox, 285.

3. Testator appointed four executors, and gave to each of them who should prove his will, and take upon themselves the execution thereof, a legacy of 15,000*l.*, and an annuity of 100*l.* All the executors proved the will, and soon afterwards a bill was filed to carry the trusts of it into execution. After this, M., one of the executors, ran away with the infant daughter of the testator from a boarding-school, and went through a ceremony of marriage with her in foreign parts, which marriage was afterwards declared null in the spiritual courts. Although M. did prove the will, yet as he did not appear to have done it with an intention of really acting in the execution of it, he is not entitled to his legacy. *Harford v. Browning*, 1 Cox, 302.

4. Executor refusing to execute the trust, shall not have a legacy to him in that character. 9 Ves. 534.

5. Legacy to a man described as executor; if the office does not continue, he shall not have the legacy. 8 Ves. 593.

6. Legacies to executors "for care and trouble in the execution of the will," not to be paid to executors refusing to act; and payment of those legacies not to be allowed to the acting executor, though charged in his accounts. *Freeman v. Fairlie*, 3 Mer. 31.

7. An executor who died before probate, was held entitled to a legacy given for his care and loss of time in the execution of the trusts of the will, by having concurred with the other executors in directions for the funeral, and

and in paying some small sums on that occasion. *Harrison v. Rowley*, 4 Ves. 212.

8. *Quære*, whether an executor was entitled to a legacy in that character, who died at a distance, without manifesting any intention to accept the trust, or without knowing it. 4 Ves. 215.

9. Presumption, that a legacy to a person appointed executor, is given to him in that character, though not apparently connected, unless there are circumstances shewing that it is intended for him personally. In this case the circumstances were rather the other way; the legacies, by codicils, to the persons appointed executors by the will, standing altogether, and equal in amount. One of the executors therefore, having renounced, not entitled to the legacies. *Stackpoole v. Howell*, 13 Ves. 417.

10. Effect of the distinction upon a legacy to a person by name, or by the description of executor; in the latter case he takes in that character, with all the consequences. 17 Ves. 466.

11. Bequest of annuities for life; "when dead to return to the executors;" a legacy to the executors beneficially, not as trustees. *Seley v. Wood*, 10 Ves. 71.

12. Residue devised to executors, in nature of joint-tenants; the will is, revoked by a codicil as to one, the other shall take the whole. *Humphrey v. Taylor*, Dick. 161.

### XXXVII. Miscellaneous points relative to bequests.

#### 1. Bequest towards liquidating the national debt.

Bequest of stock to government "in exoneration of the national debt," directed to be transferred to such person as the king, under his sign manual, shall appoint. *Newland v. Attorney-general*, 3 Mer. 684.

#### 2. Principle of arrangement as to personal estate, between the persons entitled for life and in remainder.

Principle of arrangement as to personal estate, between the persons entitled for life and in remainder; that the subject being an interest wearing out, or capable of immediate sale, though future in enjoyment, shall be valued; and the person entitled for life shall have interest upon the amount, from the death of the testator in this instance, a share in a trade, to be ascertained and paid at certain periods after his death. *Fearn v. Young*, 9 Ves. 549.

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## DIGNITIES.

### Of titles of nobility, limited by patent in tail.

A title of nobility, limited by patent in tail, is an estate tail within the protection of the statute *de donis*, whether it be conferred from any place or not; and consequently is not forfeited by an attainder of felony. *Earl Ferrer's case*, 2 Eden, 373.

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## DISCOVERY.

### When a bill for a discovery lies.

1. A bar to a suit at law is not necessarily a bar to a discovery.
2. Bill to enable the plaintiff to go to law.
3. Bill to enable the bailor of a chattel pawned, to go to law.
4. Bill to enable the plaintiff to defend a suit at law.

5. Bill

5. Bill to discover whether the defendant, plaintiff at law, has assigned his interest in the subject of the suit.
6. Bill to discover the existence of an undertaking, not to use a defence to an action at law.
7. Notwithstanding a release.
8. Bill to discover assets to satisfy an execution.
9. Bill to discover trading and act of bankruptcy.
10. Bill to discover boundaries.
11. Bill to discover cases laid before counsel, and their opinions.
12. Bill to discover the mode in which a devise was obtained or prevented.
13. Bill to discover gaming transactions.
14. Bill to discover the existence of a promise of marriage.
15. Bill to discover the existence of a resignation-bond, to defend a suit at law.
16. Bill to discover stock-jobbing transactions.

## II. When a bill for a discovery does not lie.

1. Bill to enable the plaintiff to go to law.
2. Bill to enable the plaintiff to support an action founded in immorality.
3. Where the remedy at law is plain.
4. Bill to discover facts immaterial.
5. Bill to discover facts tending to criminate.
6. Bill upon a legal title, not established at law, and denied by the answer.
7. Bill to discover gaming transactions.
8. Bill to discover whether the assignee of a mortgagee, (through assignments of persons, without notice of defect in title,) had notice.
9. Bill to discover stock-jobbing transactions.
10. Bill to discover defendant's title, after a writ of right determined against plaintiff.
11. Bill for an heir to discover title after twenty years possession and descent cast.
12. Against a mere witness.

## III. Of the time in which bills for discovery must be filed.

Bills in aid of an action at law.

## IV. Form of discovery bills.

Bill to discover gaming transactions.

## V. Of demurrers to bills of discovery.

1. Must not be too extensive.
2. Demurrer to the relief bars the discovery.
3. But a demurrer to the discovery does not bar the relief.

## I. When a bill for a discovery lies.

## 1. A bar to a suit at law is not necessarily a bar to a discovery.

Plea of matter which would be a good plea to the action at law, not a plea here in bar of discovery. *Hindman v. Taylor*, 2 B. C. C. 7.

## 2. Bill to enable the plaintiff to go to law.

Demurrer to a bill against the East India Company, and their secretary, to discover by what authority plaintiff was dispossessed of a lease for supplying Madras with tobacco, and for a commission to examine witnesses in India; stating that the plaintiff intended to bring an action, overruled. *Moodaly v. East India Company*, 1 B. C. C. 469.

## 3. Bill to enable the bailor of a chattel pawned, to go to law.

Pawnee of a bailee must discover so as to enable the owner to bring an action. 3 Ves. 226.

## 4. Bill to enable the plaintiff to defend a suit at law.

Bill will lie for a discovery of matter to constitute a defence to an action at law. *Bishop of London v. Fytche*, 1 B. C. C. 96.

## 5. Bill to discover whether the defendant, plaintiff at law, has assigned his interest in the subject of the suit.

On a bill filed to stay proceedings (in an action brought by defendant for dilapidations, founded on the destruction of the buildings therein mentioned), and for a discovery whether he has not, since the commencement of the suit at law, assigned his interest in the premises; the defendant cannot protect himself from the discovery, or discharge himself from answering by a plea, that the building had been destroyed by fire, at a time when defendant was entitled, and had ever since continued out of repair and waste. *Duke of Bedford v. Macnamara*, 1 Price, 208.

## 6. Bill to discover the existence of an undertaking, not to use a defence to an action at law.

Where the defendant produced in evidence, on a trial at *nisi prius*, an affidavit of the plaintiff, making himself liable for a loss the defendant had sustained, contrary to the defendant's express undertaking not to avail himself of it; the court decreed a discovery, though it appeared that the plaintiff himself had been in the wrong. *Withal v. Liley, Forrest*, 84.

## 7. Notwithstanding a release.

To a bill stating various dealings between M. and R. from 1788 to 1794, imputing fraud and unfair dealing, and various usurious charges, overcharges, and mistakes in accounts delivered, and praying a discovery of the several transactions and a general account; the defendant to so much of the bill as sought a discovery and prayed an account of the dealings and transactions prior to and upon the 27th May 1791, and as to all relief and discovery grounded thereon, pleaded a release made and executed on the 8th June 1791, with an averment that said lease was prepared with the consent of, and freely and voluntarily executed by M., and without any fraud or undue practice on the part of R. Plea ordered to stand, with liberty to except. *Roche v. Morgell*, 2 Sch. & Lef. 721.

## 8. Bill to discover assets to satisfy an execution.

1. Demurrer to a bill for discovery of assets to satisfy an execution taken out against defendant, after a judgment at law, overruled. *Leith v. Pope, Dick*, 575.

2. Bill by creditors by judgment, who had sued out *elegits*, for a discovery of freehold estates; charging, that the defendant upon his election as member

member of parliament, previously to the judgments, gave in his qualification; and if the estates composing it were conveyed away since, it was without consideration. Demurrer as to the qualification, &c. and answer to the rest, but not going to the charge of conveyance without consideration: the demurrer was overruled. *Mountford v. Taylor*, 6 Ves. 788.

9. Bill to discover trading and act of bankruptcy.

Demurrer to a discovery of trading as well as of an act of bankruptcy, overruled. *Chambers v. Thompson*, 4 B. C. C. 434.

10. Bill to discover boundaries.

Mortgagee of the unsettled part of an estate must discover the boundaries. 3 Ves. 225.

11. Bill to discover cases laid before counsel, and their opinions.

Demurrer to so much of a bill as called for a discovery of cases, laid before counsel, and the opinions overruled, as covering facts material to the plaintiff's case. *Richards v. Jackson*, 18 Ves. jun. 472.

12. Bill to discover the mode in which a devise was obtained or prevented.

1. The bill stated that a testator intended to re-publish his will, but was prevented from so doing by the fraud of the heir at law. A demurrer to so much of the bill as required him to discover whether the testator did not intend to republish his will, was, under the circumstances, overruled. *Dixon v. Olmius*, 1 Cox, 414.

2. Discovery compelled, whether a devise was obtained, or prevented, by the undertaking of the devisee, or heir, to do certain acts in favour of individuals; and relief, upon the ground of fraud. 9 Ves. 519.

13. Bill to discover gaming transactions.

1. A bill for discovery of money won at play will not lie at the suit of a common informer, till he has commenced some suit for relief. *Mynd v. Francis*, 1 Anst. 5.

2. A bill lies to have a discovery of the consideration of a security alleged to have been given for money won at play, and to have it delivered up. *Andrews v. Berry*, 3 Anst. 634.

3. In such a bill it is not necessary to state the nature of the action brought; it is sufficient to show, that an action was brought on the statute 9 Ann. to recover the money, and to show by the facts, that an action on the statute lay. *Ibid.*

14. Bill to discover the existence of a promise of marriage.

A bill will lie for a discovery of a promise of marriage in aid of an action of *assumpsit*. *Vaughan v. Aldridge, Forrest*, 42.

15. Bill to discover the existence of a resignation-bond, to defend a suit at law.

Upon a *quare impedit* brought against the ordinary, he files a bill for a discovery, whether there were not a bond of resignation given, in order to plead it to the action: the defendant demurred, first, that the discovery would subject him to penalties; second, that it was immaterial. To the first it was answered, that the bonds were legal; to the second, that the plaintiff had a right to the discovery, and its materiality is to be debated elsewhere; and the demurrer was overruled. *Bishop of London v. Fytch*, 1 B. C. C. 96.

16. Bill to discover stock-jobbing transactions.

1. Plea of stock-jobbing act, to a bill for discovery of stock transactions, overruled. *Bancroft v. Wentworth*, 3 B. C. C. 2.

2. Dis-

2. Discovery in support of an action to recover money under the stock-jobbing act, stat. 7 Geo. 2. c. 8. confined to those clauses, as to which it is expressly given, with protection from the penalties; and therefore not extended to the 5th and 8th sections. *Bullock v. Richardson*, 11 Ves. 373.

## II. *When a bill for a discovery does not lie.*

### 1. Bill to enable the plaintiff to go to law.

Objection that a demurrer would not lie to a bill merely for a discovery to enable the plaintiff to go to law, where the plaintiff had not brought his action at law; but held it would. *Moodaly v. Moreton*, Dick. 652. Vide 1 Anst. 5.

### 2. Bill to enable the plaintiff to support an action founded in immorality.

Demurrer to bill of discovery in support of an action to recover the expences of entertainments given by the plaintiff, under an agreement with the defendant to introduce him to a woman of fortune, with a view to marriage, allowed. *King v. Burr*, 3 Mer. 693.

### 3. Where the remedy at law is plain.

The court will not decree a discovery against bankers suing the plaintiff in equity for the amount of certain cheques drawn on them by him, on the ground of their having been given on a particular account, which the defendants in equity deny. *Askam v. Thompson*, 4 Price, 330. Nor will they order the defendants to produce the cheques that the language of them may be discovered, because such discovery could not be of use to the plaintiff in equity on the trial at law. *Ibid.*

### 4. Bill to discover facts immaterial.

1. A bill for discovery of matters, which must be either criminal or immaterial, is bad. *Selby v. Crew*, 2 Anst. 504.

2. Bill for tithes praying a discovery, whether the defendants had not associated together in their defence. A demurrer to the discovery was allowed. *Oliver v. Haywood*, 1 Anst. 82.

3. The bill prayed a discovery, whether the defendant had not contributed to the expence of a suit to try a general question against the plaintiffs. It appeared that, by the course of that suit, in evidence, no general right could be bound by it. A demurrer was allowed. *Mayor, &c. of London v. Ainsley*, 1 Anst. 158. Vide 4 Price, 330.

### 5. Bill to discover facts tending to criminate.

1. No person compelled to answer what has any tendency to criminate him. 11 Ves. 525.

2. A bureau delivered for the purpose of repairs to a person, who discovered money in a secret drawer; which he converted to his own use. This amounts to a felony; and upon that ground a demurrer to a bill of discovery was allowed. *Cartwright v. Green*, 8 Ves. 405.

3. Transfer of stock under an agreement to satisfy the deficiency in the accounts of a banker's clerk, though he is not a party, amounts to a composition of felony to prevent a prosecution. Defendant therefore may protect himself by plea from discovering, not only the broad leading fact, but any fact, the answer to which may form a step in the prosecution. *Claridge v. Hoare*, 14 Ves. 59.

### 6. Bill upon a legal title, not established at law, and denied by the answer.

Where the bill was upon a legal title, not established at law, and denied by the answer, discovery refused. 2 Ves. 129. n.

### 7. Bill



## 7. Bill to discover gaming transactions.

Vide 1 Anst. 5.

## 8. Bill to discover whether the assignee of a mortgagee (through assignments of persons without notice of defect in title,) had notice.

Assignee of a mortgagee, through assignments from persons not having notice of a defect in the title, not bound to discover whether he had personal notice. *Sweet v. Southcote*, 2 B. C. C. 66.

## 9. Bill to discover stock-jobbing transactions.

Vide 11 Ves. 373.

## 10. Bill to discover defendant's title, after a writ of right determined against plaintiff.

A plea that a writ of right had been tried and determined against the plaintiff, (who was defendant in the writ of right;) a good plea to a bill for discovery of defendant's title. *Leicester v. Perry*, 1 B. C. C. 305.

## 11. Bill for an heir to discover title after twenty years possession and descent cast.

After twenty years possession, and a descent cast, the heir at law of a former owner filed a bill for discovery of the title of the occupant, suggesting a pretended devise from his ancestor: a demurrer was allowed. *Mutloe v. Smith*, 3 Anst. 709.

## 12. Against a mere witness.

Bill for discovery, in aid of an action: demurrer by a mere witness allowed; though the discovery would be more effectual than the examination at law, and notwithstanding, a charge of interest in the defendant: as to which he may be called by the plaintiff, waiving the objection, and if called against him may be examined upon the *voire dire*. *Fenton v. Hughes*, 7 Ves. 287.

## III. Of the time in which bills for discovery must be filed.

Bills in aid of an action at law.

There is no limitation, in point of time, within which a bill for discovery in aid of an action at law must be filed. *Munt v. Scott*, 3 Price, 477.

## IV. Form of discovery-bills.

Bill to discover gaming transactions.

Vide 3 Anst. 634.

## V. Of demurrers to bills of discovery.

## 1. Must not be too extensive.

Bill by the East India Company claiming from a part-owner of a ship, freighted by them, double the sum received by him for the sale of the command, to be paid or allowed under the charter-party and a bye-law of the company, one moiety to their use, the other to be paid or returned to the person who shall give the company information, and make proof; the deed being, on settling the account, cancelled through ignorance of the fact. Demurrer to the discovery, because it might subject the defendant to penalty, covering not only the direct charge, but also circumstances of mere inducement, as the execution and cancellation of the deed, and to the relief, generally, for want of equity, and for defect of parties, viz. the other part-owners, particularly one, who executed, and the informer, was overruled. *East India Company v. Neave*, 5 Ves. 173.

## 2. De-

## 2. Demurrer to the relief bars the discovery.

1. Demurrer to a bill praying a discovery and relief; the relief, if any, being at law, allowed. *Watkins v. Bush*, Dick. 668.

2. Demurrer will lie to a bill making the discovery ancillary to the relief. *Price v. James*, Dick. 697.

3. Demurrer both to the discovery and relief, if good as to the latter, shall be allowed as to both; though the plaintiff may be entitled to the discovery. 5 Ves. 185.

4. Plea allowed as to the relief, therefore good to the discovery also; according to the general rule. *Sutton v. Earl of Scarborough*, 9 Ves. 71.

5. Plaintiff not entitled to relief, cannot have discovery. 1 Ves. & Beam. 539.

## 3. But a demurrer to the discovery does not bar the relief.

Though in a bill for discovery and relief; a plaintiff not entitled to relief is not entitled to discovery; yet the converse of the rule will not hold. *Attorney-general v. Brown*, Swanst. 294.

## DISSEISIN.

## I. What estates are or are not objects of disseisin.

Equitable estates.

## II. Who may become disseisors; who not.

1. *Cestui que trust*.

2. Mortgagor.

## III. What acts are acts of disseisin; what not.

1. Possession and receipt of rent.

2. Possession referrible to a good title.

3. Possession gained under a title inconsistent with that of the person having right.

4. Entry by A. under the lease of B.

## I. What estates are or are not objects of disseisin.

Equitable estates.

There can be no disseisin of an equitable estate, because disseisin must be of the entire estate, and because a tortious act cannot be the foundation of an equitable title. *Cholmondeley v. Clinton*, 2 Mer. 357.

## II. Who may become disseisors; who not.

1. *Cestui que trust*.

*Cestui que trust* having a substantive, independent possession, may gain the legal estate by disseisin; but a mortgagor cannot disseise his mortgagee, because his possession is that of the mortgagee. *Cholmondeley v. Clinton*, 2 Mer. 361.

2. Mortgagor.

*Ibid.*

## III. What acts are acts of disseisin; what not.

1. Possession and receipt of rent.

Possession and receipt of rent will amount to a disseisin; and give an estate upon which a fine will operate. *Conry v. Caulfield*, 2 B. & B. 272.

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## 2. Possession referrible to a good title.

Where possession can be referred to a good title, it cannot in a court of equity be treated as required by disseisin. *Conry v. Caulfield*, 2 B. & B. 272.

## 3. Possession gained under a title inconsistent with that of the person having right.

Possession gained under a title inconsistent with that of the person having right, is a disseisin at election. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 622.

## 4. Entry by A. under the lease of B.

A. acts under the lease of B., who acknowledges the entry as by his command: A. is a disseisor; and B. also is chargeable as such. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 621.

## DISSENTERS.

I. Of the appointment of trustees to dissenting congregations.  
Incidental inquiries.

## II. Of the appointment of ministers to dissenting congregations.

For a limited period.

## III. Of the rights of dissenters.

To sue in the attorney-general's name for charity-estates.

I. Of the appointment of trustees to dissenting congregations.  
Incidental inquiries.

Upon a clause for the appointment of new trustees, in case any of the old trustees changing, or becoming of a different religion from the congregation, if any question arises whether a trustee has been properly removed, it becomes necessary for the court to inquire what was the religion of the society, not to animadvert upon it; but to ascertain whether the charge is substantiated. *Attorney-general v. Pearson*, 3 Mer. 413.

## II. Of the appointment of ministers to dissenting congregations.

For a limited period.

The principle of public policy does not extend to the case of dissenters, so as to prevent the court from sanctioning the appointment of a minister to a congregation for a limited period, and not for life, provided such be the usage of the members, or the provisions of the original trust. *Attorney-general v. Pearson*, 3 Mer. 402.

## III. Of the rights of dissenters.

To sue in the attorney-general's name for charity-estates.

Dissenters may sue by information, in the attorney-general's name for charity-estates belonging to them. *Attorney-general v. Lord Dudley, Cooper*, 146.

## DISTRIBUTION, STATUTE OF.

## I. Who are not entitled to share under an intestacy.

Grandfather not entitled to share with the brother.

## II. Of the modes in which a widow shall be barred of her thirds.

1. Whether by settling a leasehold in bar of dower.
2. Whether by a bequest in bar of dower and thirds.

## III. Of bringing advances into hotchpot.

1. The doctrine obtains only in the case of actual intestacy.
2. Of the widow's claim thereon.
3. What advances shall be brought in — where the portions come from the same party, the father, or a person *in loco parentis*, small circumstances of difference, where the value is substantially the same to the child, shall not prevent satisfaction.
4. What advances shall be brought in — personal property given to the heir.
5. What advances shall be brought in — provision by will.
6. What advances shall be brought in — an annuity.
7. What advances shall be brought in — a commission in the army.
8. What advances shall be brought in — purchase in the name of a wife or child.
9. What advances shall be brought in — land claimed by settlement.
10. What advances shall be brought in — repairs of houses given to an heir in his father's lifetime
11. What advances shall not be brought in — share under an intestacy.
12. What advances shall not be brought in — repairs of houses which descend to the heir.

## IV. In relation to the custom of London.

1. Effect of advancement.
2. Force of the widow's contract not to claim.

## I. Who are not entitled to share under an intestacy.

Grandfather not entitled to share with the brother.

Grandfather not entitled to share the intestate's personal estate with the brother. *Evelyn v. Evelyn*, Dick. 146.

## II. Of the modes in which a widow shall be barred of her thirds.

1. Whether by settling a leasehold in bar of dower.  
Vide 3 B. C. C. 362.
2. Whether by a bequest in bar of dower and thirds.  
Vide 10 Ves. 17, 18.

### III. Of bringing advances into hotchpot.

#### 1. The doctrine obtains only in the case of actual intestacy.

The provision in the statute of distributions for bringing advances by way of settlement into hotchpot, applies only to actual intestacy; not, where there is an executor; and consequently a complete will; though the executor may be declared a trustee. 14 Ves. 324.

#### 2. Of the widow's claim thereon.

The widow has no claim upon what is brought into hotchpot among the children. Lord Kircudbright v. Lady Kircudbright, 8 Ves. 51.

#### 3. What advances shall be brought in — where the portions come from the same party, the father or a person *in loco parentis*, small circumstances of difference, where the value is substantially the same to the child, shall not prevent satisfaction.

Vide 9 Ves. 427.

#### 4. What advances shall be brought in — personal property given to the heir.

Advancement to the eldest son, if personal property, must be brought into hotchpot under the statute of distributions. Lord Kircudbright v. Lady Kircudbright, 8 Ves. 51.

#### 5. What advances shall be brought in — provision by will.

Provision by will considered an advancement in the life of the testator. 10 Ves. 489. 18 Ves. 494.

#### 6. What advances shall be brought in — an annuity.

The purchase of a commission in the army is an advancement, to be brought into hotchpot. An annuity is an advancement, to be brought into hotchpot; viz. the value at the date of the grant; or if it has ceased, the payments received; at the option of the child. Lord Kircudbright v. Lady Kircudbright, 8 Ves. 51.

#### 7. What advances shall be brought in — a commission in the army.

Ibid.

#### 8. What advances shall be brought in — purchase in the name of a wife or child.

Purchase in the name of a wife or child ordinarily not a resulting trust; being considered an advancement. 8 Ves. 199. Vide Swanst. 13.

#### 9. What advances shall be brought in — land claimed by settlement.

Vide 9 Ves. 425.

#### 10. What advances shall be brought in — repairs of houses given to an heir in his father's lifetime.

Money laid out by the intestate on repairs of houses, which descended to his eldest son, as heir, is not an advancement, to be brought into hotchpot under the statute; otherwise, if the houses had been given to the son in the father's life. Smith v. Smith, 5 Ves. 721.

#### 11. What advances shall not be brought in — share under an intestacy.

Share of personal property under father's intestacy, not considered an advancement by him in his life. 18 Ves. 494.

#### 12. What advances shall not be brought in — repairs of houses which descend to the heir.

Vide 5 Ves. 721.

### IV. In

## IV. In relation to the custom of London.

## 1. Effect of advancement.

In cases upon the custom of London, the effect of advancement is only to remove that child out of the way, and increase the shares of the others. Not to increase the part, of which the father would have power to dispose. 9 Ves. 460.

## 2. Force of the widow's contract not to claim.

Husband dying intestate, the widow is bound by her contract not to claim under the custom of London. 3 Ves. 336.

## DIVISION AND APPORTIONMENT.

## I. Apportionment of personal contracts.

1. Annuity.
2. Dividends.

## II. Apportionment of real contracts.

1. Fine of renewal.
2. Quit-rents, land-tax, &c.

## III. Apportionment of charge.

Vide in tit. CHARGE.

## I. Apportionment of personal contracts.

## 1. Annuity.

1. Interest by will, in the nature of annuity, not apportioned in favour of the executor of the tenant for life. *Franks v. Noble*, 12 Ves. 484.

2. Annuity to a feme covert for her sole and separate use, is not apportionable for the period between the day of her death and the gale day preceding. *Anderson v. Dwyer*, 1 Sch. & Lef. 301.

## 2. Dividends.

Dividends shall not be apportioned. *Rashleigh v. Master*, 3 B. C. C. 99.

## II. Apportionment of real contracts.

## 1. Fine of renewal.

1. In a beneficial case, the tenant for life renewing the fine shall be apportioned between him and the remainder-man, in proportion to their respective interests. *Nightingale v. Lawson*, 1 B. C. C. 440.

2. A. having given his freehold, leasehold, and personal property (the leasehold being bishop's leases renewable and ordered to be renewed) to B. for life with remainders over: the fines are to be paid out of the accumulated fund not apportioned between the tenant for life and the remainder-man. *Stone v. Theed*, 2 B. C. C. 243.

## 2. Quit-rents, land-tax, &amp;c.

Land-tax, quit-rent, &c. not apportioned as between tenant for life and the remainder. *Sutton v. Chaplin*, 10 Ves. 66.

## DOMICIL.

## I. The place of domicile ascertained.

1. General rule.
2. The place of domicile of children follows the domicile of the surviving mother.
3. In relation to the succession to personal estate.

## II. Of contemporary domicils.

1. Distinction upon the subject.
2. For what purposes they may exist.
3. Preference between them.

## III. Acquisition of a new domicile.

During pupillage.

## IV. Influence of domicile upon the rights of property.

1. Real property.
2. Personal property.
3. In the case of an intestate domiciled in England, leaving real property in Scotland.

## I. The place of domicile ascertained.

## 1. General rule.

The mere place of birth or death does not constitute the domicile. The domicile of origin, which arises from birth and connections, remains, until clearly abandoned, and another taken. *Somerville v. Lord Somerville*, 5 Ves. 750.

## 2: The place of domicile of children follows the domicile of the surviving mother.

*T. P.*, a native of England, domiciled in Guernsey, dies intestate, leaving a widow and infant children by her, and also by a former wife. The widow, after his death, is appointed guardian of the children by the royal court of Guernsey, and in conjunction with another person, who is appointed guardian of the children by the former marriage, sells the property of the intestate, and invests the produce in the English funds, after which she comes to England with her children, and is domiciled there. On the death of some of the children under age, a question arises, whether their shares of the property have become distributable according to the law of England, or of Guernsey; and it was held, that the law of England is to govern the succession, the domicile of the children being (according to the opinion of foreign jurists, our own law being silent on the subject) to follow the domicile of the surviving mother, where no fraudulent intention can be imputed. But fraud may be presumed, where no reasonable cause appears for the removal. *Pottinger v. Wightman*, 3 Mer. 67.

## 3. In relation to the succession to personal estate.

The succession to the personal estate of an intestate is regulated by the law of that place, which was his domicile at the time of his death. For that purpose there can be but one domicile; and the *lex loci rei sitæ* does not prevail. *Somerville v. Lord Somerville*, 5 Ves. 750.

## II. Of

**II. Of contemporaneous domicils.****1. Distinction upon the subject.**

Distinction upon contemporaneous domicils: in the case of a nobleman or gentleman, generally, the domicil is the mansion-house in the country; that of a merchant, is at his residence in town. 5 Ves. 789.

**2. For what purposes they may exist.**

A man may have two domicils for some purposes. 5 Ves. 786.

**3. Preference between them.**

In the case of Lord Somerville, of two acknowledged domicils, the family seat in Scotland, and a leasehold house in London, upon the circumstances, the former, which was the original domicil, prevailed. *Somerville v. Lord Somerville*, 5 Ves. 750.

**III. Acquisition of a new domicil.**

During pupillage.

A new domicil cannot be acquired during pupillage. 5 Ves. 787.

**IV. Influence of domicil upon the rights of property.****1. Real property.**

Real property regulated by the law of the country where the land lies; personal property by that of the domicil. 2 Ves. & Beam. 131.

**2. Personal property.**

Intestate domiciled in England, leaving real estate in Scotland, the heir being one of the next of kin entitled to share according to the law of England, not subject to the condition of collating the real estate according to the law of Scotland. 2 Ves. & Beam. 131.

**3. In the case of an intestate domiciled in England, leaving real property in Scotland.**

Intestate domiciled in England, having real estates in Scotland, the real estate charged with an heritable bond, as the primary fund, according to the law of Scotland; and not exonerated by the personal estate according to the law of England. 2 Ves. & Beam. 132.

**DONATIO CAUSA MORTIS.****I. Its definition.**

Preference between the two definitions given in the Digest.

**II. Nature and properties of the gift.**

It may be for a particular purpose.

**III. Essentials necessary to its validity.**

1. It must be given during the last illness.
2. Need not be *in extremis*.
3. Must be an absolute gift, to take effect immediately.
4. Delivery.
5. In the case of bills of exchange, notes, and cheques.



### I. Its definition.

Preference between the two definitions given in the Digest.

The description of *donatio mortis causa* in the *Digest Tit. de mortis causa donationibus Leg. 2.* which Swinburne has followed, is not correct; the true definition of it is in *Leg. 27.* and in *Just. Inst. Tit. 7. De donationibus*; where it appears, it has the nature of a legacy, is liable to debts, and is only a gift on survivorship. 2 Ves. 119.

### II. Nature and properties of the gift.

It may be for a particular purpose.

1. *Donatio mortis causa* may be for a particular purpose. *Blount v. Burrow*, 4 B. C. C. 72.

2. Bill upon a banker, expressly for mourning, is an appointment of the money for a particular purpose in writing, necessarily supposing death; and therefore probate not necessary. 2 Ves. 120.

### III. Essentials necessary to its validity.

1. It must be given during the last illness.

Issue directed to try whether there was *donatio mortis causa*, because it did not appear to have been in the last illness. *Blount v. Burrow*, 1 Ves. 546.

2. Need not be *in extremis*.

1. Gift of bank notes in a paper, accompanied with declarations (though not *in extremis*) a good *donatio mortis causa*. *Hill v. Chapman*, 2 B. C. C. 612.

2. Gift of a bond by delivering the same, and saying, "There, take that and keep it," in the last sickness of the donor, he dying two days after, held to be a *donatio causa mortis*, and donee directed to be at liberty to use the executor's names in suing on the bond, he indemnifying them; and the costs of the suit to be paid out of the testator's estate. *Gardner v. Parker*, 3 Mad. 184.

3. Must be an absolute gift, to take effect immediately.

An absolute gift, to take effect immediately, cannot be considered as *donatio mortis causa*; therefore, such gift of a common check on a banker payable to bearer, and of a promissory note, held not to be *donatio mortis causa*, or an appointment or disposition in nature of it; and not capable of any greater effect in equity than at law; as to the check, the bill was dismissed without prejudice to any action; as to the note, it being doubted, whether an action would lie against the executor for want of consideration, the court offered to retain the bill, if an account was necessary. *Tate v. Hilbert*, 2 Ves. 111.

4. Delivery.

*Mortis causa* cannot be by mere parol; doubtful, whether it may be by deed or writing. 2 Ves. 120.

5. In the case of bills of exchange, notes, and cheques.

1. A cheque on a banker, given in the last illness, unless offered for payment during the life, not a good *donatio mortis causa*. *Tate v. Hilbert*, 4 B. C. C. 286. Nor a promissory note given in the same manner. *Ibid*.

2. Where a banker's check is given, and is paid away for valuable consideration, or to a creditor, the executor is liable; and if the person, to whom it is given, receives it before the banker has notice of the death of the drawer, it cannot be recalled. 2 Ves. 118.

## DOWER.

## I. Of what subjects a widow shall be endowed.

1. Estates leased before marriage, and not fallen in during coverture.
2. Navigation shares.
3. An estate purchased with partnership funds, but upon an understanding.

## II. Of what subjects a widow shall not be endowed.

1. Property bequeathed to her.
2. An equity of redemption.

## III. What shall be a bar of dower.

1. General doctrine upon the subject.
2. General rule as to the form of instruments barring dower.
3. A previous settlement, notwithstanding in part the wife's property, and herself an infant.
4. Implication from a covenant in a settlement.
5. A claim of a provision made in lieu of dower after a recovery in a writ of dower.
6. A bequest inconsistent with dower, though not given in bar.
7. Conveyance to uses to be appointed by A., and in default, to A. in fee.

## IV. What shall not be a bar of dower.

1. Assignment for value.
2. A conveyance referrible, not to a power paramount the right to dower, but *aliunde*.
3. A term created for the benefit of the inheritance.
4. A term attendant, unless assigned.
5. A previous settlement precarious and uncertain.
6. Settlement on a female infant upon the contingency of the husband surviving his mother.
7. A covenant for an annuity, neither charged upon nor issuing out of land.
8. A bequest, not adding in bar of dower.

## V. Of the writ of dower.

1. When the appropriate course; when not.
2. Now almost obsolete.

## VI. Jurisdiction of courts of equity in relation to dower.

1. A bill lies for an assignment of dower.
2. No limitation in equity to arrears of dower.

## VII. Of the mode of assigning dower.

By the master.

### I. Of what subjects a widow shall be endowed.

#### 1. Estates leased before marriage, and not fallen in during coverture.

A. seized in fee of estates let at the time of his marriage upon leases for lives, which do not expire during the coverture: his wife was entitled to dower. *D'Arcy v. Blake*, 2 Sch. & Lef. 387.

#### 2. Navigation shares.

The shares in the navigation of the river Avon, under the statute 10th Anne, are real estate, and subject to dower. *Buckeridge v. Ingram*, 2 Ves. 652.

#### 3. An estate purchased with partnership funds, but upon an understanding.

Dower established against assignees under a joint commission of bankruptcy upon the estates purchased with the partnership fund, but conveyed to one partner under a specific agreement, that the estates should be his, and he should be debtor for the money. *Smith v. Smith*, 5 Ves. 189.

### II. Of what subjects a widow shall not be endowed.

#### 1. Property bequeathed to her.

A. seized in fee, devises his house and demesne to his wife for her life, at a rent below the actual value; she keeping the same in repair, and not aliening, except to the persons in remainder: A. devises the residue of his estate, together with the remainder after the death of his wife, to B. in fee. The wife electing to take the house and demesne under the will, cannot have dower thereout: but is entitled to dower out of the residue of the estate. *Birmingham v. Kirwan*, 2 Sch. & Lef. 144.

#### 2. An equity of redemption.

A wife shall not be endowed of an equity of redemption on a mortgage in fee. *Dixon v. Saville*, 1 B.C.C. 326.

### III. What shall be a bar of dower.

#### 1. General doctrine upon the subject.

In what cases a woman shall be barred of dower. *Estcourt v. Estcourt*, 1 Cox, 20.

#### 2. General rule as to the form of instruments barring dower.

1. As the right of dower is in itself a clear legal right, an intent to exclude that right must be demonstrated either by express words, or by clear and manifest implication. 2 Sch. & Lef. 452.

2. In order to exclude such right, the instrument must contain some provision inconsistent with the assertion of the right to demand dower. 2 Sch. & Lef. 453.

#### 3. A previous settlement, notwithstanding in part the wife's property, and herself an infant.

Dower barred by settlement previous to marriage, but during the infancy of the wife, of stock and leasehold property, partly the husband's, partly the wife's. *Chitty v. Chitty*, 3 Ves. 545.

#### 4. Implication from a covenant in a settlement.

Implied bar of dower by a provision under a covenant in the marriage settlement. 10 Ves. 20.

5. A claim of a provision made in lieu of dower, after a recovery in a writ of dower.

At law, if a recovery be had in a writ of dower, and the wife claim a provision made in lieu of dower, she shall be barred. *Birmingham v. Kirwan*, 2 Sch. & Lef. 451.

6. A bequest inconsistent with dower, though not given in bar.

1. Devise of a rent charge is not a bar of dower, unless so expressed, or the estate so small as to shew it must have been so intended. *Pearson v. Pearson*, 1 B.C.C. 292.

2. But where the gift is inconsistent with dower, it shall be a satisfaction for it. *Villa Real v. Lord Galway*, 1 B.C.C. 292. n.

7. Conveyance to uses to be appointed by A., and in default, to A. in fee.

Conveyance to such uses as A. shall appoint; and for default of appointment, to him in fee, a mode used to prevent dower. 10 Ves. 263.

#### IV. What shall not be a bar of dower.

1. Assignment for value.

Plea of purchase for valuable consideration is not good to a bill for dower. *Williams v. Lambe*. 3 B.C.C. 264.

2. A conveyance referrible not to a power, paramount the right to dower, but *aliunde*.

Husband having a power of appointment, paramount the right of dower, in default thereof to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking by a conveyance adapted to pass the interest in the estate, as a limitation of the fee, was held to take in that way, not by way of appointment, and therefore subject to dower. *Maundrell v. Maundrell*, 7 Ves. 567.

3. A term created for the benefit of the inheritance.

At law all terms are considered as terms in gross; and therefore without regard to the purpose prevent a dowress from any legal benefit from recovery in dower; for she recovers with stay of execution during the term. But equity regards the purpose for which the term is created and subsists; and if only for the benefit of the owner of the inheritance, it is considered part of the inheritance: not absolutely merged, but so attendant as to accompany it and every right and interest growing out of it by operation of law or agreement. Not to be used therefore against the owner of the whole or any part of the inheritance: every description of ownership having a use in the term commensurate with the interest in the inheritance. When dower arises therefore, the term in a proportion is as much attendant upon that interest as during the husband's life upon the inheritance; and protects it against either heir or purchaser. 7 Ves. 577.

4. A term attendant, unless assigned.

1. A purchaser cannot protect himself against a claim of dower by a term attendant upon the inheritance, unless he has procured an assignment. *Maundrell v. Maundrell*, 7 Ves. 567.

2. Upon a re-hearing, the lord chancellor affirmed the order, upon the point, that a purchaser, to avail himself of an outstanding term against dower, must have procured an assignment, or at least a declaration of trust; or have got possession of the deed, creating the term. Upon the other question, though appearing not to be raised by the case, the lord chancellor expressed a clear opinion, that a general power of appointment over the whole

whole estate may subsist in the same person who has the fee simple. *Maundrell v. Maundrell*, 10 Ves. 246.

5. A previous settlement precarious and uncertain.

A provision previous to the marriage of a female infant in bar of dower, thirds, and all claim upon the personal estate of the husband, if precarious and uncertain, as, that the personal estate shall go according to the custom of London, does not bar her. *Smith v. Smith*, 5 Ves. 189.

6. Settlement on a female infant upon the contingency of the husband surviving his mother.

A settlement made upon a female infant, by which an estate was settled on the husband's mother for life, remainder to the husband for life, with remainder over, in bar of dower, shall not bind the wife, in regard the mother might (as she did) survive the husband, she may therefore elect to take the provision, or her dower and free-bench. *Carruthers v. Carruthers*, 4 B. C. C. 500.

7. A covenant for an annuity, neither charged upon nor issuing out of land.

A covenant by the husband that his heirs, executors, or administrators, shall pay the wife an annuity for her life in full for her jointure, and in bar of dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable jointure within st. 27 H. 8. *Drury v. Drury*, 2 Eden, 39.

8. A bequest, not adding in bar of dower.

1. A devise or bequest by the testator to his widow, unless he say it is to be in bar of dower, doth not bar her dower. *Brown v. Parry*, Dick. 685.

2. A woman will not be barred of her dower by a provision made by will, unless there be a clear indication of the testator's intention, or unless some other part of the disposition of his property would be defeated by the widow's taking both. The testator having given *all his real* and personal estate on trust, in the first place, to pay such provision to the wife, is not of itself a sufficient indication of such intention. *Thompson v. Nelson*, 1 Cox, 447.

3. Testator charged his estate with an annuity for his wife; she shall notwithstanding have her dower. *Forster v. Cooke*, 3 B. C. C. 347.

## V. Of the writ of dower.

1. When the appropriate course; when not.

Question, whether a widow is entitled to arrears of dower from the death of her husband, or only from her claim, cannot be decided on a writ of dower. 2 Ves. 128.

2. Now almost obsolete.

Writs of dower almost out of use; they can only be opposed by a legal bar; and formerly there could be no other; now equitable bars are in daily practice. 2 Ves. 129.

## VI. Jurisdiction of courts of equity in relation to dower.

1. A bill lies for an assignment of dower.

1. Bill to have dower set out and for arrearages. *Wild v. Wells*, Dick. 3.

2. Dower decreed to be assigned. *Meggot v. Meggot*, Ibid. 794.

3. Demurrer to a bill for dower, overruled, though it is stated no impediment to suing at law. *Mundy v. Mundy*, 4 B. C. C. 294.

4. If right to dower is controverted, it must be made out at law; if not controverted,

controverted, the court of chancery has a concurrent jurisdiction; therefore, where to a bill for dower and arrears, since the death of the husband, the defendant demurred, and by answer admitted the right, and stated an offer to assign it, and an offer of the arrears since the claim, the demurrer was overruled. *Mundy v. Mundy*, 2 Ves. 122.

5. Bill filed by a widow against the heir of her husband for dower; the bill was retained for a year to try her title at law, and a writ of dower brought; before issue joined the heir died; the widow established her right against his devisee: the widow dying, her representative filed a bill of revivor and supplement against the executor and devisee of the heir, for a third part of mesne profits during the life of the widow, which was decreed; and the decree affirmed on re-hearing. *Curtis v. Curtis*, 2 B. C. C. 620.

2. No limitation in equity to arrears of dower.

Vide 9 Ves. 222.

## VII. Of the mode of assigning dower.

By the master.

Dower to be set out by the master, and the dowries to be let into possession. *Goodenough v. Goodenough*, Dick. 795.

## EAST INDIA COMPANY.

Their relative situation.

1. East India Company have neither an independent nor delegated sovereignty; but are mere subjects. 1 Ves. 390.

2. Vide in tit. CHANCERY.

## EJECTMENT.

### I. Of the action of ejectment in general.

The legal title must prevail.

### II. Of the action of ejectment between landlord and tenant.

1. Of relief from a forfeiture by non-payment of rent.

2. Of relief from a forfeiture by non-repair.

### III. Of the action for mesne profits.

Whether consequent only on a judgment in ejectment.

### I. Of the action of ejectment in general.

The legal title must prevail.

The legal title must prevail in ejectment against an equitable title; and it is not competent to a court of law to decide upon the distinction between a clear equity and a doubtful equity. *Lord Massey v. Touchstone*, 1 Sch. & Lef. 67.

### II. Of the action of ejectment between landlord and tenant.

1. Of relief from a forfeiture by non-payment of rent.

1. After judgment and execution in ejectment for non-payment of rent, a bill does not lie at the suit of the tenant, for an account and to be restored  
to

to the possession, on payment of what shall appear due without bringing the rent and costs into court; if the question appears to be merely whether so much rent was due, and not to be of too complicated a nature to be tried at law. The account sought in this case consisting only of three disputed items, admitted to have been paid, if at all, on account of rent, and being such as a jury might easily have investigated, the bill was dismissed with costs. *O'Mahony v. Dickson*, 2 Sch. & Lef. 400.

2. It would have been otherwise, *semble*, if there had been a ground of defence which could not be set up in the ejectment, but which it was unconscionable in the landlord not to admit; or if the account had been so complex that it could not properly have been taken at law. *Ibid*.

2. Of relief from a forfeiture by non-repair.

As to relief against an ejectment by a landlord for breach of a covenant to repair. *Hill v. Barclay*, 16 Ves. 402.

### III. Of the action for mesne profits.

Whether consequent only on a judgment in ejectment.

Whether action for mesne profits can be maintained before judgment in ejectment, *quære*. 6 Ves. 91.

## ELECTION.

### I. General rules.

1. Relative to the subjects to which the doctrine is applicable.
2. Grounds of the doctrine of election.
3. Knowledge or notice of the situation of things, how far requisite.
4. Election and condition distinguished.
5. In the case of contracts.
6. In the case of creditors.
7. In the case of dower.
8. In the case of the heir.
9. In the case of wills.
10. Difference in principle with respect to wills and settlements.
11. Whether the parent's election binds the child.

### II. Gift — settlement — jointure — portion — dower.

1. Construction.
2. Double jointure by settlement and will.
3. Dower and bequest.
4. Dower, and provision in bar of.
5. The leaning is against double portions.
6. Double portions by settlements on a first and a second marriage.
7. Double portions by settlement and will.
8. Double portions by will, and descent of mother's estate contracted to be sold.
9. Double legacies by different testators.
10. Bequest, and title paramount as heir, or otherwise.
11. Bequest to a feme's separate use, and title paramount to the same estate.

12. Bequest

12. Bequest of an annuity to the wife, having a claim for a mortgage debt.
13. Bequest of property not one's own, giving the owner an equivalent.

### III. Relative to creditors.

1. Of the right of election where part only of the relief sought can be obtained at law.
2. Of a special election of legal proceedings for part, and equitable for the residue.
3. Of discharging a creditor's election to sue at law.
4. Of electing between proceedings here and abroad.
5. Of electing between inconsistent demands.
6. How far the coming in under a decree, and praying a commission to prove, is considered an election.

### IV. Dower.

Vide *supra*, II.

### V. Heir.

Vide *supra*, II.

### VI. Legatee.

Vide *supra*, II.

### VII. Relative to the conditions upon which an election proceeds.

Under a settlement with two beneficial interests.

### VIII. As to what shall be accounted an election, what not.

1. Knowledge or notice how far essential.
2. Taking possession.
3. Possession taken by husband.
4. Accepting payment.
5. Accepting interest of legacy.
6. Neglecting to satisfy incumbrances.
7. Partial accession by an infant at full age.
8. In the case of different interest by settlement and by will.
9. Under an option contained in a settlement.

### IX. Of presuming an election.

1. In general.
2. In case of lunacy.

## I. General rules.

1. Relative to the subjects to which the doctrine is applicable.

1. The doctrine of election applies to a deed as well as a will. *Bigland v. Huddleston*. 3 B. C. C. 285. n.

2. The doctrine of election applies to deeds as well as wills. *Moore v. Butler*, 2 Sch. & Lef. 249, 266. Vide *Green v. Green*, 2 Mer. 86.

3. The rule of election is equally applicable to every species of instrument, whether deed or will; and is a rule of law as well as of equity. 2 Sch. & Lef. 450. Vide *Green v. Green*, 2 Mer. 86.

4. Election



4. Election applies to interests of married women, interests immediate, remote, contingent, of value, or not of value, real or personal. 2 Ves. 697.

5. The rule of election applies to dower. 2 Sch. & Lef. 450.

6. Instances of the rule, that a person having a double fund, shall not by his option disappoint another, who has only one. 8 Ves. 388. 395.

7. The doctrine of election applies to a copyhold. *Frank v. Standish*. 1 B. C. C. 588. n.

8. The doctrine of election applied to copyhold estate, not surrendered to the use of the will. 15 Ves. 393.

9. The point, that the doctrine of election reaches the customary heir, claiming a copyhold estate for want of a surrender, admitted at the bar. *Blunt v. Clitherow*, 10 Ves. 589.

10. Heir at law of heritable property in Scotland, being a legatee of personal property in England, put to election. *Brodie v. Barry*, 2 Ves. & Beam. 127.

11. Being a married woman, the interest of her husband by his marital right not affected. *Brodie v. Barry*, 2 Ves. & Beam. 127.

12. The only instances of limiting the principle of election are an attempt to devise by a will not duly executed: secondly, an attempt to devise by an infant. 13 Ves. 223.

13. Parties taking under a will, executing a power of appointment, dispute part of it; there being no fund but that to be appointed, it is not a case of election. *Bristow v. Warde*, 2 Ves. 336.

14. The doctrine of election not applicable against creditors, taking the benefit of a devise for debts, and also enforcing their legal right against other funds disposed of by the will. *Kidney v. Coussmaker*, 12 Ves. 136.

15. A. tenant in tail, with power to lease, remainder to B., wife of C., in tail, conceiving himself to have obtained the fee under a void execution of a power, made leases exceeding his power; reciting, that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself or those claiming under him: A. devised the said estates and others to B. for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to her daughter and her first and other sons, and to D. and his first and other sons, successively in the same manner; and gave to B. and C. other benefits by his will; and gave the residue to D; who filed a bill to have the will established; B. elected to take her estate tail in opposition to the will; which the master reported to be for her benefit: after her death C. who had taken under the will, claimed as tenant by the curtesy, and brought ejectments against the lessees: some of whom had expended considerable sums upon their tenements: upon bills by D. and the lessees, the lord chancellor was of opinion as to the form of D.'s bill, there was great weight in the objection, that the whole was arranged in the former cause; and if there was any omission in the decree, that was not the subject of an original bill: as to the merits, that though the assets of A. would be liable to the lessees upon eviction, the benefit of putting a party to election does not extend to a residuary legatee; and that neither D. as a disappointed devisee, nor *à fortiori* the lessees, could raise that equity against C. holding as tenant by the curtesy, under the election that B. had made, to take her estate tail against the will of A. The bill of D. therefore was dismissed; and that of the lessees retained, in order that, when they should have ascertained their damages, they might have satisfaction from the assets of A.: part of which had been received under his will by C. *Earl of Darlington v. Pulteney*. *Lady Cavan v. Pulteney*, 3 Ves. 384.

16. Devise by the general terms, "all the rest, residue, and remainder of my real and personal estate, of what nature or kind soever," to nephews and nieces, not being for creditors, wife, or children, is not sufficient to raise a

case

case of election, or for supplying the want of surrender of copyhold land, contiguous and intermixed with freehold, against the heir. *Judd v. Pratt*, 15 Ves. 390.

## 2. Grounds of the doctrine of election.

1. Election never but upon presumed intent. 1 Ves. 557.

2. The ground of the doctrine of election is, that no person puts himself in a capacity to take under an instrument, without performing the conditions of it, expressed or implied. 2 Sch. & Lef. 267.

3. The foundation of the rule of election is, that a person cannot accept and reject the same instrument. *Birmingham v. Kirwan*, 2 Sch. & Lef. 449.

4. Party claiming under an instrument must claim under the whole. 2 Ves. 696.

5. A person shall not claim an interest under an instrument, without giving full effect to it, as far as he can, renouncing any right or property, which would defeat the disposition. The ground is the implied condition, upon intention; though from mistake. 13 Ves. 220.

6. Ground of election against the heir, not only an implied condition, that he shall confirm the whole will, but also the intention, that in case the condition shall not be complied with, to give the disappointed devisees out of the estates, over which the deviser had power, a benefit correspondent with that of which they are deprived by such non-compliance. Construction accordingly: viz. to the heir absolutely, confirming the will; if not in trust for the disappointed devisees, as to so much of the estate given to him, as shall be equal in value to the estates, intended for them. 2 Ves. & Beam. 190.

7. Principle of election; giving a right, not to the thing itself, but to compensation out of something else. 18 Ves. jun. 49.

## 3. Knowledge of notice of the situation of things, how far requisite.

1. No person bound to elect without a clear knowledge of the funds. 2 Ves. 371.; *Chalmers v. Storil*, 2 V. & B. 222.

2. Widow not bound by election made under a mistaken impression of the extent of the claim against her. *Kidney v. Cousmaker*. 12 Ves. 136.

## 4. Election and condition distinguished.

1. The equity to compel election, distinguished from an express condition. 2 Ves. 560.

2. As to the reason of the distinction between conditions implied and expressed, with reference to election, as applied to freehold and copyhold estate, against the heir, *quære*. 2 Ves. & Beam. 130.

## 5. In the case of contracts.

The principle upon which a person is put to his election, under a contract, is, that if he will not give the price intended, he shall not have the thing contracted for. *Green v. Green*, 2 Mer. 94.

## 6. In the case of creditors.

Principle, that a creditor having two funds shall take to that, which, paying him, will leave another fund for another creditor. 8 Ves. 391.

## 7. In the case of dower.

1. A widow cannot be put to election, to take under the will of her husband or her dower, except by express declaration or necessary inference, from the inconsistency of her claim with the dispositions of the will. *French v. Davies*, 2 Ves. 572.

2. To compel a widow to elect to take under a will or dower, her claim to dower must be inconsistent with the will. *Strahan v. Sutton*, 3 Ves. 249.

3. A widow not put to election between her dower and an annuity by the will.

will of her husband. For the claim of dower must be inconsistent with the will. *Greatorex v. Carey*, 6 Ves. 615.

8. In the case of the heir.

General rule, that, to put an heir to election, the intention must distinctly appear. Whether it may be shown from circumstances *dehors*, *quære*. 13 Ves. 173.

9. In the case of wills.

1. Election to take under or in opposition to a will, can only be compelled upon something in the will, not *dehors*. *Stratton v. Best*, 1 Ves. 285.

2. Election can only exist where a person has a decided interest, and something is left him by will. 1 Ves. 561.

3. Parties having claim under and against a will, must elect. *Wollen v. Tanner*, 5 Ves. 218.

4. Election decreed between two claims under and against a will. *Blount v. Bestland*, 5 Ves. 515.

5. Election where one legatee insists upon something, by which he would deprive another legatee under the same will of the benefit, to which he would be entitled, if the former permitted the whole will to operate. 9 Ves. 533.

6. Devise by raising a case of election, expressly or by clear implication. 18 Ves. jun. 41.

7. A. tenant in tail, with power to lease, remainder to B., wife of C., in tail, conceiving himself to have obtained the fee, under a void execution of a power, made leases exceeding his power, reciting, that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself, or those claiming under him: A. devised the said estates and others to B. for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to her daughter, and her first and other sons, and to D. and his first and other sons, successively in the same manner; and gave to B. and C. other benefits by his will, and gave the residue to D., who filed a bill to have the will established; B. elected to take her estate tail in opposition to the will; which the master reported to be for her benefit; after her death C., who had taken under the will, claimed as tenant by the courtesy, and brought ejectments against the lessees, some of whom had expended considerable sums on their tenements; neither the lessees nor D. are entitled to stop the ejectments, or to put C. to his election; but an injunction was granted on their undertaking to bring on their causes the following term. *Lady Cavan v. Pulteney*, 2 Ves. 544.

10. Difference in principle with respect to wills and settlements.

Question, as to election, different, where it arises under a will, and where under a settlement. *Green v. Green*, 2 Mer. 95.

11. Whether the parent's election binds the child.

1. Whether the infant issue of tenant in tail was bound by the election of his parent. *Quære*. *Long v. Long*, 5 Ves. 445.

2. Testator made a provision for his wife; and gave a sum of money in trust for the separate use of a daughter, and after her death to divide the principal equally between her children and their issue at twenty-one; if none such, to his son; whom he made residuary legatee. Then after similar, but unequal, provisions for his other children, he declared, that the provision in the will for his said wife and their said children was in satisfaction of all right, claim, &c. which she, or they, or any or either of them, could set up, &c.; or which she and they would be entitled to under his marriage articles; and if his said wife and children, or either of them, should refuse, &c. he revoked the legacy

legacy and bequest therein contained to the use and benefit of such one or more of them, his said wife and children, who should refuse or decline to execute such release or discharge, and declared the same void as to such one or more of them, who should so refuse, as though he had died intestate. A child electing to take under the articles forfeits the life-interest; which falls into the residue; but the children of such child are not bound by the election; and liberty was given to apply on the death of the parent. *Ward v. Baugh*, 4 Ves. 623.

## II. *Gift — settlement — jointure — portion — dower.*

### 1. Construction.

1. By settlement of 1712, a house called B., part of the manor of H., was settled upon the settlor's nephew for life, remainder to the first and other sons in tail, with divers remainders over. By indenture in 1722, the brother of the settlor settled the remainder of the manor upon his son (nephew of the first settlor) for life, remainder to W. his first son, (then born) for life; remainder to his (W.'s) first and other sons in tail male; and a term was created by this deed to raise 4000*l.* for the daughters of W.; and there was a proviso in the deed, that in case W., or such one who should come into possession of the manor, should within seven years, convey B. to the same uses as the manor was limited, he should have a power of making a jointure; but if he should refuse or neglect so to do, all the uses limited of the manor, subsequent to his estate for life, should cease; there was also a provision by which W. was entitled to make leases, for the benefit of his daughters or younger sons. W. F., the grandson, took possession of B. and afterwards of the manor, and lived several years, but did not settle B. to the uses of the deed of 1722, but suffered a recovery of it, and disposed of it by will; and did not execute the power of jointuring, but charged the term with 4000*l.* for his daughters, and executed the power of leasing for their benefit. The bill was to have B. conveyed to the uses of the deed of 1722, or to have the leases declared void, and the execution of the power bad; or for a compensation to the amount of the charges on the manor of H. His honour held, that this was not a case of election; and that, as upon neglect of settling B. to the same uses, only the estates subsequent to W.'s estate for life were made void, and the powers (though subsequent in the order of the deed) were annexed to the estate for life, the execution thereof ought not to be set aside. *Freke v. Lord Barrington*, 3 B. C. C. 274.

2. By settlement on the marriage of E. G. with the plaintiff, estates to which E. G. was entitled as tenant in tail in remainder, are expressed to be settled, as to part, to the use of E. G. for life, remainder to the plaintiff for life, remainder to the first and other sons of the marriage, and as to part, to the use of E. G. for life, remainder to the first and other sons, &c. immediately on the determination of his life-estate. Other estates to which the plaintiff was entitled in fee simple, are by the same settlement conveyed to similar uses. Upon the death of E. G., the defendant (his only son and heir at law) enters on the estates to which he was entitled as tenant in tail under the settlement, and brings ejectments to recover possession of those to which his father was entitled as tenant in tail at the time of the settlement, and into which the plaintiff had entered on his death, as tenant for life under the settlement, as not having been duly conveyed to the uses of the settlement. An injunction was granted on the ground of election, to restrain the defendant from proceeding in these ejectments. *Green v. Green*, 2 Mer. 86.

### 2. Double jointure by settlement and will.

1. When A. by deed conveys property to his wife, and then by will devise

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the same, with other property to her, the wife must elect. *Stratford v. Powell*, 1 Ball & Beatty, 1.

2. The taking possession alone, in ignorance of the rights devised, is not sufficient evidence of an election. *Ibid.*

3. But when such devisee takes defence to an ejectment, brought for the devised estates, and there is a continuance in possession for a year, and a declaration of an intention to abide by the will; this is sufficient to prove an election made. *Ibid.*

4. Testator gives a marriage-bond to leave 2000*l.* to the wife and children, but if no children, to the wife: by will he gives her a life-estate in the whole property: she shall not be put to an election, but take both. *Forsyth v. Grant*, 3 B. C. C. 242.

5. The wife being entitled to an estate under the marriage settlement, the husband, by will, gave her an interest in another estate and all his personalty, in lieu of her claims: the will was not duly executed to pass real estate; she must elect between the personal estate and her dower; but is entitled to delay her election until the account of the personal estate is taken. *Newman v. Newman*, 1 B. C. C. 186.

### 3. Dower and bequest.

1. Devise of an annuity to testator's wife during her widowhood, charged on his real estate. Held, that she must elect to take, either under the will, or her dower. *Arnold v. Kempstead*, 2 Eden, 236.; *Amb.* 466.

2. Testator gave his wife an annuity (charged on the estate of which she was dowable); she must elect between that and her dower. Accepting the payment for three years is not an election. *Wake v. Wake*, 3 B. C. C. 255.

3. Widow put to election to take under the will of her husband, or dower, notwithstanding great disproportion. Receipt of a legacy and annuity under the will for three years, did not prevent her right of election, being presumed not to have acted with full knowledge, which would bind her. *Wake v. Wake*, 1 Ves. 395.

4. Widow held not to be put to her election by a devise to her for life of a mansion-house and fifty acres held with it, being part of the same estate out of which she claimed dower. *Lord Dorchester v. Earl of Effingham*, *Cooper*, 819.

5. Widow put to election between dower and interests under a will; to be first ascertained. *Chalmers v. Storil*, 2 Ves. & Beam. 222.

### 4. Dower, and provision in bar of.

Devisee dies in the life of the deviser, and the estate descends: the deviser's widow being entitled by the will to a provision in bar of dower must elect. 3 Ves. 337.

### 5. The leaning is against double portions.

*Vide* 1 Ves. 435.; 5 Ves. 381.; 1 B. & B. 276.

### 6. Double portions by settlements on a first and second marriage.

*Vide* 1 B. & B. 265.

### 7. Double portions by settlement and will.

1. A. upon his second marriage, settles land to raise 5000*l.* for the children of the marriage. Having four children by that marriage, he, by his will, in which he takes no notice of the settlement, gives 1000*l.* to each of them *as his and her portion*. Held, that they were not entitled to portions under both instruments; and that as they had accepted the provision by the will, they were bound by such acceptance. *Byde v. Byde*, 2 Eden, 19.; 1 Cox, 44.

2. Where a certain sum is settled by marriage articles upon the only child of the marriage, the father afterwards by will gives her all his real estates for life, with remainder to her children: and orders his personalty to be laid out in lands to the same uses; also copyholds (of which he had only the equity of redemption)

tion) are unsundered: she must elect between the devises under the will, &c. the sum which she claims under the settlement. *Macnamara v. Jones*, 1 B. C. C. 481.

3. By marriage settlement 1500*l.* was to be laid out to the use of the wife for life, with remainder in case she should survive, to her; and if the husband should survive, to such uses as she should appoint; and in default, to such persons as would take under the statute of distribution: she died without appointment, leaving a daughter: the father gave the daughter an estate in fee, in performance of the covenant: this is a case of election; but the daughter electing to take under the will, takes the personalty, as next of kin. *Hoare v. Barnes*, 3 B. C. C. 316. The first point held *contra*. *Forster v. Cooke*, 3 B. C. C. 347.

4. A. by marriage settlement, provides an annuity for the eldest son of the marriage: he afterwards, by will, gives to the eldest son a real estate for life, with remainders over: the eldest son must elect between this provision and the annuity. *Blake v. Bunbury*, 4 B. C. C. 21.

5. Under a settlement the sister of a tenant in tail was entitled to an estate for life (subject to his estate tail) taking also an interest under the brother's will, who had treated the settled estate as his own; she must elect. *Finch v. Finch*, 4 B. C. C. 38.

6. A. agrees to assign land to her son, he paying a portion of 20,000*l.* to his sister: she afterwards by will, gives his sister a portion of 20,000*l.* The sister shall take but one sum of 20,000*l.* *Finch v. Finch*, 4 B. C. C. 38.

7. Wife entitled under bond by the husband, upon the marriage, to a sum payable three months after his death for her for life, then for the children; if none, for her absolutely; by will he gave all real and personal he then had, or might die possessed of, upon trust to pay her the rents and interest for life; then the whole equally to the children; if none, over; and revoked all former settlements and wills. There were no children. Widow entitled to both. *Forrest v. Grant*. 1 Ves. 298.

8. Tenant in tail of a rent charge under settlement, being also devisee in strict settlement of the estate charged with it, put to election. *Blake v. Bunbury*, 1 Ves. 514.

9. Testator appoints to grandchildren, under a power to appoint to children, a fund to go in default of appointment equally; the appointment being bad, the children having legacies, must elect. *Whistler v. Webster*, 2 Ves. 367.

10. In a case both of election and satisfaction by the will of a parent as to two subjects of claim by his younger children under a settlement, a case of election was raised as to a third subject, stock vested in trustees, upon the construction of the will. *Pole v. Lord Somers*, 6 Ves. 309.

8. Double portions by will, and descent of mother's estate contracted to be sold.

Children to whom an estate descends from the mother, which had been contracted to be sold to her husband, shall elect between it and their claims under his will. *Pitt v. Jackson*, 2 B. C. C. 51.

9. Double legacies by different testators.

Question, Whether testator intended that legatee should give up a legacy under the will of another testator, or considered it as given up; legatee entitled to both; the intent not being sufficiently made out to compel election. *Baugh v. Read*, 1 Ves. 257.

10. Bequest, and title paramount as heir, or otherwise.

1. A person entitled under a will, and also paramount and against it, must elect. *Wilson v. Mount*, 3 Ves. 191.

2. Land devised by will not duly executed; the heir having a legacy, upon express condition not to disavow the will, must elect. 2 Ves. 371.

3. The heir claiming under a will, and against it a copyhold estate unsundered, put to his election, *Pettward v. Prescott*, 7 Ves. 540.

4. No election against an heir at law, claiming under a will, and also against it a real estate, for want of a due execution according to the statute, unless an express condition is annexed. *Sheddon v. Goodrich*, 8 Ves. 481.

5. Heir put to election between estates devised to him and descended: the deviser having been tenant in tail of some, and tenant for life with the reversion in fee of others. *Welby v. Welby*, 2 Ves. & Beam. 187.

6. Tenant in tail of estates in settlement, devises those estates and other estates of which he was seised in fee, to his heir at law, who was the next remainder-man in tail, for life with remainders over; and also a legacy of 1000*l.*; the heir claims the estates in opposition to the will. The court would not put him to his election. *White v. White*, Dick. 522.

7. Will, directing, that, in case the testators shall enter into contracts for the purchase of lands, and die before the conveyance, such contracts shall be carried into execution, and the money paid out of his personal estate, and the conveyance be to his trustees, their heirs, &c. to the uses of his will. The heir at law, having interests bequeathed to him, put to election. *Thellusson v. Woodford*, 13 Ves. 209.

8. Devise of freehold and copyhold estates. The copyholds were surrendered to the use of the will; but the testatrix afterwards exchanged part for other copyholds, which were not surrendered: the heir, claiming beneficially under the will, was put to election. *Frank v. Standish*, 15 Ves. 391.

9. Election against a Scotch heir, claiming under an English will, not controuled by the law of death-bed. 2 Ves. & Beam. 134.

11. Bequest to a feme's separate use, and title paramount to the same estate.

Feme covert must elect between an annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estate in tail. Possession taken by her husband under that title, does not preclude her election; but as it was manifestly the better interest, no inquiry was directed as to which would be most for her benefit. *Wilson v. Lord John Townshend*, 2 Ves. 693.

12. Bequest of an annuity to the wife, having a claim for a mortgage debt.

General exception of mortgage debts out of charge in will for debts, not sufficient to put wife to election to take under will, or have mortgage of her estate paid out of assets. 1 Ves. 178.

13. Bequest of property not one's own, giving the owner an equivalent.

1. Where one devises what is not his own, giving the owner an equivalent, the owner, defending the devise, must give up the equivalent to the devisee. *Lewis v. King*.

2. Devisee cannot disappoint the will, even if it disposes of his property: but must either convey according to the devise, or renounce the benefit of it *pro tanto*: so if he is an incumbrancer upon estate directed by the will to go free from incumbrance, he must elect: but the intent must appear by declaration plain, or necessary inference. 1 Ves. 523.

3. Testator disposes of the estate of another, who has some interest under the will: he shall not take that, unless he gives up his estate to that amount. 2 Ves. 372.

4. Where a testator conceiving himself entitled to the property of another person, makes a general disposition of all his estate, and gives some benefit to that person, he must elect. Therefore a husband conceiving himself entitled under a void deed to a residue bequeathed to his wife, and dying without getting possession, having made such a general disposition by a will, under which she took an interest, it is a case of election; and her election to take the provision under the will, which, though less in point of value, was

was to her separate use, was established against the assignees under the bankruptcy of her second husband. *Rutter v. Maclain*, 4 Ves. 531.

5. Where testator gives what belongs not to him, but to another; to whom he gives some estate of his own; upon an implied condition, that the other shall part with his own estate, or not take the bounty. 10 Ves. 609.

6. Election upon a will, disposing of the estate of another, and giving an estate to him; upon an implied condition, that he shall permit the will to take effect. 10 Ves. 616.

### **III. Relative to creditors.**

1. Of the right of election where part only of the relief sought can be obtained at law.

Plaintiff suing for equitable relief, part of which only could be had at law, not entitled to elect; but can proceed at law only by leave of the court. *Mills v. Fry*, 19 Ves. 277.

2. Of a special election of legal proceedings for part, and equitable for the residue.

Liberty given to the plaintiff to make a special election. *Joyce v. Barker*, Dick. 182.

3. Of discharging a creditor's election to sue at law.

Defendant ordered to elect whether he would come in under the decree or proceed at law; after electing to proceed at law, his election was discharged, and he was admitted to come in under the decree. *Dennet v. Coker*, Dick. 144.

4. Of electing between proceedings here and abroad.

Plaintiff put to his election where suing in this court, and in a foreign court of law. *Pieters v. Thompson*, Cooper, 294.

5. Of electing between inconsistent demands.

Vide 7 Ves. 540.

6. How far the coming in under a decree, and praying a commission to prove, is considered an election.

A creditor having come in under a decree, and prayed a commission to prove his debt, though he went no further, held to have made his election, and not permitted to proceed at law to recover his debt. *Farnham v. Burroughs*, Dick. 63.

### **IV. Dower.**

Vide *supra*, II.

### **V. Heir.**

Vide *supra*, II.

### **VI. Legatee.**

Vide *supra*, II.

### **VII. Relative to the conditions upon which an election proceeds.**

Under a settlement with two beneficial interests.

When a party elects under a settlement to take one of two beneficial interests, whether he is bound in equity to give up the other absolutely, or only to make compensation, *quære*. *Green v. Green*, 2 Mer. 93.



## VIII. As to what shall be accounted an election ; what not.

## 1. Knowledge or notice how far essential.

Vide 1 B. & B. 1.

## 2. Taking possession.

1. Where testator gave to his son for his life the interest of a mortgage upon an estate, of which he was tenant for life in remainder at testator's death, and also the furniture in certain houses, upon condition of his executing a release of all claims he might have upon testator's estate, and of his not contesting the will. Though the son lived fourteen months after the father's death without executing a release, and upon his first hearing the will, had expressed his dissatisfaction, and an intention of filing a bill; yet the circumstance of his never having paid any interest on the mortgage, of his having entered into possession of the furniture, and exercised acts of ownership, together with certain expressions of assent in his letters, were held to be evidence of his acceptance. *Earl of Northumberland v. Marquis of Granby*, 1 Eden, 489.; *Amb.* 657.; *Ibid.* 540.; 3 *Toml. P. C.* 277.

2. Husband devised all his real and personal in trust for his wife for life, provided she should not marry, and made her executrix. The trustees not acting, she took possession. After receiving rents and profits for five years, not allowed to elect to take a sum under marriage settlement without special ground, as that from situation of the property it was doubtful what would be the result. *Buttrick v. Broadhurst*, 1 *Ves.* 171.

3. A. tenant for life, remainder to B. his only son, in tail, remainder to A. in fee. B. died in A.'s lifetime without issue, and without having barred the remainder, having by his will given all his estates in very general terms to A. for life, and from and after his decease the settled estates by name, and also estates of which he was himself seised in fee; "and all other estates which descended or came to him, or should descend or come to him from his father" to C. and D. his sisters of the half-blood, as tenants in common, in fee, and his personal estate to A., whom he appointed executor; and having by a codicil devised to A. in fee, a freehold estate he had purchased since the execution of his will. On B.'s death, A. proved his will, possessed his personal estate, mortgaged for his own benefit the estate devised by the codicil, enjoyed during his life all the settled estates, and also the real estates whereof B. was seised in fee. A. died two years after B., having by his will, which was executed six weeks after B.'s death, devised the settled estates and all other his estates to trustees for a term of years, upon trust, for payment of his debts, and for raising money for renewing the leases of part of the settled estates, which were held by lease for lives; with remainder to C. and D. as tenants in common for life, with survivorship between them, and with remainders to their issue in strict settlement, with remainders over, including a limitation to F. for life. On A.'s death, C. and D. entered and enjoyed all the estates for fourteen years, when C. died without issue, having devised all her estates to D. in fee. D. continued in possession of the whole till her death, about twenty-nine years after the death of C. During the period of C. and D.'s enjoyment, they on various occasions executed deeds containing recitals of the will of B., and describing themselves as devisees for life under it; and on renewals of the lease of part of the settled estates, D. paid the fines and expences out of her own monies; but it appeared from several letters written by her at those times, that she considered herself as having a right, which she declined to exercise, of charging the estate with the amount. D. died without issue, leaving G. her heir at law, and having by her will devised to G. in fee part of the settled estates by name, and the residue of the settled estates by name to E. in fee (who died in her lifetime), and bequeathed 500*l.* to F., and appointed him executor.

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On a bill by G. against F., who had become entitled to an estate for life in possession under the will of A., praying a declaration that A., by accepting the benefits of B.'s will, had elected to conform to its devise; that the plaintiff was entitled to the estates comprised in the settlement, and that F. might elect to take under or against the will of D. — Held, 1. Supposing A. had made such election (which was not sufficiently apparent), yet C. and D. had elected and bound themselves to take under the will of A. — 2. That F. was bound to elect either to give up the legacy of 500*l.*, bequeathed to him by D., or that part of the settled estate which she devised to G. *Dillon v. Parker*, 1 W. C. C. 253.

3. Possession taken by husband.

Vide 2 Ves. 693.

4. Accepting payment.

Vide 3 B. C. C. 255.

5. Accepting interest by legacy.

The heir at law, a *feme covert*, to whom a legacy of 5000*l.* was given by will for her separate use, having constantly received the interest for five years, was held to have elected to take under the will; and it was determined that her infant heir, who had been admitted to a copyhold estate of the devisor, held it in trust for the devisee. *Ardesoife v. Bennet*, Dick. 463.

6. Neglecting to satisfy incumbrances.

Vide 1 Eden, 489.

7. Partial accession by an infant at full age.

Partial accession at the age of twenty-one, to a settlement by a female infant, an election to abide by the whole. 18 Ves. jun. 277.

8. In the case of different interests by settlement and by will.

A widow having different interests under her marriage settlement, and her husband's will; and proving the latter, acting under it, and receiving the rents six years, held to have made her election. *Butricke v. Broadhurst*, 2 B. C. C. 88.

9. Under an option contained in a settlement.

The testator had by settlement reserved the election of conveying certain parcels or paying a certain sum; not having elected during his life, and the personaity being inadequate to payment of debts, the estate shall be conveyed. *Tyson v. Benyon*, 2 B. C. C. 5.

## IX. Of presuming an election.

1. In general.

Vide 1 Ves. 557.

2. In case of lunacy.

No presumption of election to take as real estate, where there is incapacity, as lunacy. *Ashby v. Palmer*, 1 Mer. 296.

## ENGLAND, BANK OF.

### I. In relation to the transfer of stock.

1. Their right to restrain a transfer by an executor into his own name.
2. Their right to restrain a transfer on a specific bequest of residue.

3. Re-

3. Responsibility of the bank on a transfer to one not entitled.
4. Of making them parties to a bill to restrain a transfer.
5. Of the costs of the bank made parties to a bill for a transfer.
6. Of bringing on the bank to a hearing in a bill to discover what sum an executrix had transferred into her own name.
7. Course to be pursued on applying under 39 & 40 Geo. 3. to restrain a transfer.
8. Pending the question of lien thereon.

## II. In relation to bank stock.

What division shall be accounted capital ; what not.

## III. In relation to the bank books.

1. Distinction between them and records.
2. Mode of obtaining an inspection of.

### I. In relation to the transfer of stock.

1. Their right to restrain a transfer by an executor into his own name.

The bank of England are not to look beyond the legal title, to the trusts of the will ; and therefore cannot prevent the executor from selling out or transferring stock into his own name. *The Bank of England v. Parsons*, 5 Ves. 665.

2. Their right to restrain a transfer on a specific bequest of residue.

Though a residue is specifically devised, the bank has no right to restrain the executor from transferring the funds. *Bank of England v. Moffat*, 3 B.C.C. 260.

3. Responsibility of the bank on a transfer to one not entitled.

Bank stock specifically bequeathed to A. in trust to pay a bond debt to himself ; and as to the rest, for B. for life : remainder over : the trustee being also executor, transferred to persons not entitled under the will : the bank is not chargeable. *Hartga v. the Bank of England*, 3 Ves. 55.

4. Of making them parties to a bill to restrain a transfer.

Notwithstanding the acts of parliament 39 & 40 Geo. 3. c. 3., the bank of England may still be made parties to a bill to restrain a transfer of stock filed since that act. A demurrer by the bank was therefore overruled. *Temple v. Bank of England*, 6 Ves. 770.

5. Of the costs of the bank made parties to a bill for a transfer.

Stock in the bank being given to A. for life, and afterwards to B., and A. having bought B.'s remainder, they joined in an application to the bank to permit a transfer ; the bank refusing, a bill was filed : the bank ordered their costs. *Pearson v. the Bank of England*, 4 B.C.C. 529.

6. Of bringing on the bank to a hearing in a bill to discover what sum an executrix had transferred into her own name.

The bank being made parties to discover what sum an executrix had transferred into her own name, ought not to be brought on to a hearing. *Williams v. Williams*, 2 B.C.C. 87.

7. Course to be pursued on applying under 39 & 40 Geo. 3. to restrain a transfer.

An application under the act 39 & 40 Geo. 3. c. 36. to restrain the bank from

from making a transfer without making them parties, must be upon notice to the defendants or on affidavit, as in cases of waste. *Hammond v. Maundrell*, 6 Ves. 773.

8. Pending the question of lien thereon.

The question being whether the plaintiff has a lien upon stock: the court will not order the bank to permit a transfer. *Birch v. Corbyn*, 1 B. C. C. 571.

## II. In relation to bank stock.

What division shall be accounted capital; what not.

1. An extraordinary division of a sum of money by the bank of England, among the proprietors of bank stock, beyond the usual dividend, considered as capital; and therefore not the absolute property of the tenant for life; the lord chancellor following, but disapproving, the former decisions; and holding the circumstances, that the division was in money, not stock, and that it was to be presumed to be profit arising in the time of the tenant for life, too slight to form a distinction. *Paris v. Paris*, 10 Ves. 185.

2. An extraordinary division of profit by the bank of England among the proprietors of bank stock, considered as capital. *Clayton v. Gresham*, 10 Ves. 288.

3. Distribution by the bank of extraordinary profit, beyond the regular dividend, not by way of increased dividend, but as a bonus, taken as capital; and the manner, in which it is given, makes no difference. *Witts v. Steere*, 13 Ves. 363.

4. Tenant for life of bank stock held entitled to a dividend "of 5*l.* per cent. interest and profits for the half year." *Barclay v. Wainewright*, 14 Ves. 66.

## III. In relation to the bank books.

### 1. Distinction between them and records.

Distinction between the books of the bank of England and records. 18 Ves. jun. 203.

### 2. Mode of obtaining an inspection of.

Upon a reference to the master, it being necessary (to enable him to make his report) to have the evidence of entries in the books of the bank of England, the master is bound to grant the certificate, in order to justify the bank in permitting an inspection, rather than compel the parties by his refusal, to file their bill for discovery. *Brace v. Ormond*, 1 Mer. 400.

## ESCHEAT.

### I. Origin of the doctrine.

Of feudal original.

### II. Reason of the doctrine.

The want of, not an heir, but a tenant.

### III. Upon what event the doctrine attaches.

Upon the single event of *defectum tenentis de jure*.

### IV. In relation to copyholds.

They cannot escheat to the crown.

**V. In relation to inchoate title.**

The case of the death of a purchaser without heir before conveyance.

**VI. In relation to mortgages.**

In relation to re-conveyance, where the mortgagor dies without heir.

**VII. In relation to trusts.**

1. Reason of the doctrine of no escheat on the death of *cestui que use*.
2. Preference between a trustee and the crown claiming by escheat.

**VIII. Obligations of the lord in escheat.**

Whether bound by deeds previously executed.

**IX. In relation to the tenant.**

Of the regard had to his right of seisin.

**X. In relation to the discovery of escheats.**

Premium thereon.

**I. Origin of the doctrine.**

Of feudal original.

An escheat was in its nature feudal; and in default of heirs, the land, strictly speaking, reverted. *Burgess v. Wheate*, 1 Eden, 191.

**II. Reason of the doctrine.**

The want of, not an heir, but a tenant.

1. The right of escheat is not founded on want of an heir, but of a tenant to perform the services. *Burgess v. Wheate*, 1 Eden, 201.
2. Escheat is for want of a tenant. *Burgess v. Wheate*, 1 Eden, 235.
3. The legal right of escheat arises under the law of enfeoffment, by which the lord gave the land to the tenant and his heirs, under a tacit condition to revert, if he died without heirs. *Burgess v. Wheate*, 1 Eden, 241.

**III. Upon what event the doctrine attaches.**

Upon the single event of *defectum tenentis de jure*.

The latitude given to the donee to hold to himself, his heirs, and assigns, reduced the consideration of reverter, to the single event of *defectum tenentis de jure*. *Burgess v. Wheate*, 1 Eden, 242.

**IV. In relation to copyholds.**

They cannot escheat to the crown.

Copyhold cannot escheat to the crown. *Walker v. Denne*, 2 Ves. 170.

**V. In relation to inchoate title.**

The case of the death of a purchaser without heir before conveyance.

Case (supposed) of a purchase and the money paid by the purchaser, who  
dies

dies without heir before any conveyance. The lord could not pray a conveyance. *Per M. R. Burgess v. Wheate*, 1 Eden, 211.

#### VI. In relation to mortgages.

In relation to re-conveyance, where the mortgagor dies without heir.

If mortgagor were to die without heir, and mortgagee in possession were to come against the personal representatives for the money to; the court would compel him to re-convey, not to the lord by escheat, but to the personal representative. *Per M. R. Burgess v. Wheate*, 1 Eden, 211.

#### VII. In relation to trusts.

1. Reason of the doctrine of no escheat on the death of *cestui que use*.

The reason why there was no escheat on the death of *cestui que use* in equity, was, that on such an event no use remained, and consequently no grounds for the *subpena*. *Burgess v. Wheate*, 1 Eden, 244.

2. Preference between a trustee and the crown claiming by escheat.

Trustee not having the legal estate, cannot hold against the crown claiming by escheat. *Walker v. Denne*, 2 Ves. 170.

#### VIII. Obligations of the lord in escheat.

Whether bound by deeds previously executed.

For the purpose of binding the lord in escheat, deeds have been held good against him, that would have been void in other respects. *Burgess v. Wheate*, 1 Eden, 209.

#### IX. In relation to the tenant.

Of the regard had to his right of seisin.

The law of escheat had no regard to the tenant's right to the land, but only to his right of seisin. *Burgess v. Wheate*, 1 Eden, 243.

#### X. In relation to the discovery of escheats.

Premium thereon.

The ordinary rule for the crown to give a lease to the party discovering an escheat. 7 Ves. 71.

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### ESTATE.

#### I. In relation to quality.

1. The question defined, whether an estate is real or personal.
2. With reference to real property — fee simple or entire interest.
3. With reference to real property — freehold or leasehold.
4. With reference to real property — properties of and incidents to estates *pour autre vie*.
5. With reference to chattel interests — properties of and incidents to.
6. With reference to personal property — absolute or entire interest.
7. With reference to personal property — investment of.

#### II. In

## II. In relation to title.

1. Possession.
2. Occupancy.
3. Equitable.
4. Descent — what a sufficient seisin.
5. Of the rule *possessio fratris*.
6. Of the preference between two equal titles in the same person.

## III. In relation to the limitation of estates.

1. Construction — of implication in case of express limitations.
2. Construction — whether a limitation operates in tail or for life.
3. Construction — of the rule in Shelly's case.
4. Construction — what are words of limitation, what of purchase.
5. Construction — whether a limitation operates by way of remainder or in use.
6. Construction — whether a limitation operates absolutely or conditionally.
7. Validity or invalidity of limitations, as being or not being too remote.
8. Of accelerating limitations, the antecedent limitations being void.

## IV. In relation to the conveyance of estates; with the legal consequences.

1. Possession when essential to.
2. Effect of joining in a conveyance, upon the party's rights.
3. Effect of a mistaken recital.
4. Of livery.
5. Possession, whether essential to a release.
6. Lease and release, proof of.
7. Covenant to stand seised.
8. Fine — operation, as a bar, of fine and non-claim.
9. Fine — operation of, whether prevented by bill in equity.
10. Fine — levied *pendente lite*, its effect.
11. Fine — impeachable for fraud.
12. Fine — levied upon a fraudulent possession; its effect.
13. Fine — what subjects or parcels are included in.
14. Fine — its effect to pass future interests.
15. Fine — levied by one not having the freehold; its effect.
16. Fine — levied by elegit creditor; its effect.
17. Fine — when it operates as a discontinuance.
18. Fine — levied by tenant in tail with reversion in fee; its effect.
19. Fine — levied by one of two parceners seised in tail, with remainder in fee *aliunde*.
20. Fine — its effect upon equities and equitable rights.
21. Fine — whether a bar to equitable remainders.
22. Fine — whether a bar to a bill for relief.
23. Fine — *sur concessit*, commencement of its operation.

24. Fine

24. Fine — practice relative to the levying of.
25. Recovery — possession whether essential to.
26. Recovery — suffered by tenant in tail with reversion in fee; its effect.

**V. In relation to remitter.**

On a purchase.

**VI. In relation to merger.**

1. In the cases of tenant in tail, infant, and adult.
2. Of the merger of equitable interests in legal.
3. Whether equity will modify the legal doctrine of merger.

**VII. In relation to the conversion of property in general.**

1. As between the real and personal representative.
2. In the case of a special direction for a purpose which fails.
3. Under an agreement.
4. Under the effect of a contract by relation.
5. Of an infant's property.

**VIII. In relation to the conversion of real property to personal.**

1. The time of conversion ascertained.
2. Conversion for a special purpose; its effect.
3. In the case of a sale directed.
4. In the case of a sale directed for a special purpose.
5. In the case of a sale directed for a special purpose, which fails.
6. In the case of a contract to sell.
7. In the case of a contract to sell a reversion.
8. By construction of a settlement.
9. By construction of a will.
10. By construction of a will and deed of trust.
11. In relation to the ceremonial of a devise.
12. In favour of the next of kin, in the case of a lapsed legacy.
13. By sale of land charged with a jointure.
14. In the case of timber wrongfully felled.
15. In the case of timber, belonging to an infant, felled.
16. From the incompetency of an infant to elect.
17. By a partnership contract.

**IX. In relation to the conversion of personal property to real.**

1. As between the real and personal representatives.
2. In the case of money to be laid out in land.
3. In the case of money to be laid out in land, but lent on mortgage instead.
4. In the case of money under marriage articles, to be invested in securities.
5. Purchase money of contract that went off.
6. Damages for not conveying or settling estate.
7. In the case of an infant purchaser.
8. In the case of uses to convert personalty into land, being united with the fund in the same person.

9. By



9. By construction of a settlement.
10. By construction of a will.

**X. In relation to the exoneration of the real estate by the personal.**

1. General rule.
2. Of the parties for whom the right is available.
3. In the case of debts not contracted by the party.
4. In the case of a bond by the devisee for the devisor's debt.
5. In the case of a purchase subject to a mortgage.
6. In the case of the purchase of an equity of redemption.
7. In the case of mortgage debts.
8. By rent and profits of estate descended.
9. Vide in tit. WILL.

**XI. In relation to the exoneration of the personal estate by the real.**

1. In the case of simple contract debts.
2. In the case of debts charged upon an estate, being paid out of the estate of the first taker.
3. Vide in tit. WILL.

**XII. Exoneration in miscellaneous cases.**

1. Exoneration of the general estate by a particular fund upon which an annuity was charged.
2. Exoneration of a fund which a party bound to elect had already charged.

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**1. In relation to quality.**

1. The question defined, whether an estate is real or personal.

On a question, on the disposition by will of some new-river shares, it was agreed, that new-river shares were real property and descendible to the heir. *Lord Sandys v. Sibthorpe*, Dick. 545.

2. With reference to real property — fee simple or entire interest.

1. Limitation to a man for life and then to his heirs at law, is a fee simple. 13 Ves. 415.

2. A term being settled upon the husband for life, remainder to the wife, her executors, administrators, &c. for the residue of the term, for her jointure, and for the better settling the term on her for life, for her jointure, a covenant to renew and insert her name. The addition of these words will not reduce it to an estate for life. *Clarke v. Hackwell*, 1 B. C. C. 304.

3. With reference to real property — freehold or leasehold.

A fine was levied of certain premises by a man and his wife to the use of B., his executors, &c. for 999 years, and at the same time the lessor covenanted that if B., his heirs or assigns, should by deed express his will and mind to have the freehold and inheritance of the said premises, then such fine should enure to such persons and for such estates as by such deed should be expressed. This lease is a mere chattel, and will pass by a general residuary bequest of personal estate. *Williams v. Bishop of Landaff*, 1 Cox, 254.

4. With

#### 4. With reference to real property — properties of and incidents to estates *pur auter vie*.

1. An interest in an estate *pur auter vie*, that would be an estate tail, if applied to freehold lands of inheritance, may be disposed of by deed. 6 Ves. 158.

2. The interest in an estate *pur auter vie* to a man, his executors, administrators, and assigns, beyond the debts, belongs to those who are entitled to the personal estate. The executor was therefore held a trustee for the residuary legatees. *Ripley v. Waterworth*, 7 Ves. 425.

3. Tenant *pur auter vie* made a lease for years, and died during that lease, living the *cestui que vie*. The lessee for years would take the estate itself. 7 Ves. 128.

#### 5. With reference to chattel interests — properties of and incidents to.

Persons in possession of a chattel interest, are disabled by the imbecility of their estate from meddling with the right; and no writ which deals with the right can be brought against them. Their possession is the possession of the person having the freehold. *Saunders v. Lord Annesley*, 2 Sch. & Lef. 97.

#### 6. With reference to personal property — absolute or intire interest.

1. A limitation of personal property after a disposition that would raise an intail express or implied in real estate, is void; and the person who would be tenant in tail, takes the absolute interest. *Chandless v. Price*, 3 Ves. 99.

2. A limitation, which would create an estate tail as to freehold property, would give the absolute interest as to personal estate. 6 Ves. 159.

3. Whatever would, directly or constructively, constitute an estate tail in land, will pass an absolute interest in personal property. *Britton v. Twining*, 3 Mer. 183.

#### 7. With reference to personal property — investment of.

1. General rule, that where personal property is bequeathed for life with remainders over, and not specifically, it is to be converted into the three *per cents.*, subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle. *Howe v. Earl of Dartmouth*, 7 Ves. 137.

2. The general rule for the conversion of personal property, bequeathed for life, with remainders over into the three *per cents.*: held not to attach upon property of a testator, who died in India, under his will, made there, invested by his executor in the company's securities there: but on the arrival of the parties in this country a decree was made, that it should be remitted, and invested accordingly. *Holland v. Hughes*, 16 Ves. 111.

## II. In relation to title.

### 1. Possession.

Distinction between land and a personal chattel: the latter held by possession, the former by title; of which possession is not even *prima facie* evidence. 13 Ves. 119.

### 2. Occupancy.

Requisites to occupancy: a vacant possession, and a filling up of it by some person, who meant to occupy. 7 Ves. 442.

### 3. Equitable.

An equitable title may be barred by length of time, but cannot be shifted or transferred. *Cholmondeley v. Clinton*, 2 Mer. 360.

### 4. Descent — what a sufficient seisin.

The entry of a widow as guardian to a son, does not prevent his having  
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such a seisin as to convey title to his customary heir. *Forder v. Wade*, 4 B. C. C. 521.

5. Of the rule *possessio fratris*.

A question upon the rule, "*possessio fratris*," &c. depending upon the implication of an estate for life. *Wheldale v. Partridge*, 5 Ves. 388.

6. Of the preference between two equal titles in the same person.

Where the possession of an estate can be referred to a good and valid title, equity will not refer it to a title obtained by fraud. Therefore a fine by a person obtaining possession by fraud, and afterwards procuring assignments of elegits affecting the estate, cannot by non-claim operate as a bar; the possession of the conusor being referred to the elegit, and not to the title by fraud. *Conry v. Caulfield*, 2 B. & B. 255.

### III. In relation to the limitation of estates.

1. Construction — of implication in case of express limitations.

As to extending or reducing an express limitation in a deed by implication, *quære*. 18 Ves. jun. 422.

2. Construction — whether a limitation operates in tail or for life.

Under a limitation by deed to the father for life, remainder to his issue male, remainder to the father in fee, the sons took by purchase as joint tenants for life only; the word "issue" in a deed being a word of purchase. 4 Ves. 794.

3. Construction — of the rule in *Shelly's case*.

Vide 12 Ves. 89.

4. Construction — what are words of limitation, what of purchase.

"Heir," or "heir male of the body" in the singular number, words of limitation, not of purchase; unless words of limitation superadded, or the context shows, that those words are not used in their technical sense; as the word "issue" or "without impeachment of waste:" a limitation to trustees to preserve contingent remainders: or a direction so to frame the limitation, that the first taker shall not have the power of barring the entail. 2 Ves. & Beam. 371.

5. Construction — whether a limitation operates by way of remainder or in use.

It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise. Hence a limitation in a settlement "to trustees to the use of A. the settler for life, remainder to B. his intended wife, for life, (except as thereafter excepted,) remainder to the heirs of the body of A. begotten on B., remainder to A. and his heirs, with a proviso, that if A. should die, and leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the said trustees should stand seized of one moiety, from and after the decease of A. to the use of such child" — is a contingent remainder, not a springing use, and therefore barred by a fine levied by A. and B. *Carwardine v. Carwardine*, 1 Eden, 27.; *Fearne's Ex. Dev.* 388.

6. Construction — whether a limitation operates absolutely or conditionally.

1. Limitation over after a limitation which never took effect, established; not operating as a condition precedent. *Meadows v. Parry*, 1 Ves. & Beam. 124.

2. Bequest of 300*l.* to A., to be paid to him, his executors, &c. within twelve months after the death of B., "in case B. shall happen to survive my wife."

wife." The latter words construed with reference only to the time of payment, and not to make void the legacy, B. having died in the lifetime of testator's wife. *Massey v. Hudson*, 2 Mer. 130.

7. Validity or invalidity of limitations, as being or not being too remote.

1. Testator devises leasehold premises to his executor, after payment of certain sums to pay the rents to A. for life, and then that his natural daughter should have the same for her life; and in case she should die leaving no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will. Held, the devise over to the executors not too remote, *Taylor v. Clarke*, 2 Eden, 207.

2. Limitation of a term or the trust of a term for twenty lives in being successively, is good. 4 Ves. 382.

3. Property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor drops. 11 Ves. 146.

4. An unborn child of a person *in esse* may be made tenant for life, if beyond that the absolute interest is disposed of. *Routledge v. Dorril*, 2 Ves. 357.

5. Limitation to a child *en ventre*. 16 Ves. 296.

6. Whether a limitation in a will was a perpetuity. *Tothil v. Pitt*, Dick. 431.

7. Limitation of personal property, if A. should die without issue male, B. (if living), if not, C. and D. in succession of age, to enjoy, &c.; not too remote. *Southey v. Lord Somerville*, 13 Ves. 486.

8. Appointment by will of a sum of money to several persons upon the death of testatrix's son without issue, or without making any disposition by will or deed; held to be too remote and void. *Grey v. Montagu*, 2 Eden, 205.; 3 Toml. 315.

9. A limitation by will of personal estate after the death of N. S. without lawful issue, is too remote and void. *Jeffery v. Sprigge*, 1 Cox, 62.

10. Gift of the interest of a sum of money to A. for life, at his death, to devolve to the heirs of his body, is too remote. *Robinson v. Fitzherbert*, 2 B. C. C. 127.

11. Trust by deed, creating estates tail, after any contract for alienation to raise a sum of money for the persons next in the course of limitation, declared void, as tending to a perpetuity, and inconsistent with the rights of the tenant in tail. *Mainwaring v. Baxter*, 5 Ves. 458.

12. Limitation of personal property upon an indefinite failure of issue void, as too remote. 13 Ves. 483.

13. Limitation of personal property after an indefinite failure of issue void, as too remote; otherwise, if confined to the time of the death. Courts endeavour to support such limitation; taking advantage of any expression to construe the event never having had issue, or to confine it to the death. *Ibid.* 484.

14. By the law of Scotland, land may be made unalienable for ever under certain regulations. 4 Ves. 339.

8. Of accelerating limitations, the antecedent limitations being void.

The first use being void, *quære* whether the subsequent uses are made void, or their coming into possession is accelerated. *Robinson v. Hardcastle*, 2 B. C. C. 22.

IV. *In relation to the conveyance of estates; with the legal consequences.*

1. Possession, when essential to.

A person out of possession, cannot convey any thing to a stranger: he can  
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only give a release to one in possession. *Underwood v. Lord Courtown*, 2 Sch. & Lef. 65.; *Saunders v. Lord Annesley*, Id. 105.

2. Effect of joining in a conveyance, upon the party's rights.

Where a man is called upon to join in a conveyance for the purpose of obviating a specified objection to title, he will not be bound by it, as to any interest of which he has not been apprised. But if he consents to join in the conveyance, upon being told generally that there are objections to the title, he must be taken to have enquired into the nature of those objections, and cannot afterwards raise a question as to the extent of his information. *Braybrook v. Inskip*, 2 Mer. 356.

3. Effect of a mistaken recital.

Recital of a charge for the benefit of one who is a party to the deed, omitting to recite an estate for life in remainder of the same party, shall not hurt her title. *Finch v. Finch*, 4 B. C. C. 38.

4. Of livery.

1. Feoffment by deed to a relation and his heirs, but no livery of seisin: it shall be construed a covenant to stand seised. 2 Ves. 226.

2. Vide 3 Mer. 416.

5. Possession, whether essential to a release.

Vide 2 Sch. & Lef. 65. 105.

6. Lease and release, proof of.

Remainder under an old settlement barred by a fine and non-claim: the fine also working a discontinuance. The defendants producing the lease for a year and a copy of the release, the original not being forthcoming, the bill was retained, with liberty to bring an ejectment; and in default, the bill to be dismissed with costs. *Snell v. Silcock*, 5 Ves. 469.

7. Covenant to stand seised.

Vide 2 Ves. 226.

8. Fine—operative as a bar of fine and non-claim.

Vide 5 Ves. 469.

9. Fine—operation of, whether prevented by bill in equity.

A bill in equity not sufficient to prevent the operation of a fine at law. 5 Ves. 238.

10. Fine—levied *pendente lite*; its effect.

Fine levied *pendente lite* not to be set up at the trial of an ejectment. *Lutwich v. Southin*, Dick. 286.

11. Fine, impeachable for fraud.

A fine may at law be impeached for fraud, and in matters of fraud equity has concurrent jurisdiction. *Conry v. Caulfield*, 2 B. & B. 272.

12. Fine—levied upon a fraudulent possession; its effect.

A fine levied upon a possession acquired by the fraud of a tenant, but acquiesced in by the landlord, with notice of the fraud, will operate as a bar. *Conry v. Caulfield*, Ibid. 273.

13. Fine—what subjects or parcels are included in.

1. Fines are levied by all descriptions of names, to take in every thing: and no objection that any thing described was not really included. 1 Ves. 138.

2. Court will not intend that there are advowsons, merely because mentioned in the fine. *Butler v. Every*, Ibid. 136.

14. Fine

## 14. Fine — its effect to pass future interests.

Effect of a fine, operating as an estoppel, to pass any future interest. 14 Ves. 240.

## 15. Fine — levied by one not having the freehold; its effect.

Fine levied by a party not having the freehold, has no effect: it may be avoided by the plea "*quod partes finis nil habuerunt*." Saunders v. Lord Annesley, 2 Sch. & Lef. 99.

## 16. Fine — levied by elegit creditor; its effect.

A fine levied by an elegit creditor can avail nothing; possession not being adverse to the title of the debtor. Conry v. Caulfield, 2 B. & B. 272.

## 17. Fine — when it operates as a discontinuance.

Vide 5 Ves. 469.

## 18. Fine — levied by tenant in tail with reversion in fee, its effect.

Tenant in tail with reversion in fee levying a fine, lets in the reversion; but suffering a recovery bars it and all incumbrances, and gains a new fee. 3 Ves. 675.

19. Fine — levied by one of two parceners seised in tail, with remainder in fee *aliunde*.

Two sisters, having estates tail descend from the mother, and the remainder in fee by descent from the brother, one levies a fine: a case was sent to the master of the rolls to the common pleas, upon the question, whether she acquired a fee-simple in any, and what parts of the estate. Church v. Edwards. 2 B. C. C. 180.

## 20. Fine — its effect upon equities and equitable rights.

1. A person coming to a title which is bound by an equitable right, cannot, by levying a fine, discharge his estate from the consequences of that right. 1 Sch. & Lef. 380.

2. Where a fine is levied upon a possession gained in such a way, that the title on which the equity attaches is not altered; or where the possession is gained on a confidence, and it is attempted to make title contrary to that confidence, a fine and non-claim will make no bar. 1 Sch. & Lef. 381.

## 21. Fine — whether a bar to equitable remainders.

Fine will bar equitable, as well as legal remainders, but the estates must be completely legal or completely equitable; therefore where there was an equitable estate for life, with a legal estate tail, the recovery did not operate. Boteler v. Allington, 1 B. C. C. 72.; Shepland v. Smith, 1 B. C. C. 75.; vide Salvin v. Thornton, 1 B. C. C. 75. n.

## 22. Fine — whether a bar to a bill for relief.

Fine shall not be set up as a bar, where a bill has been filed for relief. Pincke v. Thornycroft, 1 B. C. C. 289.

23. Fine — *sur concessit*, commencement of its operation.

A fine *sur concessit* begins to operate as a bar only from the execution. Sembl. 1 Sch. & Lef. 228.

## 24. Fine — practice relative to the levying of.

A *dedimus* is sued to take the acknowledgment of a husband and wife who were resident in Jamaica. Owing to accidental circumstances the *dedimus* was not returned until a year after the *teste*; and on this account the cursitor refused to receive it, as being contrary to the practice of their office. But the court directed the cursitor to receive it. Townsend v. Lowe, 1 Cox, 410.

25. Recovery — possession whether essential to.

A recovery suffered by a person not in possession, has no operation. *Wynne v. Cookes*, 1 B. C. C. 515.

26. Recovery — suffered by tenant in tail with reversion in fee; its effect.

Vide 3 Ves. 675.

V. In relation to remitter.

On a purchase.

If a person having a mere right, obtain possession, by contract with him who has it, he cannot be remitted to his mere right; but must hold the possession according as he has received it; because it was his folly to take possession in that manner, without recovering it by lawful means. 2 Sch. & Lef. 103.

VI. In relation to merger.

1. In the cases of tenant in tail, infant, and adult.

The case of merger with reference to tenants in tail, infant, and adult. 11 Ves. 277.

2. Of the merger of equitable interests in legal.

1. Where legal and equitable estates meet in the same person, the equitable merge in the legal. *Wade v. Paget*, 1 Cox, 74.; 1 B. C. C. 363.

2. Where the equitable and legal estates equal and co-extensive unite in the same person, the former merges; therefore, where the former descends *ex parte paternā*, the latter *ex parte maternā*, upon their union the paternal heir has no equity. *Selby v. Alston*, 3 Ves. 339.

3. To create a merger of the equitable in the legal estate by their union, the interest in each must be the same; an equitable recovery therefore barred an equitable remainder in tail, in the person who had the whole legal fee. *Brydges v. Brydges*, 3 Ves. 125.

4. Where a term would merge by its union with the inheritance in the person, if he has in the one the legal, in the other the equitable, estate, the term will attend the inheritance. Therefore, where tenant for years subsequently to his will contracted to purchase the inheritance, and died before conveyance, the residuary legatees have no claim under the term against the heir. *Capel v. Girdler*, 9 Ves. 509.

3. Whether equity will modify the legal doctrine of merger.

At law and in equity, where there is a confusion of rights, there is an immediate merger; that is prevented in equity by the intention either express or implied; as in the case of an infant entitled to an estate, and also to a charge upon it; the rights remain distinct, because more beneficial. 2 Ves. 264.

VII. In relation to the conversion of property in general.

1. As between the real and personal representative.

1. No equity between the heir or devisee and personal representative to convert property from the state, in which it is found at the death. 5 Ves. 303.

2. To convert real or personal property, as between real or personal representatives, from the state, in which it is found at the death, the character of land or money must by the trust, covenant, &c. be imperatively and definitively affixed to it; otherwise, if there was an option, there is no equity. The bill by the heir claiming the personal property, as real estate, was dismissed without costs. *Wheldale v. Partridge*, 5 Ves. 388.

3. As

3. As between real and personal representatives their rights are purely legal. Chance decides between them; and neither has any equity to convert the property. The intent of the testator is a consideration for devisees 2 Ves. 170.

2. In the case of a special direction for a purpose which fails.

General principle, that where a person, dealing upon his own property only, has directed a conversion for a particular purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; and this court regards him as not having directed the conversion. 7 Ves. 435.

3. Under an agreement.

What is agreed to be done considered as done; as money under contract to be laid out in land, &c. 13 Ves. 472.

4. Under the effect of a contract by relation.

Property held converted under the effect of a contract by relation, though the actual conversion depended on a contingency, not in the option of the owner, and did not take place during his life. 7 Ves. 436.

5. Of an infant's property.

Conversion of the property of an infant for his benefit guarded so as not to change the nature of it as between the representatives. 11 Ves. 278.

## VIII. *In relation to the conversion of real property to personal.*

1. The time of conversion ascertained.

General residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently may be, upon trust to pay the interest, &c. for life, and as to the capital for the children. The stock being considerably increased between the death in April and the sale at Michaelmas, it was decreed, that the conversion was in a reasonable time, and the party entitled for life should have interest from the conversion; and as to premises, that from a defect of title could not be sold, that, being for the interest of all, that they should not be sold, a value should be set upon them, to carry interest at 4*l. per cent.* from the death. *Gibson v. Bott*, 7 Ves. 89.

2. Conversion for a special purpose; its effect.

Real estate, to be converted into personal for special purposes, not personal property to all intents; so as to let in creditors by simple contract. *Gibbs v. Ougier*, 12 Ves. 413.

3. In the case of a sale directed.

1. Where a real estate is ordered to be sold, and is blended with personal property, it becomes personalty, and shall go accordingly. *Fletcher v. Ashburner*, 1 B.C.C. 497.

2. But where they are to be blended only for particular purposes, (as to pay certain legacies, which lapse by the death of the legatees in the life of the testator,) then so much as is real shall result to the heir, and so much as is personal to the personal representative. *Ackroyd v. Smithson* 1 B.C.C. 502.

3. Land, under a devise in trust to be sold, not considered as real estate. The trust not being executed, but no act done, showing an intention to alter the character impressed by the uses of the will. An objection to the title of the heir upon that point prevailed. *Kirkman v. Miles*, 13 Ves. 338.



4. In the case of a sale directed for a special purpose.

1. Devise of real estate in trust to sell; if a conversion to personal property, not absolutely, but for partial purposes, as the payment of debts, a resulting trust as to the surplus for the heir; but as personal property. *Wright v. Wright*, 16 Ves. 188.

2. Conversion directed by will, of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities; subject to that as to the real estate, a resulting trust for the heir; which cannot be affected by an unattested codicil, bequeathing a lapsed share of the residue. *Hooper v. Goodwin*, 18 Ves. jun. 156.

5. In the case of a sale directed for a special purpose, which fails.

Clear rule in equity, that, where real estate is directed to be converted into personal for a purpose which fails either wholly or partially, to that extent the money is considered real estate. 1 Ves. & Beam. 174.

6. In the case of a contract to sell.

A contract to sell will not in all cases convert the real into personal; and it shall not be so to defeat the party's intention. *Foley v. Percival*, 4 B. C. C. 419.

7. In the case of a contract to sell a reversion.

A. makes a lease to B. for seven years, and on the lease is endorsed an agreement, that if B. shall, within a limited time, be minded to purchase the inheritance of the premises for 3000*l.*, A. would convey them to him for that sum. B. assigns to C. the lease and the benefit of this agreement. A. dies, and by his will gives all his real estate (generally) to D., and all his personal estate to E. and D. equally. Within the limited time, but after the death of A., C. claims the benefit of the agreement from D., who accordingly conveys the premises to C. for 3000*l.* This sum of 3000*l.* when paid, is part of the personal estate of A., and E. is entitled to one moiety of it as such. *Lawes v. Bennett*, 1 Cox, 167.

8. By construction of a settlement.

By articles previous to the marriage of F. N. and E. S., the wife grants to trustees, &c. an undivided sixth part of certain estates for eighty years, if S. N. should so long live, and then upon trust (so soon as convenient after the death of S. N., and after settlement made by the husband of an estate called the F. estate, and of a rent charge of 260*l.* to which he was entitled in reversion, expectant on the death of S. N.) absolutely to sell and dispose of the same, and apply the money arising from the sale thereof, and of the other premises after mentioned, upon the trusts after mentioned. By the same articles the husband covenants, within ten years, to convey the F. estate to the same trustees, upon the like trusts as were declared as to the said undivided sixth; and likewise covenants within six months after the death of S. N. to settle upon them the said rent charge upon the trusts therein mentioned. The trusts of the monies to arise by sale of all the premises directed to be sold, are then declared, to the husband for life, then to the issue of the marriage, and in default of issue, as the husband should appoint. The husband dies in the lifetime of S. N. without issue, having by his will, after confirming the marriage articles, given to his wife all his real and personal estate, to which he became entitled by his marriage, and which should remain undisposed of at his death, and the residue of his personal estate, and appointed her his executrix, and having devised all other his real estate to his wife for life, with remainder to the defendant. S. N. afterwards dies; no sale takes place, and no settlement is made of the F. estate, according to the articles. The widow enters into possession of that estate, according to the articles. The widow enters into possession of

of that estate, conceiving herself to be only entitled as tenant for life under the will of her husband; and upon her death, the defendant enters as entitled in remainder under the same will. Upon a bill filed by the executor of the widow, to whom she had devised all the residue of her estate real and personal, claiming to have the F. estate sold under the covenant in the marriage articles, and the produce paid to him as part of the personal estate of the widow, it was decreed accordingly; the court being of opinion, that the covenant to convey being absolute and unqualified, the estate must be considered as having been converted into personalty by the marriage articles; that the testator could not be held to have elected to take it otherwise, the period of sale not being arrived when she died; that the will afforded no evidence of an intention to pass it as real estate; and lastly, that the widow could not, by any conduct, tending to show in what light she considered it at all to affect the question. *Stead v. Newdigate*, 2 Mer. 521.

9. By construction of a will.

Direction by will to sell real estates, and after the sale to pay certain legacies, held upon the will not a conversion out and out, so that the surplus produce would pass by an unattested codicil. To produce that effect, an intention must be collected from the will duly attested to pass that surplus under terms *primâ facie* descriptive of personal property only, but upon the whole will intended to pass such surplus. *Sheddon v. Goodrich*, 7 Ves. 481.

10. By construction of a will and deed of trust.

Copyhold conveyed on trust to sell; the money to be deemed part of his personal estate, and in trust for such uses as he should by deed or will appoint; and in default for his right heir. A will, executed on the same day, but not referring to the deed, directing a sale of particular property, and disposing of the personal estate in general terms, held not applicable to the estate, conveyed by the deed; which went to the heir; no use being by the subsequent instrument declared; if the estate was converted. *Lowes v. Hackward*, 18 Ves. jun. 168.

11. In relation to the ceremonial of a devise.

Real estate cannot be converted into personal by will, so as to enable the testator to make a direct disposition of it by an unattested codicil. 18 Ves. jun. 166.

12. In favour of the next of kin, in the case of a lapsed legacy.

Conversion of real estate into personal complete for all the purposes of the will, not for the next of kin, in case of lapse. 18 Ves. jun. 165.

13. By sale of land charged with a jointure.

Stock, produced by a sale of real estate under the London dock act, (39 & 40 Geo. 3. c. 47.) subject to jointure, considered as real estate: the original character not having been displaced by a complete conversion. *Shard v. Shard*, 14 Ves. 348.

14. In the case of timber wrongfully felled.

Representatives — if a bailiff cuts timber without authority, and before it is sold the party dies, it is personal assets, and the heir has no action against the personal representative; nor is there any equity between them on the subject. 2 Ves. 74.

15. In the case of timber, belonging to an infant, felled.

1. Timber improperly cut down during infancy, and infant dying, shall go as real estate. *Tullet v. Tullet*, Dick. 322.

2. Where timber was cut down from off a lunatick's estate, because in a perishing

perishing state, and for the benefit of the rest, under a reference and order of the court: Lord Thurlow seemed to think upon a question between the heir and personal representative, that under such circumstances, the money raised was personalty; but recommended a bill to have a solemn judgment. *In re Bromfield*, 1 Dick. 762.

#### 16. From the incompetency of an infant to elect.

Real estate converted into personal out and out, under a trust to sell for the payment of debts, and to pay the residue to the grantor, his executors, &c.; and falling thus, impressed with the character of money to one who died an infant, incompetent therefore to elect to have it re-converted, passed to his administratrix. *Van v. Barnett*, 19 Ves. 102.

#### 17. By a partnership contract.

1. Estate real may be converted by a co-partnership agreement into personalty, but must be so expressly to have the effect. *Thornton v. Dixon*, 3 B.C.C. 199.

2. Upon the construction of a deed for the purpose of a partnership, real estate held to be converted out and out into personal. *Ripley v. Waterworth*, 7 Ves. 425.

### IX. In relation to the conversion of personal property to real.

#### 1. As between the real and personal representatives.

1. Money being once clearly impressed with real uses, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and, to put an end to it, in a question between the heir and executor, either the money must come to the possession of the person, from whom they claim in those characters, or, he must, if it is in the hands of a third person, do some act, denoting a change of intention. 7 Ves. 235.

2. To entitle the heir to the performance of an agreement for a purchase out of the personal estate, the agreement must have been binding upon the parties contracting, so that the property was converted in equity before the death. *Buckmaster v. Harrop*, 7 Ves. 341. Affirmed on rehearing. 13 Ves. 456.

3. Liability of real and personal representatives in respect of a contract regulated by that of the party at his death. If he could not be compelled to take the estate, the heir cannot insist on having it, and that the personal estate shall pay for it. 10 Ves. 607.

4. When a contract for the purchase of an estate is not complete in the lifetime of the ancestor, the terms of it not being ascertained, the heir is not entitled to have the personal estate applied in payment of the purchase money. *Savage v. Carroll*, 1 Ball & Beatty, 265. — When the terms of such contract are not sufficiently made out in proof, a reference or issue will not be granted to ascertain them. *Ibid*.

5. To entitle an heir to an application of the personal estate, in completing a contract for a purchase of lands by his ancestors, it must be such, as he could have been compelled to perform. 1 Ball & Beatty, 281.

#### 2. In the case of money to be laid out in land.

1. Money on mortgage ordered to be laid out in land, shall be considered as land. *Lealie v. Duke of Devonshire*, 2 B. C. C. 189.

2. Personal estate devised by will to be laid out in the purchase of lands, to be considered as land until laid out. *Carr v. Ellison*, Dick. 796.

3. Money being ordered to be laid out in land, an infant cannot elect to take it as money, or devise or bequeath it either as land or money. *Carr v. Ellison*, 2 B. C. C. 56.

#### 4. The

4. The rule, that money to be laid out in land shall be considered as land, holds only where the quality of land is imperatively fixed on the money. 2 Ves. 184.

5. Stock, taken by the heir as real estate under a trust, to lay it out in land, not executed, considered as personal estate in him, under circumstances, shewing his conception and intention to treat and dispose of it as personal property. *Triquet v. Thornton*, 13 Ves. 345.

6. By marriage settlement 500*l.* was assigned to trustees in trust to lay the same out in land, with the consent of the wife, and to pay the rents to the wife for her life, for her separate use, remainder to the husband for life, and after the death of the survivor in trust to convey the same to such persons and for such estates as the wife should by deed or will appoint; and in default of appointment in trust for the right heirs of the wife for ever: proviso, that until such purchase should be made, the trustees should invest the money in the public funds, with the consent of the wife, and pay the dividends to the wife for life, for her separate use, and after her death to such persons as the rents of the lands to be purchased would go to, according to the limitations aforesaid, and to pay or transfer the principal sum of 500*l.* or the stock in which the same should be invested, to such person as, according to the limitations aforesaid, would be entitled to the inheritance of such lands. This 500*l.* was never paid to the trustees, but remained in the hands of the husband at the death of the wife. She having made no appointment, this 500*l.* vested in her heir at law (subject to the life-interest of the husband); but the heir took it as money, and therefore at her death this interest passed to his personal representatives. *Russel v. Smythies*, 1 Cox, 215.

3. In the case of money to be laid out in land, but lent on mortgage instead.

Personal to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession; and passed by such general words in a will as would pass land. *Rashley v. Masters*, 1 Ves. 201.

4. In the case of money under marriage articles, to be invested in securities.

Personal under marriage articles to be invested in land or government, or other securities: the court finding it in its original state considers it as personal; but part having been laid out in land, which was settled, and afterwards sold, and the produce invested in stock, till a proper purchase of land could be found to be settled to the same uses, that was considered as land. *Bristow v. Warde*, 2 Ves. 336.

5. Purchase money of contract that went off.

Estate contracted for, but contract dismissed, on account of testator's estate made part of real estate, and the money should be laid out in land to the same uses. *Whitaker v. Whitaker*, 3 B. C. C. 31.

6. Damages for not conveying or settling estate.

A certain estate is covenanted to be conveyed, and is not so; the breach of the covenant is in damages — such damages are money, not land, in the hands of the party injured. *Wade v. Paget*, 1 Cox, 74, 1 B. C. C. 363.

7. In the case of an infant purchaser.

1. Where part of an infant's real estate was settled in jointure upon her mother, who being distressed, and about to sell her interest, a petition was presented, and the infant, upon a reference to the master, and under an order of court, purchased it; she afterwards attained twenty-one, received a year's rent, and died. Held, that the purchase, though made during infancy,

was

was to be considered as real estate. *Inwood v. Troyne*, 2 Eden, 148.; Amb. 417.

2. Lands purchased by the guardian of an infant with his personal estate, will, in case of his death during his minority, be considered still as personalty. *Gibson v. Scudamore*, Dick. 45.

8. In the case of uses to convert personalty into land, being united with the fund in the same person.

The decisions, that where the uses to convert personal into land are united with the fund in the same person, it shall be considered as land, without intent declared to the contrary, have gone too far; for in that case the uses are merged, there being no person to call for the application. 1 Ves. 204.

9. By construction of a settlement.

As between the representatives money considered land under a direction in a settlement with all convenient speed after request to lay it out; though no request was made; upon the construction, all the limitations being adapted to real uses, and other circumstances. *Thornton v. Hawley*, 10 Ves. 129.

10. By construction of a will.

Money, under a direction to be laid out in land, considered as real estate under a general disposition by the will of a person, entitled to it absolutely in either shape, of "the money and land," in the absence of intention: the word money being answered by another fund of stock. *Biddulph v. Biddulph*, 12 Ves. 161.

## X. In relation to the exoneration of the real estate by the personal.

1. General rule.

No exoneration of the heir by the personal assets of a party, who never personally contracted; or not originally, but only as a farther security in a subsequent transaction, not intended to disturb the order of charge: as the transfer of a mortgage; or the purchase of an equity of redemption: even though the interest is raised, the excess follows the subject of the original contract. 7 Ves. 336.

2. Of the parties for whom the right is available.

The equity to have real estate exonerated by personal, subsists only between the heir or devisee and the residuary legatee; not against specific or general legatees, much less creditors. 2 Ves. 65.

3. In the case of debts not contracted by the party.

Personal estate shall not exonerate the real of a debt, not contracted by the party. *Earl of Tankerville v. Fawcett*, 2 B. C. C. 57.

4. In the case of a bond by the devisee for the devisor's debt.

D. devised estates to trustees for a term of years in trust to raise money for payment of all his debts and legacies, and subject to that term he limited the estates in strict settlement with the ultimate remainder to his own right heirs. By the falling in of the intermediate limitations, A. and B. became entitled to the estates as right heirs of the testator. The testator's debts and legacies remaining unsatisfied, A. and B. executed joint bonds for the amount of them, and then A. died. These bonds are not debts of A. to which his personal estate is primarily liable, but they must be borne in the first instance by the devised estate. *Basset v. Percival*, 1 Cox, 268.

5. In the case of a purchase subject to a mortgage.

1. A. purchased an estate, subject to a mortgage; the personal shall not exonerate

**APPENDIX.] In relation to the exoneration of the personal estate, &c. 557**

exonerate the real of the mortgaged debt, though the purchaser has given a fresh security. *Tweddell v. Tweddell*, 2 B. C. C. 101. 152.

2. Estate sold subject to a mortgage was exonerated in favour of the heirs, by the personal estate of the purchaser; his acts having clearly made it his personal debt. *Woods v. Huntingford*, 3 Ves. 128.

3. The heir of a purchaser exonerated by his personal assets from a mortgage: the result of the transaction being a personal contract; and the personal assets therefore the primary fund. *Waring v. Ward*, 7 Ves. 332.

**6. In the case of the purchase of an equity of redemption.**

1. Upon the purchase of an equity of redemption, the agreement of the purchaser with the vendor to pay the mortgage, without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser. *Butler v. Butler*, 5 Ves. 534.

2. Though upon the purchase of an equity of redemption the incumbrance is not, as between the representatives of the purchaser, his personal debt, even by his covenant to pay, which is considered as only for indemnity of the vendor, it is if, beyond that, he enters into a new contract with the mortgagee; as for different times and modes of payment, &c. *The Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

**7. In the case of mortgage debts.**

1. Exoneration of the heir from a mortgage, the personal debt of the ancestor. *Ripley v. Waterworth*, 7 Ves. 453.

2. T. was devisee of an estate which had been mortgaged to A. by the testator, which mortgage carried interest at *5l. per cent.* S. joined in an assignment of the mortgage from A. to B., discharged from the former proviso of redemption, and subject to redemption on payment of principal and interest at the rate of *4l. per cent.* only, and S. covenanted for payment of such principal and interest: afterwards S. agreed to raise the interest to *5l. per cent.*, and covenanted to pay interest at that rate. Then S. died, leaving an arrear of interest due on the mortgage. This not being originally the debt of S., his covenants are only collateral, and his personal estate is not primarily liable to discharge any part either of principal or interest due on the mortgage. *Shafto v. Shafto*, 1 Cox, 207.

3. An estate descended from A. to B. subject to a mortgage. A. died considerably indebted by simple contract. B. made a further mortgage of the premises for payment of the simple contract debts of A. This is not a debt to which the personal estate of B. is primarily liable, but both the mortgages are charges in the first instance on the land. *Lord Tankerville v. Fawcett*, 1 Cox, 237.

**8. By rent and profits of estate descended.**

Rent and profits of an estate descended to be applied before the inheritance is sold. *Rowe v. Beavis*, Dick. 178.

**XI. In relation to the exoneration of the personal estate by the real.**

**1. In the case of simple contract debts.**

The leaning of the court to charge land with simple contract debts, must be warranted by the intention. 1 Ves. 443.

2. In the case of debts charged upon an estate, being paid out of the estate of the first taker.

Debts, charged upon an estate, paid out of the estate of the first taker, an infant. The infant's estate reimbursed by a charge; though the securities had been cancelled. 11 Ves. 283.

**XII. &c.**

## XII. Exoneration in miscellaneous cases.

1. Exoneration of the general estate by a particular fund upon which an annuity was charged.

A., on a separation from his wife, covenants to pay her an annuity of 200*l.* during her life, and assigns a pension for his own life and that of I. R. to trustees, as an auxiliary fund in case of failure of payment by him; and covenants, that in the lifetime of the wife all his real and personal estate shall be charged with an annuity. A. dies, leaving real estate, which descended on his heir at law, and personal, to the amount of 16,000*l.*: I. R. is surviving. The wife has no right to an allocation of the real and personal estate, to secure her annuity. *Lynar v. Mills*, 2 Sch. & Lef. 338.

2. Exoneration of a fund which a party bound to elect had already charged.

A party bound to elect between two funds, having mortgaged one, elects the other; the former must be taken subject to the mortgage, but shall be reimbursed by the latter. *Rumbold v. Rumbold*, 3 Ves. 65.

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## ESTOPPEL.

### Of equitable estoppel.

A bill filed in 1757 by H., pretending to be a devisee, charging that B., the only son of testator, was illegitimate, and making M. a party (who in case of B.'s illegitimacy was heir at law to testator:) issue of *devisavit vel non* directed; H. and B. proceed to the trial of that issue, M. taking no part in it: the issue found in the negative, and the bill dismissed in 1770. On a bill filed in 1776 by B. for the possession and title deeds, he has an equity against H.'s ever insisting on the will or the illegitimacy; and also against M.'s insisting on the illegitimacy, after having declined to contest it on the issue. *Bond v. Hopkins*, 1 Sch. & Lef. 413. 426. 436.

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## ESTOVERS.

### Of the application of estovers to collateral purposes.

1. Estovers of one estate are not to be applied to the repairs, &c. of another estate. *Lee v. Alston*, 1 B. C. C. 194.
2. Vide in tit. TREES.

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## EVIDENCE.

### I. Of the rules of evidence in courts of equity.

In equity as at law, the production of a document makes the whole evidence.

### II. Nature of proofs.

1. The evidence must be confined to the points in issue.
2. Admissibility before the master of evidence in the cause not read at the hearing.
3. The rule of evidence in the accountant-general's office.
4. Ad-

4. Admissibility of additional evidence on appeals and re-hearings.
5. Papers of record in another court may be used at the hearing.
6. The presumption of death from lapse of time, has relation back.
7. Preference between witnesses and surveyors as to the value of premises.
8. Necessary proof, on a bill by the assignor and assignee, of a debt.

### III. Of facts which the courts will notice *ex officio*.

1. The existence of a war in which this country is engaged.
2. The existence of a war between foreign potentates.

### IV. Admissibility of secondary evidence.

1. Where the original is in the other party's possession.
2. Of copies in general.
3. Copy of an answer.
4. Copies of the bank books.
5. Copy of the memorial of the assignment of an Irish judgment.
6. Copies of parish registers.
7. Copy of the memorial of the registry of a deed.
8. Copy of a lost terrier.

### V. Admissibility of parol evidence to explain, vary, or discharge written instruments.

1. General rule upon the subject.
2. In relation to fraud.
3. In relation to the statute of frauds.
4. In relation to illegality.
5. In relation to mistake or surprise.
6. To rebut a presumption.
7. In relation to the specific performance of contracts.
8. Annuity deed — that the annuity was to be redeemable.
9. Annuity deed — omission of a clause of redemption upon an understanding.
10. Appointment, to prove it improperly obtained.
11. Auction, conditions of sale.
12. Contract, joint instead of several.
13. Conveyance, that an absolute conveyance was for security only.
14. Deeds, general rule.
15. Deeds, consideration.
16. Deeds, circumstances of execution.
17. Deeds, intention in executing.
18. Deeds, to establish or rebut fraud.
19. Lease, to prove the intention from conversations on executing.
20. Leases, omission of a particular estate, upon an understanding.
21. Lease — to connect an advertisement therewith.
22. Lease — to prove what clauses had been read over.
23. Mortgage — extension of.

24. Mortgage



24. Mortgage — that the wife's estate was mortgaged without an intention to become a creditor.
25. Settlements — to prove the intention.
26. Settlements — mistake in taking instructions for.
27. Settlements — to prove notices of incumbrances.
28. Wills — general rule.
29. Wills — to control the construction.
30. Wills — mistake.
31. Wills — to include mortgages and other property not strictly testator's own.
32. Wills — children.
33. Wills — annexation of a codicil to a will.
34. Wills — intention to give the personal estate exempt from debts.
35. Wills — that a sum in long annuities meant a gross sum.
36. Wills — mistaken description of the fund out of which legacies were given.
37. Wills — description of legatee.
38. Wills — mistaken description of legatee.
39. Wills — contradicting the qualities by which a legatee is described.
40. Wills — to show the existence of the condition upon which a legacy was given.
41. Wills — to prove that a legacy was to be discharged from debts.
42. Wills — that legacies were accumulative.
43. Wills — redemption of legacy.
44. Wills — as to the disposal of the residue.
45. Wills — on a question of satisfaction.
46. Wills — a schedule written subsequent to the will.
47. Wills — implied trust for next of kin or heir.
48. In the case of unstamped instruments.
49. To show that a purchase paid for by A. was meant for B.
50. To show that an application of funds was for the wife's or her relation's benefit.
51. To show that a devisee was a trustee only.
52. To show a promise by residuary legatee to increase a provision.
53. As between the executor and next of kin.
54. Whether admissible.
55. An equity for the resulting trust.
56. Against the answer.

#### VI. Ancient writing.

1. Admissibility without farther proof, of a will thirty years old.
2. Admissibility of an ancient entry to found the presumption of a declaration of charitable uses.
3. Admissibility of an ancient inscription over an alms-house.
4. What custody the legitimate custody of terriers and vicar's books.

#### VII. Answer.

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**VIII. Bill.**

Admissibility of a bill in a former cause, as a corroborating proof that a demand is stale.

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Its admissibility and effect.

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Mode of proving them.

**XII. Proof of hand-writing.**

1. Test of a witness's competency.
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1. Admissibility without farther proof of the certificate of a public notary.
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3. Admissibility of this evidence on questions of pedigree.
4. Admissibility upon questions of pedigree of inscriptions upon rings, and tombstones.
5. Admissibility of declarations of heads of families upon inquiries *post mortem* touching pedigree.
6. Admissibility of *memoranda* by a relation on a question of pedigree.
7. Admissibility of the husband's declarations as to his wife's legitimacy.
8. Admissibility of the deceased's declarations as between his real and personal representatives.
9. Admissibility of a receipt for costs to prove the result of a suit.
10. Admissibility of entries in vicar's books to prove the result of a suit.
11. Admissibility of a vicar's books to disprove the antiquity of a modus.
12. Admissibility of the registers of the fleet prison to prove marriages.

**XIV. Parish registers.**

1. Admissibility of an informal register.
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**XV. Probate.**

1. Admissibility of a probate to establish a will in courts of equity.
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**XVI. Public documents.**

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**XVII. Recitals.**

Proof of one deed by the recital of its existence in another.

**XVIII. Suitor's admissions.**

1. Whether allowing a bill to be taken *pro confesso*, admits the account charged.
2. Received with suspicion when proved by a witness stationed to overhear them.

**XIX. Suitor's examination in the cause.**

Admissibility of, in his discharge, on taking the accounts under the decree.

**XX. Verdict.**

1. Admissibility of a conviction obtained partly upon plaintiff's evidence.
2. A conviction for a nuisance in obstructing a way, is not conclusive of the right.

**XXI. Proofs in miscellaneous cases.**

1. Proof that a party not joined, is abroad.
2. On an indictment against a witness for perjury.

**XXII. See further in tit. CHANCERY PRACTICE. — WITNESS.****I. Of the rules of evidence in courts of equity.**

In equity, as at law, the production of a document makes the whole evidence.

In equity, as at law, a party producing a letter or other document in evidence, cannot use it partially, but makes the entire evidence. *Boardman v. Jackson*, 2 B. & B. 386.

**II. Nature of proofs.**

1. The evidence must be confined to the points in issue.

The evidence of facts, not put in issue on the record, is inadmissible. *Blake v. Marnell*, 2 B. & B. 47.

2. Admissibility before the master of evidence in the cause not read at the hearing.

Evidence in the cause, though not read at the hearing, may be received by the master. *Smith v. Althus*, 11 Ves. 564.

3. The rule of evidence in the accountant-general's office.

The rule of evidence in the accountant-general's office ought to be the same as in the court. Therefore upon the marriage of a woman, entitled to the interest of a fund for her separate use, an affidavit was required, beyond the marriage, and identity, that there was no settlement, or agreement for a settlement; without prejudice to future cases. *Clayton v. Gresham*, 10 Ves. 288.

4. Admissibility of additional evidence on appeals and re-hearings.

1. On appeals and re-hearings additional evidence permitted in some instances. If the rule is so, it must be subject to costs. 1 Ves. & Beam. 153.

2. Whether new evidence can be produced upon an appeal from the rolls, *quære*. 11 Ves. 593.

3. New

3. New evidence on an appeal from the rolls; being in truth a re-hearing. *Buckmaster v. Harrop*, 13 Ves. 456.

5. Papers of record in another court may be used at the hearing.

Papers of record in another court of justice used at the hearing of a cause in the court of chancery, saving just exceptions. 11 Ves. 559.

6. The presumption of death from lapse of time, has relation back.

The presumption of death from length of time has relation to the commencement of the period. *Webster v. Birchmore*, 13 Ves. 362.

7. Preference between witnesses and surveyors as to the value of premises.

Evidence as to value of witnesses stating opinions formed upon a loose recollection of circumstances at a distant period, not to be put in competition with that of surveyors actually employed at the time to ascertain the value, and where no bad motive can be ascribed, so as to affect a lease, sought to be set aside for undervalue. *Attorney-general v. Cross*, 3 Mer. 542.

8. Necessary proof, on a bill by the assignor and assignee, of a debt.

On a bill by assignor and assignee of a debt for the recovery of the same, stating the assignment, it is not necessary to prove the assignment, though the defendants state that they are ignorant of it. *Ryan v. Anderson*, 3 Mad. 174.

### III. Of facts which the courts will notice *ex officio*.

1. The existence of a war in which this country is engaged.

A war between foreign countries must be proved: but the courts take notice of a war in which this country is engaged, without proof. 11 Ves. 292.

2. The existence of a war between foreign potentates.

*Ibid.*

### IV. Admissibility of secondary evidence.

1. Where the original is in the other party's possession.

1. Answer to a bill by a rector for an account of tithes setting up a simoniacal contract, supported by evidence of the contents of a letter alleged to have been written by the witness (one of the patrons of the living) to the plaintiffs, previous to his admission to the living, containing the terms of the agreement, which were afterwards accepted, and the letter containing such acceptance subsequently returned to the plaintiff, and destroyed by him on an objection to the admissibility of evidence of the letter containing the proposal, on the ground of want of notice to the plaintiff to produce the original: held, that the evidence was admissible, the depositions being sufficient notice. *Wood v. Strickland*, 2 Mer. 461.

2. Even at law notice to produce the original is not necessary, where, from the nature of the proceeding, the party must know that the contents of the instrument in his possession will come into question. *Wood v. Strickland*, *Ibid.*

2. Of copies in general.

The production of a paper importing to be an attested copy may, with other evidence, have considerable weight. 17 Ves. jun. 140.

3. Copy of an answer.

The attested copy of an answer is not admissible in evidence before the grand jury. 1 Ball & Beatty, 296.

## 4. Copies of the bank books.

Copies of the books of the bank of England are evidence: but upon a question, whether the signature to a transfer is the genuine hand-writing, the book must be produced. *Auriel v. Smith*, 18 Ves. jun. 198.

## 5. Copy of the memorial of the assignment of an Irish judgment.

An attested copy of the memorial of the assignment of a judgment is evidence of the fact of the assignment. *Hobhouse v. Hamilton*, 1 Sch. & Lef. 207.

## 6. Copies of parish registers.

Copy of the parish register, evidence. 18 Ves. jun. 204.

## 7. Copy of the memorial of the registry of a deed.

An attested copy of the memorial of the registry of a deed is evidence of the fact of the registry: but if the memorial be used as evidence of the contents of the deed, the original must be produced. *Hobhouse v. Hamilton*, 1 Sch. & Lef. 207.

## 8. Copy of a lost terrier.

A copy of a lost terrier not admissible in evidence. *Leathes v. Newitt*, 4 Price, 355.

## V. Admissibility of parol evidence to explain, vary, or discharge written instruments.

## 1. General rule upon the subject.

1. Parol evidence cannot be admitted for the purpose of varying a written agreement, although it may for the purpose of raising an equity founded on the agreement, by proof of collateral circumstances. *Davis v. Symonds*, 1 Cox, 402.

2. Whatever is wanting to show the consideration, and from whom it moves, may be supplied by evidence *dehors* the deed; where such evidence does not contradict the deed. 17 Ves. 192.

3. A deed may be impeached by matter *dehors*; as upon averment of illegal and corrupt consideration. 13 Ves. 318.

4. A legal instrument is not to be construed by the acts of the parties. *Baynham v. Guy's Hospital*, 3 Ves. 295. 694.

5. Legal instruments not to be construed by the acts of the parties. 6 Ves. 238.

6. By the rule of law, independent of the statute of frauds, parol evidence cannot be received to contradict a written agreement. 7 Ves. 218.

7. The rule, that a written agreement within the statute of frauds cannot be varied by parol, does not affect a subsequent, distinct, collateral agreement. 6 Ves. 337.

8. In what manner a written agreement may be affected by parol evidence; and upon what grounds the court proceeds in admitting or rejecting such evidence. See *Davis v. Symonds*, 1 Cox, 402.

9. Parol evidence is only admitted to support legal rights against an equitable claim. *Stephenson v. Heathcote*, 1 Eden, 41.

10. On a written agreement, parol evidence admissible in equity in cases of fraud, and where party will admit there was some agreement. 1 Ves. 243.

11. Parol evidence is admissible to explain the terms of an ambiguous written instrument, but not to extend them. *Stokes v. Moore*, 1 Cox, 219.

12. Parol evidence is admissible to explain the subject matter of an agreement, although not to vary the terms. *Ogilvie v. Foljambe*, 3 Mer. 53.

13. Latent ambiguity produced and dissolved by parol; but parol never admitted on patent ambiguity. 1 Ves. 415.

14. Request

14. Bequest to the son and daughter of one who has several sons; latent ambiguity. 1 Ves. 415.

15. Parol evidence admissible upon a latent, not upon a patent, ambiguity, to rebut equities, grounded upon presumption, and perhaps to support the presumption, to oust an implication, and to explain, what is parcel of the premises granted or conveyed. 6 Ves. 397.

## 2. In relation to fraud.

1. Parol evidence admissible in opposition to a specific performance of a written agreement upon the heads of mistake or surprise as well as of fraud; and upon such evidence the bill was dismissed. Another bill for the specific performance of the agreement, corrected according to the same evidence, contradicted by the answer, was also dismissed. *The Marquis of Townshend v. Stangroom*, 6 Ves. 328.

2. Fraud in procuring a deed, and the circumstances attending it, may be proved by parol evidence. *Blake v. Marnell*, 2 B. & B. 47.

3. Though a defendant resisting a specific performance may go into parol evidence, that by fraud the written agreement does not express the real terms, a plaintiff cannot for the purpose of obtaining a specific performance with a variation. *Woollam v. Hearn*, 7 Ves. 211.

4. Distinction between the admission of parol evidence to support or resist the specific performance of a contract for land: admissible for the latter purpose upon mistake and surprise, as well as fraud; not to vary, add to, or explain the written contract. *Clowes v. Higginson*, 1 Ves. & Beam. 524.

5. Parol evidence of declarations by the auctioneer at the sale warranting the quantity, received in opposition to a specific performance, on the ground of fraud: not to enforce performance. *Winch v. Winchester*, 1 Ves. & Beam. 375.

6. If in an agreement sought to be specifically executed there be an omission, either by mistake or fraud, it is competent for a defendant to show that omission by parol evidence, as matter of defence, and to rebut the plaintiff's equity. But it seems that a plaintiff, in similar circumstances, cannot do so. 1 Sch. & Lef. 38, 39.

7. Parol evidence admissible on the part of a defendant resisting the specific performance of an agreement, to prove fraud, mistake, or omission in the article, and also to show the situation of the parties as connected with it. *Flood v. Finley*, 2 B. & B. 15.

## 3. In relation to the statute of frauds.

Vide 6 Ves. 337.; 7 Ves. 218.

## 4. In relation to illegality.

Vide 13 Ves. 318.

## 5. In relation to mistake or surprise.

Vide 6 Ves. 328.; 1 S. & L. 38, 39.; 2 B. & B. 15.; 1 V. & B. 524.

## 6. To rebut a resumption.

Vide 7 Ves. 508.

## 7. In relation to the specific performance of contracts.

Vide 7 Ves. 211.; 15 Ves. 516.; 1 S. & L. 38, 39.; 2 B. & B. 15.; 1 V. & B. 375. 524.

## 8. Annuity deed — the annuity was to be redeemable.

1. Evidence that it was part of an agreement for an annuity, that it should be redeemable, refused. *Portmore v. Morris*, 2 B. C. C. 219.

2. Parol evidence not admitted to prove an agreement made upon the purchase of an annuity, that it should be redeemable. *Hare v. Shearwood*, 1 Ves. 241.

9. Annuity-deed — omission of a clause of redemption upon an understanding.

Upon a grant of an annuity, a bill was filed to redeem, upon a suggestion that it was part of the original agreement, but omitted in the deed, from an apprehension that it would make the transaction usurious: parol evidence was offered to prove it was part of the original agreement; but refused to be admitted; the bill not stating the omission to have been by fraud. *Irnham v. Child*, 1 B. C. C. 92.

10. Appointment, to prove it improperly obtained.

Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. *Kemp v. Kemp*, 5 Ves. 849.

11. Auction, conditions of sale.

1. Parol evidence against conditions of sale by auction, rejected. Alterations in writing permitted with great jealousy. 13 Ves. 471.

2. Parol evidence in aid of a specific performance upon the sale of an estate by auction, to explain by declaration of the auctioneer an ambiguity on the face of the particular, by a general clause for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement, signed on the back of the particular, binding the purchaser "to a strict fulfilment of this article, and to abide by the conditions and declarations made at the sale," rejected. *Higginson v. Clowes*, 15 Ves. 516.

3. Distinction, where evidence is to resist a specific performance. *Ibid.*

12. Contract, joint instead of several.

On a bill for a specific performance of an agreement by several persons, to enter into several bonds for 1500*l.*, parol evidence permitted to be read, to show that the agreement was to give a joint-bond to that amount. *Lord William Gordon v. Marquis of Hertford*, 2 Mad. 106.

13. Conveyance, that an absolute conveyance was for security only.

Evidence admitted to show that a conveyance, which was absolute, was meant only as a security, the written evidence showing that the deed was not such as was intended. *Cripps v. Jee*, 4 B. C. C. 472.<sup>2</sup>

14. Deeds, general rule.

A deed not to be varied by parol evidence of the actual agreement. *Jackson v. Cator*, 5 Ves. 688.

15. Deeds, consideration.

1. An impeached deed cannot be supported by evidence of considerations different from those alleged in it. 2 Sch. & Lef. 501.

2. *Ibid.* 17 Ves. 192.

16. Deeds, circumstances of execution.

Parol evidence is admissible to shew under what circumstances a bond or deed was executed. 1 Ball & Beatty, 14.

17. Deeds, intention in executing.

Parol evidence to prove the intention of a party in executing a deed, rejected. *Lord Irnham v. Child*, Dick. 554.

18. Deeds to establish or rebut fraud.

Declarations of a party to a deed previous to the execution admitted in support of the deed against imputations of fraud: declarations subsequent, impeaching the deed, were rejected. *Conolly v. Lord Howe*, 5 Ves. 700.

19. Lease, to prove the intention, from conversations on executing.

Evidence not admissible to prove from conversations before and at the time

time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, though the same was written by the lessee, and the words "clear of all taxes" (the purport of the conversation) were omitted in the memorandum. *Rich v. Jackson*, 4 B. C. C. 514.

20. Leases, omission of a particular estate, upon an understanding.

Parol evidence offered to prove that a particular estate was left out of a lease under an agreement, by the joint direction of both parties, refused, and the bill dismissed. *Lawson v. Laude*, Dick. 346.

21. Lease, to connect an advertisement therewith.

A. advertised lands to be let for three lives or thirty-one years; B. entered into a written agreement for a lease, but in the agreement, the term for which the lease was to be made, was not mentioned: there being no reference in the agreement to the advertisement, parol evidence was not admissible to connect the one with the other, so as to ascertain the term. *Secus*, if the agreement had referred to the advertisement. *Clinan v. Cooke*, 1 Sch. & Lef. 22, 23.

22. Lease, to prove what clauses had been read over.

Agreement for a lease of a farm, referring to a paper containing the terms: bill for specific performance according to such clauses as had been read to the plaintiff—parol evidence to prove that was refused. *Brodie v. St. Paul*, 1 Ves. 226.

23. Mortgage—extension of.

A mortgage by deed cannot be extended by parol. *Ex parte Hooper*, 2 Rose, 328.

24. Mortgage that the wife's estate was mortgaged without an intention to become a creditor.

Evidence admissible to shew that when the wife's estate was mortgaged for the benefit of husband, she did not mean to be a creditor against his assets. *Clinton v. Hooper*, 2 B. C. C. 201.

25. Settlements, to prove the intention.

Evidence to prove the intention of the parties to a settlement, refused. *Brydges v. the Duchess of Chandos*, 2 Ves. 417.

26. Settlements—mistake in taking instructions for.

Parol evidence read to prove a mistake of a solicitor in taking instructions for a settlement. *Rogers v. Earl*. Dick. 294.

27. Settlements—to prove notices of incumbrances.

Parol evidence of an agent, admitted to prove a party to a deed, had notice of an incumbrance on the estate. *Shelburne v. Inchiquin*, 1 B. C. C. 338.

28. Wills—general rule.

1. In trying the meaning of phrases in a will, all circumstances may be looked at, in which the court might have been called upon to determine the meaning of the same phrases applied to a different state of circumstances. 11 Ves. 457.

2. Circumstances *dehors* the will may be evidence as to the property; not as to the intention. 13 Ves. 174.

3. Latent ambiguity arises *dehors* the will; and evidence is admissible to explain it; as in case of two manors of the same name, or an inadequate description of a child: not to explain a patent ambiguity upon the face of the will. 1 Ves. 259.

4. Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, and so to ascertain



ascertain the subject of the devise. This is different from the cases of reference to a paper which is to form part of the will, where the will itself must specify the paper to be incorporated with it. *Sandford v. Chichester*, 1 Mer. 653.

5. Extrinsic evidence admitted, not to construe a will, but to show with reference to what it was made. 15 Ves. 514.

6. Will not to be construed by something *dehors* as by the state of the property, where no latent ambiguity. 18 Ves. 466.

7. Evidence not admissible to alter a will. *Herbert v. Reed*, 16 Ves. 481.

8. Parol evidence of the intention of a testator, is not to be received to control the will. *Doyle v. Blake*, 2 Sch. & Lef. 240.

9. Will construed without regard to the instructions. 2 Ves. & Beam, 318.

10. Will not to be construed by subsequent circumstances. 1 Ves. 475.

11. Will, if extrinsic evidence could be admitted, not to be construed by matters posterior to its execution. 2 Ves. & Beam. 199.

12. Where parol evidence is let in to explain a will, the first evidence is that of declarations made at the time of executing it. The evidence of declarations made before and after is, in comparison, entitled to little attention. *Langham v. Sanford*, 2 Mer. 23.

#### 29. Wills — to control the construction.

Parol evidence not admissible to show the intention of the testator against the construction upon the face of the will. 8 Ves. 22.

#### 30. Wills — mistake.

Evidence of mistake not admissible to affect the construction of a will. 13 Ves. 376.

#### 31. Wills — to include mortgages and other property not strictly testator's own.

A statement of property written by the testator, and his books of accounts, admitted as evidence, that he considered as his property, and meant to dispose of, property, not strictly, though in some sense, his: viz. mortgages and leases, the property of his wife under a will, by which he was executor with her before marriage. *Druce v. Denison*, 6 Ves. 385.

#### 32. Wills — children.

1. Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will, for the purpose of finding whether there were any who had acquired the reputation of children: and it is possible for illegitimate children to acquire that reputation. *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419.

2. Under a bequest by an unmarried man "to my children the sum of pounds sterling 5000 each," parol evidence allowed to show who the testator considered in the character of children, and they having obtained a name by reputation, admitted to take as a class, though illegitimate, and not named in the will. *Beachcroft v. Beachcroft*, 1 Mad. 490.

#### 33. Wills — annexation of a codicil to a will.

Since the statute of frauds, annexations of a codicil to a will not admissible evidence of republication, because parol. 1 Ves. 495.

#### 34. Wills — intention to give the personal estate exempt from debts.

1 Parol evidence of testator's intention to give his personal estate exempt from debts, rejected. *Stephenson v. Heathcote*, 1 Eden, 38.

2. Parol evidence refused, that it was the testator's intention to devise his personal estate exempt from debts. *Gale v. Croft*, Dick. 23.

## 35. Wills — that a sum in long annuities meant a gross sum.

Evidence of the state of a testatrix's property let in to show that by a gift of a sum in long annuities, she meant a gross sum, not an equivalent annuity. *Fonnereau v. Poyntz*, 1 B. C. C. 472.

## 36. Wills — mistaken description of the fund out of which legacies were given.

1. Evidence offered to prove, that a testator who gave a legacy to A. his executors, administrators, or assigns, knew A. to be dead, and meant it for his representatives, rejected. *Maybank v. Brooks*, Dick. 577.

2. Parol evidence to prove that the testator knew a legatee was dead, in order to show his intention that the legacy should be transmissible, not admitted. *Maybank v. Brooks*, 1 B. C. C. 84.

3. A legacy to a lady — is void, and shall not go to the master to be supplied by parol evidence. *Hunt v. Hort*, 3 B. C. C. 311.

4. Legacy to Mrs. G., evidence admitted. *Abbot v. Massie*, 6 Ves. 148.

5. Testator devised to all the children of his two sisters A. and B.: A., long before the date of the will changed from the Jewish to the Roman Catholic religion, was baptized by a new name, and became a professed nun at Genoa: bill by the children of C. a third sister, living with B. at Leghorn, upon ground of mistake in testator, and evidence of intent to provide for his sisters at Leghorn, dismissed. *Delmare v. Robello*, 1 Ves. 412.

6. Testator gave a sum, part of his four *per cent.* bank annuities, to his wife for life, and after her decease, to several relations. Evidence was admitted that he had no such stock at the date of the will, having previously sold it all, and invested the produce in long annuities, and to show the cause of the mistake; and the legacies were established. *Selwood v. Mildmay*, 3 Ves. 306.

7. Testator bequeathed part of his three *per cent.* consolidated bank annuities. Upon evidence that he had no bank stock at the date of his will, or at his death, but that he had three *per cent.* South-sea annuities; the legacies were established out of that fund. *Dobson v. Waterman*, 3 Ves. 308.

8. Legatee entitled notwithstanding a mistake of his name. 3 Ves. 322.

9. Legacy of 2400*l.* in the five *per cent.* consolidated bank annuities: decreed, that 2400*l.* five *per cent.* annuities; viz. navy bills, should be purchased; evidence of the intention and mistake as to the fund being rejected. *Chambers v. Minchin*, 4 Ves. 675.

10. Legacy to Price, the son of Price: upon the evidence the plaintiff, the only claimant, was declared entitled. *Price v. Page*, 4 Ves. 680.

## 37. Wills — description of legatee.

Description of legatee, which it was doubtful whether it applied to mother or daughter, held from the construction to mean the former: extrinsic evidence admitted, but held to amount to nothing. *Hussey v. Berkeley*, 2 Eden, 194.

## 38. Wills — mistaken description of legatee.

1. Legacy to "James, son of Thomas A." There was no person of that description; but there was a Thomas son of James A. The court will not receive evidence to show, that this was a mistake in the description. *Andrews v. Dobson*, 1 Cox, 425.

2. Bequest "to the children of Robert Holmes, late of Norwich, and now of London, the sum of 100*l.* a piece." Robert Holmes had left Norwich at the age of fourteen or sixteen; and died in London several years before the will. His only surviving child entitled to the legacy against the claim of the children of George Holmes, formerly of Norwich, residing in London at the testator's death, upon the suggestion of mistake. The right not barred by merely signing a receipt as a witness upon payment by the executor

cutor to the adverse party; not amounting to a release or fraud. *Holmes v. Custance*, 12 Ves. 279.

3. Legacy to the testator's nephew, Robert the son of Joseph C.: the testator had two nephews called Robert; one the son of his brother John C., the other of his brother Thomas C.; and the testator had no brother Joseph, nor was there any other Joseph C. This is a latent ambiguity, and may be explained by evidence. *Careless v. Careless*, 1 Mer. 384.

39. Wills — contradicting the qualities by which a legatee is described.

Upon a legacy to the wife of the testator, by the description of his chaste wife, evidence of her incontinence is not admissible, 4 Ves. 809.

40. Wills — to show the existence of the condition upon which a legacy was given.

Legacy to A. if in the testator's service at the time of his decease. Parol evidence admitted to show, that, though she had quitted his house, she continued, and was considered by him as in his service; and upon that evidence the legacy was established. *Herbert v. Reed*, 16 Ves. 481.

41. Wills — to prove that a legacy was to be discharged from debts.

A legatee, son-in-law to the testator, was held entitled to his legacy discharged from debts due by him to the testator, and a debt, for which the testator was his surety, upon evidence from the testator's accounts, letters, and memorandums in his hand-writing. Parol evidence of declarations in conversation was produced for the same purpose: but the court appeared to rely on the evidence in writing. *Eden v. Smyth*, 5 Ves. 341.

42. Wills — that legacies were accumulative.

1. Evidence admitted to show that legacies given by a second codicil were intended as accumulative. *Coote v. Boyd*, 2 B. C. C. 521.

2. Whether parol evidence of the intention of the testator can be read originally in opposition to a claim of double legacies, *quære*. *Osborne v. the Duke of Leeds*, 5 Ves. 369.

43. Wills — redemption of legacies.

1. Parol evidence is admissible to fortify the presumption of a legacy being adeemed. *Monk v. Lord Monk*, 1 Ball & Beatty, 298.

2. The presumption of a legacy being adeemed, may be rebutted by parol evidence. 1 Ball & Beatty, 303.

44. Wills — as to the disposal of the residue.

Admission of evidence as to disposal of a residue, where a legacy is given to the executors. *Nourse & Hornsby v. Finch*, 4 B. C. C. 239.

45. Wills — on a question of satisfaction.

1. Evidence of a parent's intention, that a portion should not be a performance of a legacy, admitted. *Debeze v. Maun*, 2 B. C. C. 165. 519.

2. Parol evidence admitted upon the question as to satisfaction of portions. 11 Ves. 547.

3. Upon a presumption of satisfaction by will, evidence admissible: 1st, to constitute the fact, that the testator was debtor; 2dly, to meet or fortify the presumption. 6 Ves. 321.

46. Wills — a schedule written subsequent to the will.

The question, whether evidence, viz. a schedule written by the testator subsequent to the will, could be admitted, was not decided. *Pole v. Lord Somers*, 6 Ves. 309.

47. Wills — implied trust for next of kin or heir.

Parol evidence admitted in favour of the legal title of the executor to the residue; unless plainly and unequivocally declared a trustee; so for a devise

visé for a particular purpose against an implied trust for the heir. 14 Ves. 322.

48. In the case of unstamped instruments.

Evidence in writing, not admitted, as an agreement unstamped, does not prevent parol evidence; if otherwise admissible. *Hiern v. Mill*, 13 Ves. 114.

49. To show that a purchase paid for by A. was meant for B.

Where land was paid for with the money of A., parol evidence to shew that the purchase was made on behalf of B., refused. *Bartlett v. Pickersgill*, 1 Eden, 515.; 1 Cox, 15.

50. To show that an application of funds was for the wife's or the relation's benefit.

Parol evidence admissible to prove application for benefit of the wife or any relation of her's. 1 Ves. 184.

51. To show that a devisee was a trustee only.

Parol evidence of the declarations of a devisee admitted to prove her being only a trustee. *Strode v. Winchester*, Dick. 397.

52. To show a promise by residuary legatee to increase a provision.

Provision by will, increased upon evidence of the testator's request to the executor and residuary legatee, and his promise; upon which the testator refused to make a new will, and said he would leave it to the generosity of the executor. *Barrow v. Greenough*, 3 Ves. 152.

53. As between the executor and next of kin.

1. Legacy to an executor for his care; that is equivalent to a declaration of trust; therefore evidence is not admissible. 2 Ves. 473.

2. Ground of admitting parol evidence between the executor and next of kin as to the residue undisposed of. 4 Ves. 730.

3. Admitted upon equities arising out of presumptions; and in the case of the next of kin and executor, evidence between the will and the death of the testator, but as to his intention at the date of the will. 6 Ves. 324.

4. Where the executor is trustee of the residue for the next of kin, parol declarations previous and subsequent to the will, as well as at the time, are admissible; but their weight and efficacy very different. 7 Ves. 518.

5. One executor having a legacy for his trouble, parol evidence was admitted, on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin; and she was held entitled to the residue undisposed of. *Williams v. Jones*, 10 Ves. 77.

54. Whether admissible.

Question as to the admissibility of evidence to support the plaintiff's equity. *Knight v. Pêche*, Dick. 327.

55. An equity for the resulting trust.

Parol evidence read to rebut an equity for the resulting trust. *Lake v. Lake*, Dick. 236.

56. Against the answer.

Parol evidence not admissible to raise an equity, that a pension granted by the crown to the defendant, was in trust for the plaintiff, against the oath of the defendant in his answer. *Fordyce v. Willis*, 3 B. C. C. 577.

## VI. Ancient writing.

1. Admissibility, without further proof, of a will thirty years old.

Whether the rule, that a deed thirty years old proves itself, applies to a will. *Quære*. *M'Kenzie v. Fraser*, 9 Ves. 5.

2. Ad-

2. Admissibility of an ancient entry to found the presumption of a declaration of charitable uses.

A declaration of uses by the founder of a charity, presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date; the book being kept by the trustees for entering their proceedings, and containing an order by the trustees, dated six years after creation of the trust, that the declaration of the founder be then entered as to the trustees. *Attorney-general v. Boulton*, 2 Ves. 380.

3. Admissibility of an ancient inscription over an alms-house.

Bequest of stock to be laid out in building alms-houses. The fact that alms-houses were in mortmain before the 9 Geo. 2. c. 36., proved by an old inscription, and an extract from a local history. *Shaw v. Pickthall*, 1 Dan. 92.

4. What custody the legitimate custody of terriers and vicar's books.

1. A book from the registry of Lincoln, containing *inter alia*, what were called copies of endowments of certain vicarages was received as evidence of an endowment of a vicarage in Northamptonshire, by the lord chief baron (giving up considerable doubt) on the production of cases wherein it had been received before. *Leonard v. Franklin*, 4 Price, 264.; *Halse v. Eyston*, 4 Price, Appendix; *sed vide Harward v. Sims*, *Ibid*.

2. *Vide* 4 Price, 216.

### VII. Answer.

Admissibility of a co-defendant's answer against his companion.

The answer of a co-defendant, not brought to hearing, read as evidence against his companion at the hearing. *Pitt v. Willis*, Dick. 24.

### VIII. Bill.

Admissibility of a bill in a former cause, as a corroborating proof that a demand is stale.

Bill in another cause admitted to be read at the hearing of this as a corroborating circumstance to prove a stale demand. *Handside v. Brown*, Dick. 236.

### IX. Counsel's opinion.

Admissibility of counsel's opinion in a cause between vendor and purchaser.

The opinion of counsel read as evidence. *Brown v. Yarroway*, Dick. 353.

### X. Foreign judgment.

Its admissibility and effect.

Decree at Leghorn allowed to be read as evidence; and this court would not overrule what was determined there; and injunction made perpetual. *Burrows v. Jamereau*, Dick. 48.

### XI. Foreign laws.

Mode of proving them.

A foreign law must be proved as a fact. 3 Ves. & Beam. 99.

### XII. Proof of hand-writing.

1. Test of witness's competency.

1. Rule as to proof of hand-writing. The witness must have seen the party

party write; and swear to his belief, that the writing produced is his. 8 Ves. 473.

2. If the witness will not swear to his belief of the hand-writing, but says, that he thinks it like, the lord chancellor of opinion that is not evidence. Ibid. 476.

2. By comparison of hands.

1. Comparison of hands by a person, who never saw the party write, is not evidence. Ibid. 474.

2. Comparison of hand-writing, though lately admitted as evidence, if confirmed by the contents of correspondence, refused in the instance of a single letter for the purpose of commitment. *Wade v. Broughton*, 3 Ves. & Beam. 172.

3. Entries in a book coming out of the possession of a defendant, who was the grandson of a preceding rector, not allowed to be read as evidence to support a *modus* on the testimony of a witness, who said he believed it to be in the rector's hand-writing, from comparing it with the original will of the rector in doctor's commons. *Randolph v. Gordon*, 1 Dan. 88.

### XIII. Hearsay.

1. Admissibility without farther proof of the certificate of a public notary.

A notary-public has credit every where; but the certificate of a magistrate of a colony abroad, requires evidence to his character. *Hutcheon v. Mannington*, 6 Ves. 823.

2. Admissibility without farther proof of the certificate of the magistrate of a colony.

Vide 6 Ves. 823.

3. Admissibility of this evidence on questions of pedigree.

1. Upon pedigree slight evidence sufficient; as reputation; and a forgery established is not decisive; but weighs considerably against the party producing it. *Vowles v. Young*, 13 Ves. 140.

2. Hearsay of relations admitted to prove consanguinity, and without the correctness, required upon other facts. The degree therefore is not required. But, the principle being interest, the opinion of the neighbourhood will not do. Ibid. 147.

3. Qualification as to evidence of tradition, even upon pedigree. It must be from persons, having such a connection with the party, that it is natural and likely, from their domestic habits, that they are speaking the truth, and could not be mistaken. Upon that principle, descriptions in wills, monuments, bibles, &c. are admitted. *Whitelocke v. Baker*, 13 Ves. 511.

4. Declarations of relations evidence of pedigree; but inconclusive without showing upon what occasion, what led to them, &c. Whether a physician or servant, who attended the family, can be admitted as one of the family, *quære*. *Walker v. Wingfield*, 18 Ves. jun. 443.

4. Admissibility upon questions of pedigree of inscriptions upon rings, and tombstones.

Inscriptions upon tombstones, and engravings on rings, evidence of pedigree. 13 Ves. 144.

5. Admissibility of declarations of heads of families, upon inquisitions *post mortem* touching pedigree.

Evidence of pedigree by declarations of heads of families upon inquisitions *post mortem*. Ibid. 143.

6. Ad-

6. Admissibility of *memoranda* by a relation on a question of pedigree.

Handwriting of a relation deceased, rejected as evidence of pedigree. *Edwards v. Harvey, Cooper, 39.*

## 7. Admissibility of the husband's declarations as to his wife's legitimacy.

In the case of pedigree, hearsay evidence of declarations by the husband as to his wife's legitimacy admissible, as well as those of relations by blood. *Vowles v. Young, 13 Ves. 140.*

## 8. Admissibility of the deceased's declaration as between his real and personal representatives.

On a question between the real and personal representatives of A. (who died intestate), whether A. had actually agreed in his lifetime for the purchase of an estate, the parol declarations of A. in his lifetime, are not admissible evidence. *Perchard v. Benyon, 1 Cox, 214.*

## 9. Admissibility of a receipt for costs to prove the result of a suit.

A receipt for payment (by a person sued by a vicar for tithes) of the plaintiff's bill of costs, is evidence of the suit having resulted in favour of the vicar. So is an entry to that effect in a former vicar's books. *Parsons v. Bellamy, 4 Price, 190.*

## 10. Admissibility of entries in vicar's books to prove the result of a suit.

*Ibid.*

## 11. Admissibility of a vicar's books to disprove the antiquity of a modus.

The vicar's books are evidence to show that the money payments received in lieu of tithes are founded on and regulated by a criterion not in existence beyond legal memory; *e.g.* the poor's rates. *Walter v. Holman, 4 Price, 171.*

## 12. Admissibility of the registers of the fleet prison to prove marriages.

1. The fleet register evidence, not as a register, but a declaration upon the fact. *Lloyd v. Passingham, 16 Ves. 59.*

2. The fleet book of marriages not evidence as a register. *Lloyd v. Passingham, Cooper, 152.*

## XIV. Parish registers.

## 1. Admissibility of an informal register.

As to admitting in evidence a parish register, not kept according to the canon, requiring weekly entries, or a copy without proof that the original is not to be found, *quære*. *Walker v. Wingfield, 18 Ves. jun. 443.*

## 2. Admissibility of a defaced register.

Parish register admissible evidence notwithstanding the loss of a leaf, not destroying the series of entries. *Walker v. Wingfield, 18 Ves. jun. 443.*

## XV. Probate.

## 1. Admissibility of a probate to establish a will in courts of equity.

Probate of will in the ecclesiastical court sufficient, as far as it goes; farther proof, if necessary, may be proceeded on in this court. *1 Ves. 54.*

## 2. Admissibility of a probate to prove the fact of death.

The probate of the testator's will, admitted as proof of his death. *French v. French, Dick. 268.*

## XVI. Public

## XVI. Public documents.

## Baptismal register.

A copy of a register of baptism in the island of Guernsey, is not sufficient evidence here of a party being of age. *Huet v. Le Mesurier*, 1 Cox, 275.

## XVII. Recitals.

Proof of one deed by the recital of its existence in another.

1. Decree for raising money under a deed of appointment; though the only copy produced appeared not executed; upon recitals of it in a settlement, as a subsisting effectual deed, and evidence from the books of a deceased solicitor of charges for the preparation and execution of it. *Skipwith v. Shirley*, 11 Ves. 64.

2. A recital in a deed executed in 1739, that by a separate deed in 1703, A. declared he was seised of the freehold of lands in trust for B., to whom he had, upon the same day, granted a lease of the same lands for 1000 years, is not evidence of the contents of the deed declaring the trust. Neither is the receipt of a master, acknowledging such deed to have been lodged with him, evidence of its contents, though it may of its existence. *Kelly v. Power*, 2 B. & B. 236.

## XVIII. Suitor's admissions.

1. Whether allowing a bill to be taken *pro confesso*, admits the account charged.

Though a plaintiff, by his bill, state an account by which a balance appears to be due to him, and the bill is decreed to be taken *pro confesso*, and an account directed, and the charge is what is stated by the bill, he must prove it. *Dominicetti v. Latti*, Dick. 588.

2. Received with suspicion when proved by a witness stationed to overhear them.

Evidence of conversation overheard by a witness placing himself behind wainscot, &c. received with great caution. *Savage v. Brocksopp*, 18 Ves. jun. 335.

## XIX. Suitor's examination in the cause.

Admissibility of, in his discharge, on taking the accounts under the decree.

Examination of plaintiff before the master, not evidence in his discharge, in taking the accounts under the decree. *Lady Kilmurry v. Crew*, Dick. 60.

## XX. Verdict.

1. Admissibility of a conviction obtained partly upon plaintiff's evidence.

A defendant having been convicted on the evidence of plaintiff (among other witnesses) of perjury, in denying a parol agreement in his answer. Leave for plaintiff to file a supplemental bill, in the nature of a bill of review, stating the conviction, refused. *Bartlett v. Pickersgill*, 1 Eden, 515.; 1 Cox, 15.

2. A conviction for a nuisance in obstructing a way, is not conclusive of the right.

A conviction for a nuisance in stopping a way, is not conclusive evidence of



of the right; cannot be pleaded in bar; and would not bind the party convicted, if he brought an action of trespass. 1 Ball & Beatty, 515.

### XXI. proofs in miscellaneous cases.

#### 1. Proof that a party not joined, is abroad.

A. stated, by books in evidence for defendant, to be a merchant abroad, and one witness swearing he knew him late a merchant abroad, and no evidence of his return, sufficiently proved out of the jurisdiction, as would be presumed at law; and defendant precluded from objecting that he was not a party. *Weymouth v. Boyer*, 1 Ves. 417.

#### 2. On an indictment against a witness for perjury.

Evidence that a witness upon recollection declared, he had sworn what was not true, and went back offering to correct it, but too late, admitted upon an indictment for perjury. 13 Ves. 284.

## EXCEPTIONS, BILL OF.

### I. When the appropriate course to rectify an error; when not.

1. General rule upon the subject.
2. In the case of orders.

### II. Of the writ to compel the sealing of the bill.

1. Preliminaries to its issuing.
2. By whom made out.

### I. When the appropriate course to rectify an error; when not.

#### 1. General rule upon the subject.

Wherever any matter is capable of being brought on the record, and the court refuses to allow it to be so brought, and this refusal does not in its nature come upon the record, though if the thing were allowed, that matter would appear upon the record; this is the proper subject of a bill of exceptions. 1 Sch. & Lef. 82.

#### 2. In the case of orders.

The writ grounded on the stat. Westm. 2. commanding judges to seal a bill of exceptions, does not lie where the exception taken is to an order of a court of law amending one of its own records. *Lessee of Lawler v. Murray*, 1 Sch. & Lef. 75. Nor to any order made upon motion. *Sembl.* Ibid.

### II. Of the writ to compel the sealing of the bill.

#### 1. Preliminaries to its issuing.

Such writ ought not to issue without special order from the person holding the great seal. 1 Sch. & Lef. 75. 80.

#### 2. By whom made out.

The writ commanding judges to seal a bill of exceptions, ought to be made out by the clerk of the crown, and not by the cursitor. 1 Sch. & Lef. 75. 80.

## EXCOMMUNICATION.

- I. Of the writ de excommunicato capiendo.  
Supersedeas of the writ.
- II. Of absolution from an illegal excommunication.  
Preliminary notice.

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 I. Of the writ de excommunicato capiendo.

Supersedeas of the writ.

1. The court refused to supersede a writ *de excommunicato capiendo*. *Ex parte Cheveley*, Dick. 473.

2. Executrix, in custody under a writ *de excommunicato capiendo* for not appearing to a citation by a creditor to exhibit an inventory, moved for a *supersedeas*, disputing the debt upon equitable grounds: Motion refused. *The King v. Blatch*, 5 Ves. 113.

## II. Of absolution from an illegal excommunication.

Preliminary notice.

Writ to absolve a person unlawfully excommunicated. Notice required. *Boraine's case*, 15 Ves. 346.

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 EXECUTOR AND ADMINISTRATOR.

- I. Of the appointment, and revocation of the appointment, of executors.
  - 1. Distinction between an executor in trust, and a trustee not executor.
  - 2. Distinct revocations and substitutions by distinct codicils.
- II. Of the probate.
  - 1. When a prerogative probate will be dispensed with by a court of equity.
  - 2. It is conclusive as to the character of executor.
  - 3. What acts an executor may perform before probate.
  - 4. Responsibility of an executor who interferes, and then renounces without having proved.
- III. Of a disputed probate.  
Jurisdiction of courts of equity *pendente lite*.
- IV. On the union of executors in disposing of or charging the estate.
  - 1. In the case of assigning a term, the deed being prepared for both.
  - 2. Effect of a dissent.
- V. Effect of the renunciation of an executor.  
A co-executor during his companion's lifetime.

VI. Of surbitorship between co-executors.

In relation to the residue.

VII. Of the legal consequences of nominating one an executor.

Whether, when a debtor, it operates as a release.

VIII. Of an executor *de son tort*.

Ordering the funeral will not make one such.

IX. Of the grant of administration.

1. When a prerogative administration is proper.
2. When a prerogative administration will be dispensed with by a court of equity.
3. When an administration *de bonis non* is requisite.
4. Of a temporary grant under stat. 38 Geo. 3. c. 87.
5. Determination of a temporary grant, with the subsequent proceedings.
6. Object of granting administration, *pendente lite*.
7. Effect of a grant made after an executor has acted *in pais*.
8. What acts may be done before grant of administration by one entitled to it.

X. Of the administration bond.

Conditions upon which a suit thereon will be restrained.

XI. Of a disputed administration.

Jurisdiction of courts of equity *pendente lite*.

XII. Of the authority of an administrator.

An administrator *pendente lite*.

XIII. Of the rights of executors and administrators.

1. They succeed to the equities of those whom they represent.
2. How far considered absolute proprietors of the estate.
3. To pledge the estate.
4. To alienate the estate.
5. To dispose of a lease held under covenant not to alien.
6. Of specific restraints against their alienating.
7. To the possession of securities to obtain their contents.
8. To purchase the estate.
9. To renew a lease for their own benefit.
10. To enlarge a tenancy at sufferance for their own benefit.
11. To the profits arising from investing the estate.
12. To the profits of the sale of testator's manuscript works.
13. Reimbursements for the employment of an attorney.
14. Reimbursement for the employment of an accountant.
15. Distinction between a receiver and a personal representative, with respect to remuneration for charges and trouble.
16. Commission upon receipts and payments by an executor abroad.
17. Extent of the right of retainer.
18. Retainer as co-surety with the testator.
19. Retainer in the case of trusts.

20. Retainer against the next of kin, to indemnify against a future contingent demand.
21. Retainer out of a co-executor's legacy, in respect of a *deceasavit*.
22. Retainer by a temporary, for the true, representative.
23. Retainer for the true representative, a lunatic.
24. To be allowed for payment of legacies.
25. To restrain a creditor from proceeding at law.
26. To restrain a bill by a legatee, after a distribution of assets under a decree.
27. To the protection of the court, in doing what it has ordered.
28. To the protection of the court, in doing what it would order.
29. To the indulgence of the court.
30. Under discretionary powers granted by the will.
31. To set up the title of the heir at law, on a question whether property is personal or real.
32. Equitable demands of the representative against the next of kin, how protected.
33. Co-executors take a residue as joint-tenants.
34. Of an infant executor.

#### XIV. Of derivative rights.

Whether a purchaser from a representative is bound to see to the application of the money.

#### XV. Of the obligation of executors and administrators.

1. Their duty to keep distinct accounts.
2. Their duty to ear-mark money in their hands.
3. In regard to investing the estate upon security.
4. To perfect a gift *inter vivos*.
5. In miscellaneous cases.

#### XVI. Responsibility of executors and administrators.

1. A representative is liable for incautious, though innocent, acts.
2. Distinction with respect to legatees and creditors.
3. Modes of securing themselves from.
4. Responsibility of an executor who interferes, and then renounces without having proved.
5. What is or is not an interference by an executor who never proves.
6. Responsibility from keeping money at a banker's.
7. For interest upon property retained.
8. For deficiencies arising from investing the estate.
9. For a loss arising from employing the assets.
10. Responsibility of, from the failure of an agent.
11. For the loss of money obtained through the medium of their draft.
12. Responsibility from neglecting to enforce payment of debts.
13. For not paying off debts.
14. In the case of a legacy not well appropriated.
15. Of setting off a bequest to the executor against his receipts.

16. Responsibility of a receiver's representative.
17. For acting under a decree afterwards reversed.
18. In relation to specific performance of testator's agreement.
19. Estoppel resulting from the payment of legacies.
20. Whether discharged by lapse of time.
21. Liability of an administrator, *pendente lite*, for interest upon money retained.
22. Responsibility in general cases of a co-executor for the act of his companion.
23. Responsibility of a co-executor for the act of his companion, in the case of joining in acts of necessity.
24. Responsibility of a co-executor for the act of his companion, in the case of property passing through his hands.
25. Responsibility of a co-executor for the act of his companion, in dissipating assets handed over by the former.
26. Responsibility of a co-executor for the act of his companion, from enabling him to receive the property.
27. Responsibility of a co-executor for the act of his companion, from enabling him, by indorsement, to receive the contents of a bill.
28. Responsibility of a co-executor for the act of his companion, from joining in a transfer to him.
29. Responsibility of a co-executor for the act of his companion, in the case of a joint receipt.
30. Responsibility of a co-executor for the act of his companion, from joining in a sale of stock.
31. Responsibility of a co-executor in a miscellaneous case.

#### XVII. Of a bill for an account and distribution.

1. The bill is directed, not against the person, but the estate.
2. Mode of compelling personal representatives to account.
3. Annexation of a schedule to an administrator's answer, disputing the claim.
4. Of enforcing due diligence in accounting.
5. Mode of accounting for property bequeathed to minors.
6. Of excuses for not discovering the application of the estate.
7. Of directing the account against a co-executor as well, notwithstanding his not having proved or received assets.
8. A representative not joined, may be made a party after decree to account.
9. What admission of assets sufficient to order them into court.
10. Effect of an admission of assets.
11. An admission of assets is waived by going to an account before the master.
12. The first question, upon the distribution, is, as to the existence of a legal debt.
13. Extent of an annuity-creditor's claim on a deficiency of assets.
14. A case in which a surety claimed, and was admitted to a certain extent.
15. Whether the statement in an answer of belief of the debt being due, will found a decree.
16. Further directions after a decree to account.

17. Of bringing an administrator before the master, after decree passed and entered.
18. Course pursued — where, after examination of creditor's witnesses, the heir, supposed dead, was found living.

**XVIII. Of a decree for an account and distribution.**

1. Nature of the account that will be decreed on a bill filed by a single creditor.
2. Of the right of a creditor to prosecute a decree obtained by the next of kin.

**XIX. Of the proof of debts.**

Plaintiff admitted to prove before the master.

**XX. Payment of debts.**

After a decree to account.

**XXI. Of enforcing the payment of debts due from the estate.**

By bill, at the suit of the party interested, against a debtor to the estate.

**XXII. What are legal assets ; to what demands, and in what order they shall be applied.**

1. Reversion upon estate-tail.
2. Orphanage share under the custom of London.
3. Remittance for a specific purpose.
4. Term specifically devised.
5. Lands devised to the heir, subject to the payment of debts.
6. Securities which testator declared to executor he never meant to enforce.
7. Debt due from the representative himself.
8. Annuity charged upon land, with a covenant for seisin in fee, which the covenantor had not, is a specialty debt.
9. Covenant by retiring partner for payment of debts and indemnity ; payment by the other on breach by covenantor's death, is a specialty debt.
10. Payment of simple before specialty debts, without notice, when protected.
11. A joint bond held several against creditors in the administration of assets.
12. With respect to the creditors of a trade carried on subsequent to the death.

**XXIII. What are equitable assets.**

1. Equity of redemption of mortgage in fee.
2. Lands devised, subject to the payment of debts.
3. A charge for payment of debts.
4. Lands with a mere naked power to the executor to sell for payment of debts.
5. Lands devised for sale for payment of debts, the residue to be part of the personal estate.
6. Power of appointment over a sum of money, to be raised under a trust term, executed in favour of volunteers.

**XXIV. Of marshalling assets.**

1. General rules relative to the administration of real estate.
2. In favour of simple-contract creditors.
3. In the case of bond-creditors.
4. Against judgment-creditors.
5. In favour of legatees.
6. In favour of a charity.
7. In favour of the wife's paraphernalia.
8. Practice connected therewith.

**XXV. In relation to judicial proceedings.**

1. Right of an administrator *pendente lite* to lodge money in court.
2. A bill necessary to enable an administrator *pendente lite* to lodge money in court.
3. General grounds upon which an executor will be called upon to pay assets into court.
4. Of obliging a representative to pay assets into court, notwithstanding outstanding debts.
5. Of obliging a representative to pay assets into court, notwithstanding the pendency of an action against him.
6. Of obliging a representative to pay assets into court, admitted to have been received and lent on security.
7. Of obliging a representative to pay into court money bequeathed in trust to be laid out for an infant.
8. Of obliging a representative to pay into court money due from himself.
9. Trespass, for mesne profits does not lie against personal representatives.

**I. Of the appointment, and revocation of the appointment, of executors.**

1. Distinction between an executor in trust, and a trustee not executor.

The difference between an executor in trust, and a trustee not executor. 1 Ball & Beatty, 414.

2. Distinct revocations and substitutions by distinct codicils.

Testatrix having appointed three executors, makes a codicil, revoking the appointment of one of them, and appoints two persons executors in her room: by another codicil, she revokes the appointment of the former revoked executrix, and appoints a third person in her room; they are all executors. *Frewin v. Relfe*, 2 B. C. C. 220.

**II. Of the probate.**

1. When a prerogative probate will be dispensed with by a court of equity.

1. Under a decree for payment of debts out of cash in the bank, the accountant-general was ordered to pay the executor of a creditor by simple contract under a probate in the diocese, where he had resided; without a prerogative

prerogative probate: the sum being small; and no *bona notabilia* out of that diocese. *Sweet v. Partridge*, 5 Ves. 148.

2. Prerogative probate not dispensed with on account of the smallness of the sum. *Newman v. Hodgson*, 7 Ves. 409.

2. It is conclusive as to the character of executor.

Probate conclusive as to the character of executor. *Griffiths v. Hamilton*, 12 Ves. 298.

3. What acts an executor may perform before probate.

A commission may be taken out by an executor before he has attained probate. *Ex parte Paddy*, 3 Mad. 241.

4. Responsibility of an executor who interferes, and then renounces without having proved.

1. Executor who has not proved, not considered as acting, by assisting a co-executor, who had proved, in writing letters to collect debts. Nor by writing directly to a debtor of the testator and requiring payment. *Orr v. Newton*, 2 Cox, 274.

2. A. named executor in a will, acts on behalf of particular legatees, disclaiming an intention of interfering generally. He afterwards renounces formally in favour of B., who was named a trustee in the same will; who thereupon obtains administration *cum testamento annexo*. B. possesses himself of the assets, and afterwards dies insolvent. A. is liable as executor, notwithstanding his renunciation: and is answerable for the acts of B., it appearing that he had a control over the assets; and B. being considered as having obtained possession thereof by his means. *Doyle v. Blake*, 2 Sch. & Lef. 231.

### III. Of a disputed probate.

Jurisdiction of courts of equity *pendente lite*.

Jurisdiction of a court of equity for an account of personal estate and a receiver, pending a litigation for probate; though an administration *pendente lite* might be obtained in the ecclesiastical court. *Atkinson v. Henshaw*, 2 Ves. & Beam. 85.

### IV. On the union of executors in disposing of or charging the estate.

1. In the case of assigning a term, the deed being prepared for both.

It is no objection to a title, that an assignment of a term was executed by one executor only, though the deed was prepared as an assignment by two executors, one executor being competent to assign. *Simpson v. Gutteridge*, 1 Mad. 609.

2. Effect of a dissent.

Assignment of part of the assets, and judgment confessed, to a creditor by one executor, not available against the dissent of the others, on behalf of the general creditors; though perhaps the court would not interpose against the particular creditor, if the property had actually passed, or to deprive him of any legal advantage. *Lepard v. Vernon*, 2 Ves. & Beam. 51.

### V. Effect of the renunciation of an executor.

A co-executor during his companion's lifetime.

The renunciation of one executor in the lifetime of another, is a nullity. It is not binding on him, unless made after he has become the survivor. *Arnold v. Blencowe*, 1 Cox, 226.



### VI. Of survivorship between co-executors.

In relation to the residue.

1. The appointment of executors gives a joint interest in the residue; which, not being severed, survived. *Griffiths v. Hamilton*, 12 Ves. 298.
2. Survivorship among executors. *White v. Williams*, 3 Ves. & Beam. 72.
3. Executors divide a part of their testator's property, but leave a sum in the funds to secure an annuity: as to this they are joint tenants, and on the death of one, it shall survive. *Baldwyn v. Johnson*, 3 B.C.C. 455.

### VII. Of the legal consequences of nominating one an executor.

Whether, when a debtor, it operates as a release.

1. Making debtor executor, is not an extinguishment of the debt. *Carey v. Goodinge*, 3 B.C.C. 110.
2. The testator's making a bond-debtor one of his executors, does not extinguish the debt. *Errington v. Evans*, Dick. 456.

### VIII. Of an executor *de son tort*.

Ordering the funeral will not make one such.

Giving directions for the funeral will not make a man executor.  
4 Ves. 216.

### IX. Of the grant of administration.

1. When a prerogative administration is proper.

Creditors or the legal representatives of such of them as were dead, were ordered to be paid the sum reported due to them out of the funds, in court, and the accountant-general directed to draw on the bank for the same. He issued drafts under provincial administrations to pay such administrators. The accountant-general declining to sign such drafts, not thinking they authorised it; application was made that such drafts might be issued. It stood over for consideration, and on renewing the application, the lord chancellor was decidedly of opinion, that such administration did not warrant the payment. *Docker v. Horner*, Dick. 746.

2. When a prerogative administration will be dispensed with by a court of equity.

The court cannot dispense with a prerogative administration. *Challnor v. Murhall*, 6 Ves. 118.

3. When an administration *de bonis non* is requisite.

B. a married woman, made a will, merely executing a power given her by the marriage settlement, but she appointed C. executrix generally. The ecclesiastical court granted probate of this will in the general form. B. was the sole executrix of her late husband A. The general probate of the will of B. will transmit to C. the representation of A. without an administration *de bonis non*. *Barr v. Carter*, Cox, 2 — 429.

4. Of a temporary grant under stat. 38 Geo. 3. c. 87.

Administration granted under statute 38 Geo. 3. c. 87.; where the executor went to Scotland. It cannot be disputed in this court; though it may at law. Though not for a limited time, it is for a limited purpose; viz. being made defendant to suit in equity. The effect of the return of the executor, in this instance (the executor's executor,) is, that he must be made a party in the usual course; and then the temporary administrator may  
account,

account, have his costs, and be discharged: but the proceedings had are not put an end to. *Raynsford v. Taynton*, 7 Ves. 460.

5. Determination of a temporary grant, with the subsequent proceedings.

Administration during a particular period, or till a particular event, determines at that period, or on that event: for instance, an administration during the absence of an executor; and the administrator ought in his declaration to aver, that the executor is out of the realm. 7 Ves. 467.

6. Object of granting administration *pendente lite*.

1. An administrator *pendente lite* is appointed to collect the debts and property. 1 Ball & Beatty, 192.

2. To enable such administrator to lodge money in court, he must file a bill. *Ibid*.

3. Whether he would be justified in so doing. *Quare*. *Ibid*.

4. To charge him with interest he should be called on to lodge the balance in court. *Ibid*.

7. Effect of a grant made after an executor has acted *in pais*.

An administration granted after an executor has acted *in pais*, may be repealed by an application to the ecclesiastical court; but is not merely void, except as a protection to the executor. The act *in pais* of the executor could not be set up by a debtor to the fund, in answer to a suit by the administrator. *Doyle v. Blake*, 2 Sch. & Lef. 237.

8. What acts may be done before grant of administration by one entitled to it.

Defendant arrested under a writ of *ne exeat regno*, for a debt due to the intestate, discharged; the plaintiff not having obtained administration. *Swift v. Swift*, 1 Ball & Beatty, 326.

## X. Of the administration bond.

Conditions upon which a suit thereon will be restrained.

An administratrix entered into the usual bond in the prerogative court to exhibit an inventory within a limited time, &c. The time having elapsed without an inventory being exhibited, a creditor put the bond in suit in the name of the archbishop. The administratrix filed her bill for an injunction, which was granted on the terms of her giving judgment in the action which was to stand as a security for the costs at law and in equity (but not for the debt,) and amending the bill by submitting to account. *Thomas v. Archbishop of Canterbury*, 1 Cox, 399.

## XI. Of a disputed administration.

Jurisdiction of courts of equity *pendente lite*.

Jurisdiction of a court of equity pending a disputed administration in the ecclesiastical court, to protect the property by a receiver not ousted by the power of the ecclesiastical court to appoint an administrator *pendente lite*. *Ball v. Oliver*, 2 Ves. & Beam. 96.

## XII. Of the authority of an administrator.

An administrator *pendente lite*.

1. Power of administrator *pendente lite* to bring actions for recovering debts. 2 Ves. & Beam. 97.

2. The nature of the authority conferred on an administrator *pendente lite*

*lite* is merely to collect the effects and to pay debts; he has no authority to pay legacies; yet if he does pay them *bond fide*, he shall have credit for them. 1 Sch. & Lef. 254.

### XIII. Of the rights of executors and administrators.

#### 1. They succeed to the equities of those whom they represent.

B., a purchaser under a decree of the first presentation to a living of which A. is seised for life of the advowson, afterwards takes a conveyance from A. of the second presentation to the same living, and sells the first presentation to the present incumbent. To a bill by A. to set aside this transaction on the ground of fraud, praying a discovery, B. puts in an answer, refusing to make the discovery required, as tending to subject him to forfeiture on account of simony; B. having afterwards died, the suit is relieved against his executor, who is held entitled to the same protection that was claimed by B. *Parkhurst v. Lowten*, 1 Mer. 391.

#### 2. How far considered absolute proprietors of the estate.

1. In many respects and for many purposes third persons may consider executors absolute owners. 7 Ves. 166.

2. After a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution the goods of a testator for the executor's own debt. *Ray v. Ray*, Cooper, 264.

#### 3. To pledge the estate.

1. Deposit of bonds of the testator, by an executrix, with bankers, as a security for her own debt. *Quære*, whether the bankers can retain them. *Scott v. Tyler*, 2 B. C. C. 431.

2. Security by executor upon the assets for his own debt and future advances, with other circumstances, proving the act not to be consistent with the duty of executor, but for his own advantage, cannot be held. 17 Ves. jun. 168.

3. Pledge of the assets by an executor cannot be held, even against a pecuniary or residuary legatee, and though for money, advanced at the time, if under circumstances, showing knowledge of an intended application, not conformable to, or connected with, the character of executor. Distinction between an antecedent debt and a present advance, as the consideration not conclusive. 17 Ves. jun. 170.

4. Pledge by executors, of bonds to the testator sustained upon advances of money from time to time for several years: the bill being filed, not by specific legatees, but by co-executors, who had not previously acted. *M'Leod v. Drummond*, 14 Ves. 353.; 17 Ves. 152.

5. Leasehold estates specifically bequeathed to an executor, were by him assigned as a security for his own debt. That assignment, no collusion appearing, was established against a creditor. *Taylor v. Hawkins*, 8 Ves. 209.

6. Upon a deposit by executors of the testator's property with their own, for their own debt, the latter to be first applied. 17 Ves. jun. 158.

#### 4. To alienate the estate.

1. Power of disposition generally incident to an executor. 7 Ves. 166.

2. A lease by an administrator to a party having notice, that a sale was required by the persons beneficially interested, cannot be supported, and will be set aside. *Drohan v. Drohan*, 1 Ball & Beatty, 185.

3. Transfer by an executor, a clear misapplication of assets, immediately after the death, to secure a debt of the executor and future advances, under circumstances of gross negligence, though not direct fraud, set aside by general legatees. *Hill v. Simpson*, 7 Ves. 152.

#### 5. To

## 5. To dispose of a lease held under covenant not to alien.

Executors may dispose of a lease for years as assets, notwithstanding a proviso or covenant that lessee shall not alien. *Seers v. Hind*, 1 Ves. 294.

## 6. Of specific restraints against their alienating.

Testator may provide, that in case of a devolution to executors, they shall not alien : but it must be very special. 1 Ves. 295.

## 7. To the possession of securities to obtain their contents.

Motion granted that securities shall be delivered to executor to receive money. *Jones v. Jones*, 3 B. C. C. 80.

## 8. To purchase the estate.

1. An executor shall not be permitted, either mediately or by means of a trustee, to be the purchaser from himself of any part of the assets ; but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. *Hall v. Hallet*, 1 Cox, 134.

2. Executor cannot buy the debts for his own benefit. 6 Ves. 628.

3. Executor cannot buy for his own benefit debts due from the testator's estate. 8 Ves. 346. 350.

## 9. To renew a lease for their own benefit.

On a question as to leases renewed by an executrix after the term had expired, whether for her own benefit, or for the benefit of the estate of the testator, and a secret trust to her executors, they were declared to result for the next of kin. *Bromfield v. Chichester*, Dick. 480. ; *Raw v. Duthelly*, Id. 480.

## 10. To enlarge a tenancy at sufferance for their own benefit.

An executor to a tenant by sufferance, or at will, obtaining a larger interest, is a trustee for the residuary legatee ; like the case of general occupancy. 11 Ves. 392.

## 11. To the profits arising from investing the estate.

1. If an executor lay out the assets on private securities, all the benefit made thereby shall accrue to the estate, yet the executor shall answer all the deficiency ; and the particular circumstances of good conduct in the executor cannot prevail against the general rule. *Adye v. Feuilliteau*, 1 Cox, 24.

2. Executors bound to accumulate, cannot account, as if the money had been laid out in the funds ; if it was not so laid out ; or, being so, he had sold out at an advance. 11 Ves. 108.

3. Executor acting with regard to the testator's property in any other manner than the trust requires, is answerable to the *cestuy que trust* for any gain, and is liable to any loss. 4 Ves. 622.

4. Where an executor appears to have made 5*l. per cent.* of the assets in his hands, or where he has by the non-application of assets done damage to the estate, to the amount of 5*l. per cent.*, in either case he shall be charged with interest at that rate ; and therefore where he permits debts carrying interest at 5*l. per cent.* to run on, when he had in his hands a fund to pay them, he shall *ed ratione* pay interest at that rate. But where it appears only that the executor retained the assets for his own purposes, he shall answer interest at 4*l. per cent.* *Hall v. Hallet*, 1 Cox, 134.

5. Testator in India, bequeaths a sum of sicca rupees to his wife for life, with remainder to his children, and appoints his wife executrix, who invests the money on Indian securities, producing a large rate of interest, and afterwards comes to England with her only child, an infant. On bill by the infant, held, that the widow is not compellable to refund the excess of interest

interest received by her, beyond what the legacy would have produced if invested in the English funds, but ordered the money to be remitted to England, and laid out in *3l. per cent.* annuities. *Holland v. Hughes*, 3 Mer. 685.

12. To the profits of the sale of testator's manuscript works.

Account ordered of one moiety of the profits arising by the sale of testator's manuscript books. *Foster v. Strange*, Dick. 348.

13. Reimbursements for the employment of an attorney.

1. If an executor employs a solicitor to do business for him in the management of his testator's affairs, he shall be allowed what he pays the solicitor for such business. *Macnamara v. Jones*, Dick. 587.

2. Allowance made to a solicitor, employed by the mother of an infant, in receiving rents which were in danger of being lost, given as a just allowance to the mother, supposing her the accounting party. *Stewart v. Hoare*, 2 B. C. C. 663.

14. Reimbursement for the employment of an accountant.

Executor, under the circumstances, allowed the expences of an accountant. *Henderson v. M'Iver*, 3 Mad. 275.

15. Distinction between a receiver and a personal representative, with respect to remuneration for charges and trouble.

Distinction between an executor and a receiver as to allowances for charges and trouble. 15 Ves. 276.

16. Commission upon receipt and payments by an executor abroad.

1. An executor in India, passing his accounts in this court, is entitled to the commission upon the receipts or payments, according to the practice in India. *Chatham v. Lord Audley*; *Poole v. Larkins*, 4 Ves. 72.

2. Agents being also appointed executors of the principal, are not entitled to commission upon remittances from India by the testator, not received until after his death. *Hovey v. Blakeman*, 4 Ves. 596.

3. Executor in India, having a legacy for his trouble, not entitled to commission on receipts and payments, or either, as executor; nor allowed, in passing his accounts after a series of years, to renounce his legacy, and charge commission on such receipts and payments. *Freeman v. Fairlie*, 3 Mer. 24.

17. Extent of the right of retainer.

Executor's right to retain his own debt. 18 Ves. jun. 296.

18. Retainer as to co-surety with the testator.

Executor had become bound with the testator in a bond for another person, allowed to retain the whole of what was due on the bond. *Bathurst v. De la Zouch*, Dick. 460.

19. Retainer in the case of trusts.

A right of retainer is not prejudiced by the circumstance, that the administration is granted to another for the use of the creditor, a lunatic, any more than if *durante minoritate*, nor, that the debt is due to a trustee. *Franks v. Cooper*, 4 Ves. 763.

20. Retainer against the next of kin, to indemnify against a future contingent demand.

Executor claiming to retain out of the residue certain parts of the property, to protect himself against a future contingent demand in respect of covenants entered into by the testator for payment of rent and repairs of an estate held by him under lease from a corporation, though there was no existing breach of covenant nor arrears of rent, in respect of which he was liable :

liable: on a bill by the residuary legatee for the property so retained, ordered, that the funds in question be made over to the plaintiff, on his giving a sufficient indemnity to the executor; the terms of such indemnity to be settled before the master. *Simmonds v. Bolland*, 3 Mer. 547.

21. Retainer out of a co-executor's legacy, in respect of a *devastavit*.

Retainer allowed to one executor out of a legacy to his co-executor in respect of a *devastavit*. *Sims v. Doughty*, 5 Ves. 243.

22. Retainer by a temporary, for the true, representative.

Vide 4 Ves. 763.

23. Retainer for the true representative, a lunatic.

*Ibid.*

24. To be allowed for payment of legacies.

Under a decree for an account, and applying personal estate in payment of debts and funeral expences, and directing the clear surplus to be paid over, making to the parties all just allowances, the master ought to allow payments in discharge of legacies. *Nightingale v. Lawson*, 1 Cox, 23.

25. To restrain a creditor from proceeding at law.

1. This court will not before a decree interpose in favour of an executor against a creditor proceeding at law. *Rush v. Higgs*, 4 Ves. 638.

2. A decree against an executor is in nature of a judgment at law. After that he may, on motion, without filing a bill for an injunction, restrain a creditor suing at law. The executor must pay the costs till notice of the decree, but not after notice; and he must make an affidavit as to the funds in his hands. *Paxton v. Douglas*, 8 Ves. 520.

3. Effect of a decree against administrator, entitling him to an injunction against the suit of a creditor, qualified by requiring an account of the assets either by the answer or affidavit. *Gilpin v. Lady Southampton*, 18 Ves. jun. 469.

4. In the case of an executor after a decree to account, creditors are restrained by injunction without bill, from proceeding at law. 1 Ball & Beatty, 320.

26. To restrain a bill by a legatee, after a distribution of assets under a decree.

After a distribution of assets under a decree ascertaining rights of legatees, advertisements for all persons interested to prove their claims before the master, being previously published, a bill by a legatee against the representatives of the executor, dismissed. *Farrell v. Smith*, 2 B. & B. 337.

27. To the protection of the court, in doing what it has ordered.

Where equity has taken the management of assets from an executor, it will not permit him to be charged for what has been done pursuant to its directions. *Farrell v. Smith*, 2 B. & B. 342.

28. To the protection of the court, in doing what it would order.

1. If an executor without application to the court, does what the court would have approved, it shall stand. 4 Ves. 369.

2. The court will protect an executor in doing what it would order. 7 Ves. 150.

29. To the indulgence of the court.

Indulgence of the court to executors and trustees having a difficult duty to perform, but keeping their accounts regularly, being always ready to give information as to the state of the fund, and having provided for the security of the fund, no more than strict justice, and as such to be considered. *Freeman v. Fairlie*, 3 Mer. 42.

30. Under

## 30. Under discretionary powers granted by the will.

1. A payment for mourning rings, though not directed by the will, allowed, under the discretion given to the executors. *Paice v. the Archbishop of Canterbury*, 14 Ves. 364.

2. The testator directed his executors to lay out the residue of his estates in the purchase of land, or upon heritable or personal securities, at such rate of interest as they should think reasonable. The executors lent the fund to one of themselves on bond at *4l. per cent.*, when *5l. per cent.* might have been made by heritable or government securities. The discretion given by the will to the executors might have been soundly exercised by their lending the money to any other person upon such terms as they thought reasonable; but a trustee contracting with himself cannot spare himself, and he shall therefore pay interest at *5l. per cent.* for the money in his hands. *Forbes v. Ross*, 2 Cox, 113.

## 31. To set up the title of the heir at law, on a question whether property is personal or real.

Executor unable to state whether houses, the rent of which he has been receiving as executor, are leasehold or freehold, not allowed to set up the title of the heir at law as between himself and the personal representatives. *Freeman v. Fairlie*, 3 Mer. 35.

## 32. Equitable demands of the representative against the next of kin, how protected.

An administratrix having an equitable demand against the personal estate of her intestate, the court will enjoin the next of kin from proceeding in the spiritual court to compel a distribution; but they may proceed to compel the administratrix to exhibit an inventory. *Backhouse v. Hunter*, 1 Cox, 342.

## 33. Co-executors take a residue as joint tenants.

Executors taking a residue as executors, are joint tenants. *Frewen v. Relfe*, 2 B. C. C. 220.

## 34. Of an infant executor.

The court will not order money to be paid out to an infant executrix, but will refer it to the master to enquire whether there are any debts or legacies, and to consider of a maintenance. *Compart v. Compart*, 3 B. C. C. 195.

## XIV. Of derivative rights.

Whether a purchaser from a representative is bound to see to the application of the money.

Generally, a purchaser from an executor not bound by his misapplication of the money; nor in many cases even of pledge, if free from fraud, or direct evidence on the face of the transaction of an intended misapplication. 17 Ves. jun. 154.

## XV. Of the obligation of executors and administrators.

## 1. Their duty to keep distinct accounts.

It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer. If therefore he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books in which any part of those accounts may be inserted. *Freeman v. Fairlie*, 3 Mer. 43.—It is a more difficult question as between an executor bound to produce, and his partner in trade; but if the partners have permitted him to mix the accounts, it seems they cannot afterwards object to the production. Clearly so in a case where

where the executor has admitted the having lent to the house part of the trust property, and that they have been dealing with it. *Freeman v. Fairlie*, 3 Mer. 44.

2. Their duty to ear-mark money in their hands.

An executor dealing with money in his hands is bound to ear-mark it; but if he cannot answer as to the state of it, the court has no power to act as upon an admission. *Freeman v. Fairlie*, 3 Mer. 40.

3. In regard to investing the estate upon security.

Executor cannot lend money on personal security, though words which may imply a discretion so to do, are used by the testator. *Wilkes v. Steward*, Cooper, 6.

4. To perfect a gift *inter vivos*.

Executor never called upon to do any act to perfect a gift *inter vivos*, except in the particular cases of supplying a defective execution of a power, and the want of a surrender of a copyhold. 12 Ves. 46.

5. In miscellaneous cases.

Dividend received by an executor on account of a bond specifically bequeathed, but retained by him, and another, to which he was beneficially entitled under the will, apportioned. *Innes v. Johnson*, 4 Ves. 568.

## XVI. Responsibility of executors and administrators.

1. A representative is liable for incautious, though innocent, acts.

Executor in trust for infants, having paid under a written obligation, executed abroad, though in possession of a counter-obligation to repay part with interest at the death of the party, acknowledging that to be so much more than the debt, and neither instrument having been transferred, was charged as having been paid incautiously, though innocently; and therefore he was permitted to try the question at law. *Vez v. Emery*, 5 Ves. 141.

2. Distinction with respect to legatees and creditors.

Executors may be discharged as against legatees, though not as against creditors; the former being bound by the terms of the will; the latter not. 2 Sch. & Lef. 239. 245.

3. Modes of securing themselves from.

Executors, in order to be discharged, must either wholly renounce or put the administration of the assets into the hands of a court of equity. 2 Sch. & Lef. 245.

4. Responsibility of an executor who interferes, and then renounces without having proved.

Vide 2 Cox, 274.; 2 S. & L. 231.

5. What is or is not an interference by an executor who never proves. Ibid.

6. Responsibility from keeping money at a banker's.

Keeping money at his banker's, considered as employing it in his trade. 11 Ves. 61.

7. For interest upon property retained.

1. Executors keeping money of testator's longer than the exigencies of his affairs require, shall pay interest; but one shall not be answerable for the sum come to the hands of the other, unless they have done joint acts. Each shall be liable to the whole costs. *Littlehales v. Gascoyne*, 3 B. C. C. 73.

2. An executor keeping money of the testator in his hands, liable to interest



interest and costs. Lord chancellor said, if he laid it out in three per cents, the court would affirm his act. *Franklin v. Frith*, 3 B. C. C. 493.

3. An executor keeping the fund, and using it for his own benefit, contrary to his trust, decreed to account with interest at *5l. per cent.* and costs. *Piety v. Stace*, 4 Ves. 620.

4. Executor, to whom negligence was imputable, charged with the arrears of rent unreceived, and balances in his hands, together with interest at *4l. per cent.* and the costs of the suit relating to such arrears and balances. *Tebbs v. Carpenter*, 1 Mad. 290.

5. Instances where executors were made to pay interest on balances in their hands. 1 Ball & Beatty, 231. n.

8. For deficiencies arising from investing the estate.

Vide 1 Cox, 24.; 2 Cox, 113.

9. For a loss arising from employing the assets.

Vide 4 Ves. 622.

10. Responsibility of, from the failure of an agent.

1. Executors directed with all convenient speed to pay debts and lay out the residue in mortgage, held not answerable for a loss by the insolvency of the testator's banker, after selling negotiable securities deposited with him by the testator. *Rowth v. Howell*, 3 Ves. 565.

2. Testatrix directed her executor to sell ten houses, and invest the produce (after payment of her debts) in real or government securities, and to pay the interest to her three nephews until they attained twenty-one; and as each attained that age, to have one-third of the principal. The executor sold the houses, and applied part in payment of funeral expences, &c., and paid the rest into his banker's hands, mixing it with his own money. The bankers failed, and held that he was liable to pay the money to the legatees. *Fletcher v. Walker*, 3 Mad. 73.

11. For the loss of money obtained through the medium of their draft.

1. Executors joining in a draft for the property of the testator, and suffering the money to be in the hands of a tradesman, are both liable to the loss, though one has done no other act in execution of the will. *Sadler v. Hobbs*, 2 B. C. C. 114.

2. Two executors under the circumstances, charged with a loss by neglecting to call in money lent by the testator upon bond. *Powell v. Evans*, 5 Ves. 839.

12. Responsibility from neglecting to enforce payment of debts.

1. Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary. 5 Ves. 844.

2. Executor not having brought an action on a bond, charged with the same. *Lawson v. Copeland*, 2 B. C. C. 156.

13. For not paying of debts.

Vide 1 Cox, 194.

14. In the case of a legacy not well appropriated.

Executor shall make good a legacy not well appropriated. *Cooper v. Douglas*, 2 B. C. C. 231.

15. Of setting off a bequest to the executor against his receipts.

The annuity given to the executor by the will was stopped to satisfy debts due from him in respect of receipts as executor. *Skinner v. Sweet*, 3 Mad. 244.

16. Re-

16. Responsibility of a receiver's representative.

Of a receiver admitting assets bound to answer what was upon a subsequent inquiry found due for interest. 4 Ves. 606.

17. For acting under a decree afterwards reversed.

Executor pays debts with money received under a decree which is reversed; he must refund; otherwise, if the appeal is delayed. 2 Ves. 583.

18. In relation to specific performance of testator's agreement.

Agreement to grant an annuity. Execution of such an agreement against the executors. *Nield v. Smith*, 14 Ves. 491.

19. Estoppel resulting from the payment of legacies.

Executor having paid legacies, stands in a situation in which (at least for the security of the fund) it is not competent to him to allege, that debts are unpaid. *Freeman v. Fairlie*, 3 Mer. 38.

20. Whether discharged by lapse of time.

Effect of length of time against a demand in respect of misapplication of assets by the executor. 17 Ves. jun. 165.

21. Liability of an administrator, *pendente lite*, for interest upon money retained.

Vide 1 B. & B. 192.

22. Responsibility in general cases of a co-executor for the act of his companion.

1. One executor doing an act, by which property gets into the possession of another executor, though with an innocent motive, is equally answerable. Otherwise, if he is merely passive. The *cestui que trust* barred by acquiescence. *Langford v. Gascoyne*, 11 Ves. 333.

2. To discharge a co-executor, the act must be necessary for the purposes of the will; and he must use reasonable diligence in inquiring into the truth of the representation. 11 Ves. 254.

23. Responsibility of a co-executor for the act of his companion, in the case of joining in acts of necessity.

One executor in trust is not answerable for the receipts of the other merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer: otherwise, if he goes farther and concurs in the application. *Hovey v. Blakeman*, 4 Ves. 596.

24. Responsibility of a co-executor for the act of his companion, in the case of property passing through his hands.

A co-executor, who proved, but never acted, cannot be charged by receiving a bill by the post on account of the estate, and sending it immediately to the acting executor. *Balchen v. Scott*, 2 Ves. 678.

25. Responsibility of a co-executor for the act of his companion, in dissipating assets handed over by the former.

If one executor possess part of his testator's estate, and pays it over to another executor, who embezzles it; the former, or in case of his death, his assets, shall make it good. *Townsend v. Barber*, Dick. 366.

26. Responsibility of a co-executor for the act of his companion, from enabling him to receive the property.

As to the cases, breaking down the distinction between executors and trustees joining in an act, by which one obtains and misapplies the fund, VOL. VIII. Q q that

that executors are all liable, trustees not, as the former need not, and the latter must, join. *Quere.* 16 Ves. 479.

27. Responsibility of a co-executor for the act of his companion, from enabling him, by indorsement, to receive the contents of a bill.

Bill of exchange remitted to two agents, payable to them personally, who on the death of the principal become his executors: the mere indorsement of the one, after they are executors, in order to enable the other to receive the money, is not sufficient to charge him, who does not receive it. 4 Ves. 608.

28. Responsibility of a co-executor for the act of his companion, from joining in a transfer to him.

Executor charged for negligence by joining in a transfer to a co-executor upon his representation, that it was required for debts: but not liable so far as they can prove the application to that purpose; though he possessed other funds, part of the assets, not through them; which funds he wasted. *Lord Shipbrooke v. Lord Hinchinbrook*, 11 Ves. 252.; 16 Ves. 477.

29. Responsibility of a co-executor for the act of his companion, in the case of a joint receipt.

1. General rule, that executors joining in a receipt are all chargeable: in the case of trustees, only the person receiving the money. The reason of the distinction. The lord chancellor disapproved the relaxation in favour of executors of that rule. 7 Ves. 198.

2. Executor, who is likewise a trustee, joining in a receipt and re-conveyance of a mortgaged estate, though he does not receive the money, is liable; the receipt being in evidence, no enquiry can be made as to the fact. *Scurfield v. Howes*, 3 B. C. C. 90.

3. Where executors are jointly charged, one only having received the money, and the other joined in the receipt, it is on the ground that the property is under the controul of both. 2 Sch. & Lef. 242. The question in such a case, is, whether the executor joining in the receipt had a controul? and of that, his joining in the receipt is evidence. *Ibid.*

4. Executors join in a receipt for money which is under the controul of both: both shall be responsible, though the money be actually received only by one; for it amounts to a direction by the other to pay his co-executor. *Secus*, if the signing be of necessity, and the money not under the controul of both. 1 Sch. & Lef. 341.

5. Joining in a receipt, though perhaps not absolutely necessary, not conclusive against an executor, any more than against a trustee, to charge him with the receipts of his co-executor. 4 Ves. 608.

6. Where testator had directed that his executors should not be liable for each other's acts, one of them, who was in good credit at the time, having called in a mortgage, and received the money, sends round the assignment to his co-executors, who execute it, and sign a receipt. Held, that as no part of the money had come to their hands, they should not be answerable. *Westley v. Clarke*, 1 Eden, 357.; *Cox's P. W.* 82 n.; *Dick.* 329.

30. Responsibility of a co-executor for the act of his companion, from joining in a sale of stock.

One executor and trustee charged under the circumstances, with a loss occasioned by joining in the sale of stock; the other having received all the money and absconded. *Chambers v. Minchin*, 7 Ves. 186.

31. Responsibility of a co-executor in a miscellaneous case.

T. and his partners, together with W., give securities to C., for the proper debt of T. W. dies, leaving T. and C. his executors, and T. his residuary legatee;

legatee; and leaving a sum of money under the controul of C. C. applies this money to the payment of the securities given by T. and Co. and by W.; and debits W. in an account with the amount: and on settling with T., as executor of W., C. hands him over these securities, and pays him as residuary legatee, the balance due to the estate of W. C. shall be answerable to the creditors and legatees of W., on failure of T., as well for the sum paid to T., as that retained by C. *Joy v. Campbell*, 1 Sch. & Lef. 328. 340.

## XVII. *Of a bill for an account and distribution.*

1. The bill is directed, not against the person, but the estate.

At law, the person often sued in respect of the assets; in equity, the assets themselves. 1 Ves. 430.

2. Mode of compelling personal representatives to account.

There is no regular way of calling executors to account but by bill, they not being bound to account as guardians and receivers. 1 Ball & Beatty, 75.

3. Annexation of a schedule to an administrator's answer, disputing the claim.

Administrator disputing by his answer the foundation of the bill, viz. a balance of accounts against the testator's estate, need not set forth an account of the personal estate, &c. by way of schedule. *Philips v. Caney*, 4 Ves. 107.

4. Of enforcing due diligence in accounting.

Executor in India coming to England, and after 21 years being called upon to account, alleging that he has left his books, &c. behind him in India, ordered to produce copies of all entries in such books, &c. within six months, though it should be impossible that he should do so, in order that the court may have an opportunity from time to time of seeing that he has used proper diligence. *Freeman v. Fairlie*, 3 Mer. 45.

5. Mode of accounting for property bequeathed to minors.

Executors are not, on motion, permitted to account before the master, for property bequeathed by testator to minors. An account so taken is not binding on the minors, there being no suit depending in court, to which they were parties. *In re Burke*, 1 Ball & Beatty, 74.

6. Of excuses for not discovering the application of the estate.

That the executor is uncertain whether part of the property is real or personal, and, if real, who are the persons entitled to it, does not afford him any ground for declining to set forth in answer to a bill by the personal representatives, what he has done with the property. *Freeman v. Fairlie*, 3 Mer. 37.

7. Of directing the account against a co-executor as well, notwithstanding his not having proved or received assets.

An infant legatee sued for an account against two executors; one of them had not proved, and denied having received any assets: the account was directed against both. *Price v. Vaughan*, 2 Anst. 524.

8. A representative not joined, may be made a party after decreed to account.

An executor not a party introduced into the decree as a party, and ordered to account. *Pitt v. Brewster*, Dick. 37.

9. What admission of assets sufficient to order them into court.

Admission by an executor, that the whole amount of the property is near 40,000*l.*, and that the whole is invested in India on public securities, either

in his name, or in the name of the house in which he is a partner, but subject to his disposal, unless some part is in the hands of the said house at interest, which he believes may be the case, not a sufficient admission of money in his hands, to order the payment into court of any part of it. *Freeman v. Fairlie*, 3 Mer. 39.

10. Effect of an admission of assets.

1. Defendant, executor of a receiver, admitted assets to pay rents received by his testator: the bill was amended, by a charge that the testator made interest. The executor not answering the amended bill, a decree was made, that he should pay interest made by his testator; and on re-hearing, held bound by the admission. *Foster v. Foster*, 2 B. C. C. 616.

2. *Vide* 5 Ves. 21.

11. An admission of assets is waived by going to an account before the master.

An admission of assets, by the executor's answer, is waived, if the plaintiff goes to an account before the master. *Wall v. Bushby*, 1 B. C. C. 484.

12. The first question, upon the distribution, is, as to the existence of a legal debt.

Upon the administration of assets no question ought to be determined in equity, till it is first determined whether there is a good debt at law. 4 Ves. 815.

13. Extent of an annuity-creditor's claim on a deficiency of assets.

Upon a deficiency of assets administered in this court, a value must be set upon an annuity at the time of the death; and the annuitant can claim only in respect of that. *Franks v. Cooper*, 4 Ves. 763.

14. A case in which a surety claimed, and was admitted to a certain extent.

B., as a surety for A., became bound with him in a joint bond to C. and D. in a penalty of 180,000*l.* with condition for payment of 90,000*l.* with interest at 5*l. per cent.* By a counter bond of the same date, A. became bound to B. in a like penalty, with condition to save harmless, and indemnified the said B., his heirs, executors, &c. from payment of the said sum of 90,000*l.* and interest, and from all damages he might sustain for or on account of the non-payment of the said sum of 90,000*l.* and interest. After the deaths of A. and B., the executors of B. were called upon to pay; and actually did pay to C. and D. 22,000*l.* on account of the principal, and several large sums on account of the interest of A.'s debt. In a suit for the administration of A.'s estate, the court allowed the executors of B. to come in as creditors of the several sums of money so paid by them, and for interest on the 22,000*l.*, but not for interest on the several sums of money paid by them to C. and D. for interest of the original debt. *Rigby v. M'Namara*, 2 Cox, 415.

15. Whether the statement in an answer of belief of the debt being due, will found a decree.

The answer of an administrator to a creditor's bill, stating, that he believes the debt is due, whether that is sufficient foundation for a decree, *quære*. *Hill v. Binney*, 6 Ves. 738.

16. Farther directions after a decree to account.

Upon farther directions, under the usual decree for an account against an administratrix, an enquiry as to balances in her hands from time to time, with a computation of interest thereon prayed by petition, upon affidavits of her conduct before the master, by attempting to support her discharge by forgery, &c. was refused. *Parnell v. Price*, 14 Ves. 502.

17. Of

17. Of bringing an administrator before the master, after decree passed and entered.

Administrator not brought before the master by motion after a decree passed and entered, if any thing in it affecting him by way of order to pay: otherwise, if only to witness what is done. *Habergham v. Vincent*, 1 Ves. 68.

18. Course pursued — where, after examination of creditor's witnesses, the heir, supposed dead, was found living.

Bill by creditors of testator; after they had examined their witnesses, they discovered that the heir at law, supposed to be dead, was living; what was done thereupon. *Austen v. Hinton*, 1 Dick, 280.

XVIII. *Of a decree for an account and distribution.*

1. Nature of the account that will be decreed on a bill filed by a single creditor.

Where a single creditor files a bill for the payment of his own debt only, the court does not direct a general account of the testator's debts, but only an account which is ordered to be paid in a course of administration. *Attorney-general v. Cornthwaite*, 2 Cox, 44.

2. Of the right of a creditor to prosecute a decree obtained by the next of kin.

In case of unreasonable delay in prosecuting a decree in a suit by next of kin against an administrator, the court will give leave to a creditor to prosecute a decree which has been so neglected. *Sims v. Ridge*, 3 Mer. 458.

XIX. *Of the proof of debts.*

Plaintiff admitted to prove before the master.

The plaintiff admitted to prove his debt before the master. *Newman v. Norris*, Dick. 259.

XX. *Payment of debts.*

After a decree to account.

Administratrix not allowed for debts paid after a decree to account; but shall stand in the place of the creditors paid. *Jones v. Jukes*, 2 Ves. 518.

XXI. *On enforcing the payment of debts due to the estate.*

By bill, at the suit of the party interested, against a debtor to the estate.

1. Though generally a bill by those interested in the personal estate, as creditors, or next of kin, will not lie against a debtor to the estate, it will under circumstances, as, in this case upon collusion with the representative. The defendant was also liable in the character of trustee and agent. *Doran v. Simpson*, 4 Ves. 651.

2. The general principle, on which a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case, applies equally to the case of a creditor overpaid by the executor. In a case of that sort upon the circumstances of suspicion, particularly attending to the character of the creditor, as attorney and confidential agent to the testatrix, an issue was directed. *Abeger v. Rowley*, 6 Ves. 748.

3. Creditor permitted to sue the debtor in equity, upon collusion with the executor. 9 Ves. 86.

4. Suit by a creditor against persons accountable to the estate allowed in  
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a special case; as, where the representatives cannot, or will not, act. One object of the suit being the establishment of an agreement for carrying on a colliery, the plaintiff must take it subject to all engagements, as a continuing concern. No security to be given for the result of the account. Whether the plaintiff, being a creditor by judgment 17 years old, can have a decree without putting himself in a situation to proceed at law, viz. reviving by *scire facias, quære*. The bill would be retained, that the debt might be substantiated by an issue, or other proceeding at law. *Burroughs v. Elton*, 11 Ves. 29.

## XXII. What are legal assets; to what demands, and in what order they shall be applied.

### 1. Reversion upon estate tail.

1. Reversion in fee, after an estate tail spent, held to be assets to pay debts. *Countess of Warwick v. Edwards*, Dick. 51.

2. The question whether a reversion (after several estates tail) falling in after the death of the reversioner, be assets to pay his debts, agitated, but not determined. *Tweedale v. Coventry*, 1 B. C. C. 240.

### 2. Orphanage share under the custom of London.

Orphanage share under the custom of London is subject to debts. 2 Ves. 254.

### 3. Remittance for a specific purpose.

A remittance in bills and notes, for a specific purpose, viz. to answer acceptances, received by the administrator, in consequence of the death of the party, to whom it was remitted, held not general assets: the special purpose operating a lien; which would also be the effect upon a bankruptcy. *Hassel v. Smithers*, 12 Ves. 119.

### 4. Term specifically devised.

Where there are debts, executors may sell testator's term specifically devised; and even in suspicious circumstances of fraud, after long possession, by purchase, court will not relieve. *Andrew v. Wrigley*, 4 B. C. C. 125.

### 5. Lands devised by the heir, subject to the payment of debts.

Devise to heir at law, subject to the payment of testator's debts; legal assets. *Young v. Demet*, Dick. 452.

### 6. Securities which testator declared to executor, he never meant to enforce.

Notwithstanding declarations of the testator to his executor, that he never meant to call for payment of a promissory note; it was held part of the assets, which were insufficient for the legacies; a charge on the real estate failing for want of a proper attestation of the will. *Byrn v. Godfrey*, 4 Ves. 6.

### 7. Debt due from the representative himself.

A debt, due by the executor, is assets; for the same reason that he may, if a creditor, retain; that he cannot sue himself. 13 Ves. 264.

### 8. Annuity charged upon land, with a covenant for seisin in fee, which the covenantor had not, is a specialty debt.

Voluntary annuity of 60*l.* by deed charged upon lands of which the grantor covenanted to be seised in fee. By his will he confirms the deed, and gives the grantee a legacy of 600*l.*, grantor not being seised in fee, grantee considered as a creditor by covenant, and satisfaction decreed to him out of personal estate. *Giles v. Roe*, Dick. 570.

### 9. Co-

9. Covenant by retiring partner for payment of debts and indemnity; payment by the other on breach by covenantor's death, is a specialty debt.

Under a covenant to a retiring partner, as soon as conveniently could be to pay the debts, and indemnify him against them, broken by the death of the covenantor, leaving debts undischarged, those debts paid by the other, a debt by specialty; against which the administrator cannot retain his own simple contract debt; as he may a debt in equal degree. *Musson v. May*, 3 Ves. & Beam. 194.

10. Payment of simple before specialty debts, without notice, when protected.

Where payment of a simple contract debt, without notice of specialties, is held a good administration. *Hawkins v. Day*, Dick. 155.

11. A joint bond held several against creditors in the administration of assets.

Joint bond held several against creditors in the administration of assets. *Burn v. Burn*, 3 Ves. 379.

12. With respect to the creditors of a trade carried on subsequent to the death.

Testator disposes of his property by his will, and directs a trade in which he was concerned, to be carried on after his death. Held, that only the testator's capital in the trade was liable to the creditors of the trade, who became such after the testator's death, and that they had no further claim upon his assets. *Ex parte Richardson*, 3 Mad. 138.

### XXIII. ~~What~~ *What are equitable assets.*

1. Equity of redemption of mortgage in fee.

An equity of redemption of a mortgage in fee, is not equitable assets; at least, as against judgment-creditors; who have a right to redeem. *Sharpe v. the Earl of Scarborough*, 4 Ves. 538.

2. Lands devised, subject to the payment of debts.

A testator wills his debts to be paid, and charges his estates with the payment of them, and subject thereto, devises his estate in fee simple to his widow. It was held to be equitable assets. *Wride v. Clarke*, Dick. 382.

3. A charge for payment of debts.

1. A charge for payment of debts makes equitable assets. *Bailey v. Ekins*, 7 Ves. 319.

2. Power of appointment over a sum of money, to be raised under a trust term, executed in favour of volunteers, is assets for creditors. But the equity of a purchaser from a party, taking under a voluntary deed of appointment, was preferred to that of general creditors, having no specific charge. *George v. Milbanke*, 9 Ves. 190.

4. Lands with a mere naked power to the executor to sell for payment of debts.

1. Testator directed that all his estates should be sold, and after payment of certain sums, the remainder to be vested in his executors for the payment of debts: the money arising from the sale, held to be equitable assets. *Newton v. Bennet*, 1 B. C. C. 135.

2. The testator charged all his estates, except a particular estate, with the payment of his debts, which he willed should be paid; and directed his executors nominated, and the survivor and his heirs to sell for that purpose,



without devising his estate to them: these estates held to be equitable assets; and if deficient, a real estate specifically devised, and part of the personal estate specifically bequeathed to contribute in proportion to raise the deficiency, and the master to settle such proportion. *Silk v. Prime*, Dick. 384. 1 B. C. C. 138. n. 302.

5. Lands devised for sale for payment of debts, the residue to be part of the personal estate.

Devise to sell for payment of debts, the residue to be part of the personal estate; equitable assets. *Batson v. Lindegreen*, 2 B. C. C. 94.

6. Power of appointment over a sum of money, to be raised under a trust-term, executed in favour of volunteers.

Vide 9 Ves. 190.

#### XXIV. Of marshalling assets.

1. General rules relative to the administration of real estate.

1. The old practice, to administer the personal estate before a sale of real estate, charged in aid, relaxed. Now, if the master foresees a deficiency, a sale is permitted. 8 Ves. 2.

2. In the administration of assets ordinarily the first fund applicable is the personal estate, not specifically bequeathed: then land devised or ordered to be sold for payment of debts; not merely charged: then descended estates; then lands charged with the debts. The distinction is between a mere charge upon the real estates, and proposing the mode, in which the debts are to be paid. 8 Ves. 124-5.

3. Practice of this court for convenience to sell property, which it may afterwards appear unnecessary to sell; as real estate, before the situation of the personal property is ascertained: the court afterwards setting right the interests. 9 Ves. 65.

2. In favour of simple-contract creditors.

1. Assets marshalled in favour of simple-contract creditors and legatees. *Fenhoulhet v. Passavant*, Dick. 253.

2. Assets marshalled to let in simple-contract creditors, and legatees upon legal assets, *pro tanto* as the specialty creditors shall exhaust of equitable assets. *Lowthian v. Hassel*, Dick. 737.

3. Assets marshalled: if it appears at any period of the cause, that specialty creditors have gone upon the personal estate, though the bill is not framed with that view. *Gibbs v. Ougier*, 12 Ves. 413.

3. In the case of bond-creditors.

1. Bill by a single bond-creditor for payment of what was due to him out of the real assets descended. *Robinson v. King*, Dick. 297.

2. Bond-creditors decreed to be paid out of the personal assets of the obligor; and if not sufficient, out of the real assets descended. *Walter v. Goring*, Dick. 299.

3. Bill by a single bond-creditor to be satisfied out of personal and real assets; the bill, after consideration, dismissed so far as it prayed satisfaction out of the real estate. *Bedford v. Leigh*, Dick. 707.

4. Against judgment-creditors.

Assets are not marshalled against judgment-creditors. *Sharpe v. the Earl of Scarborough*, 4 Ves. 538.

5. In favour of legatees.

1. One legacy charged on real and personal estate; if that legacy exhaust the personal estate, the other legatees shall stand in his place against the devisees of the land *pro tanto*. *Hamly v. Fisher*, Dick. 104.

2. A legatee to stand in the place of a specialty creditor *pro tanto*, against real estate descended, but not against a real estate devised. *Hamly v. Fisher*, Dick. 105.

3. Testator ordered that his executors should possess his estates and substance to pay his debts, and gave legacies; the assets shall be marshalled. *Foster v. Cooke*, 3 B. C. C. 347.

4. Testatrix, after giving an annuity and legacies, devised her real estate, subject to the said annuity and legacies, and her debts and funeral and testamentary expences, and the debts of her late brother. The assets were marshalled in favour of a legatee by a codicil. *Norman v. Morrell*, 4 Ves. 769.

5. The personal estate being amply sufficient for the debts, though not equal to the discharge of the legacies in full, and the real estate being devised, the court would not under a direction to the executors to pay the debts and funeral expences, as soon as conveniently may be, marshal the assets in favour of the legatees. *Keeling v. Brown*, 5 Ves. 359.

6. Assets marshalled in favour of charity-legacies. *Attorney-general v. Lord Mountmorris*, Dick. 379.

7. Decree of the master of the rolls, directing assets to be marshalled, in order to let in a bequest to a charity, reversed by the lord chancellor. *Hilliard v. Taylor*, Dick. 475.

8. Court will not marshal assets for a charity. *Makeham v. Hooper*, 4 B. C. C. 153.

#### 6. In favour of a charity.

*Vide supra*, pl. 5.

#### 7. In favour of the wife's paraphernalia.

1. A real estate charged with payment of debts in aid of the personal estate, shall be applied before the widow's paraphernalia. *Boyntun v. Boyntun*, 1 Cox, 106.

2. The claim to paraphernalia not to be disappointed by the effect of the option of a creditor, having a double fund. 8 Ves. 397.

#### 8. Practice connected therewith.

*Vide* 12 Ves. 413.

### XXV. In relation to judicial proceedings.

#### 1. Right of an administrator *pendente lite* to lodge money in court.

*Vide* 1 B. & B. 192.

#### 2. A bill necessary to enable an administrator *pendente lite* to lodge money in court.

*Vide* 1 B. & B. 192.

#### 3. General grounds upon which an executor will be called upon to pay assets into court.

1. Executor not called on to lodge money, except upon affidavit of his insolvency, or an admission by him of a balance in his hands, after payment of debts. *Rutherford v. Dawson*, 2 B. & B. 17.

2. Personal property in the hands of a testamentary guardian and executor, ordered into court, though no imputation of insolvency or misconduct on the part of the executor: there being no particular purpose to be answered by leaving it outstanding. *Blake v. Blake*, 2 Sch. & Lef. 26.

#### 4. Of obliging a representative to pay assets into court, notwithstanding outstanding debts.

Executor admitting a balance due from him to the testator upon an unsettled account, ordered to pay the amount into court, notwithstanding there were

were debts of the testator still outstanding; the testator having died three years before. *Mortlock v. Leathes*, 2 Mer. 491.

5. Of obliging a representative to pay assets into court, notwithstanding the pendency of an action against him.

An executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. The plaintiff in the action did recover, and the court ordered the amount to be paid out to the plaintiff in the action, and not to the executor. *Yare v. Harrison*, 1 Cox, 377.

6. Of obliging a representative to pay assets into court, admitted to have been received and lent on security.

Executor by schedule to his answer acknowledging that he had received the testator's property, and lent it on a promissory note, ordered to pay the money into court. *Vigrass v. Bonfield*, 3 Mad. 62.

7. Of obliging a representative to pay into court money bequeathed in trust to be laid out for an infant.

Executors having personal estate of the testator given to them by the will, upon trust to lay out on good and sufficient security, for an infant, to be paid on his coming of age, after a decree to account, and after notice by the next friend of the infant plaintiff, lending a part of such personal estate upon mortgage; ordered to pay the same into court; but the motion, asking in the alternative, that the executors might be ordered to replace the amount by so much stock as the same would have purchased at the time of investment, was to that extent refused. *Widdowson v. Duck*, 2 Mer. 494.

8. Of obliging a representative to pay into court money due from himself.

Executor bound to call in money out upon personal security; and therefore to pay into court money due from himself. 8 Ves. 466.

9. Trespass, for mesne profits does not lie against personal representatives.

No action of trespass for mesne profits against the executor. 6 Ves. 86.

## FELON.

### Effect of an attainder.

The party may still be charged in execution.

A person attainted may be charged in execution. 6 Ves. 734.

## FIXTURE.

~~Whether an annexation to the freehold shall pass to the real or personal representative.~~

Materials for waggon-ways to work mines.

Reference to master to inquire whether timber, &c. laid down for making waggon ways, &c. for the better working of mines, &c. are fixed to the freehold,

hold, and go to the heir or remainder man, or to the personal representative of the party erecting them. *Lowther v. Cavendish*, 1 Eden, 99.; Amb. 356.; 3 Toml. P. C. 186.

## FOREIGNER.

## I. Alien friend.

1. How far aliens are subject to the operation of the laws of their own state.

*In the case of a bequest to a married woman.*

2. Effect of the naturalization of.

*To confirm an antecedent conveyance.*

## II. Alien enemy.

1. Who are considered as alien enemies.

*Alien's trading in an enemy's country, though resident also as a neutral's consul.*

2. Who are not considered as alien enemies.

*British residents in an enemy's country, for the purposes of a licensed trade.*

3. Validity or invalidity of transactions with alien enemies.

1. *Contracts.*

2. *Commerce.*

4. Effect of alien enmity upon antecedent rights.

1. *It suspends only, without destroying, rights by contract.*

2. *It destroys the right of insurance, where the property is lost by capture during war.*

5. In relation to judicial proceedings.

1. *Plea of alien enmity to a bill for relief.*

2. *Plea of alien enmity to a bill of discovery.*

## I. Alien friend.

1. How far aliens are subject to the operation of the laws of their own state.

*In the case of a bequest to a married woman.*

Legacy, to a married woman, subject of a foreign state, paid to the husband; to whom it would by the law of that country belong. 3 Ves. 323.

2. Effect of the naturalization of.

*To confirm an antecedent conveyance.*

Alien, devisee in trust to sell, joins in a conveyance, and afterwards obtains an act of naturalization, by which it is declared that he is *from thenceforth* naturalized, and shall be, and is enabled to ask, take, have, retain, and enjoy, &c. all lands which he may or shall have by purchase or gift of any person or persons whatsoever. This act does not operate to confirm the title of the purchaser under a conveyance previously made. *Fish v. Klein*, 2 Mer. 431.

## II. Alien

## II. Alien enemy.

## 1. Who are considered as alien enemies.

*Alien's trading in an enemy's country, though resident also as a neutral's consul.*

Alien carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral state, considered an alien enemy, and as such disabled to sue, and liable to confiscation. *Albretcht v. Sussman*, 2 Ves. & Beam. 323.

## 2. Who are not considered as alien enemies.

*British residents in an enemy's country, for the purposes of a licensed trade.*

Residence of a British subject in an enemy's country, for the purpose of a trade licensed by the government of this country, not a disability to sue or take out a commission of bankruptcy. *Ex parte Baglehole*, 18 Ves. jun. 525.

## 3. Validity or invalidity of transactions with alien enemies.

## 1. Contracts.

Contract with alien enemy void. 13 Ves. 71.

## 2. Commerce.

Commerce of a person resident in an enemy's country, as representative of the crown of this country, illegal and the subject of prize, however beneficial to this country, unless authorized by licence. 18 Ves. jun. 528.

## 4. Effect of alien enmity upon antecedent rights.

1. *It suspends only, without destroying, rights by contract.*

The right of a foreigner by contract, generally, is only suspended by a subsequent war; and may be enforced upon the restoration of peace. In bankruptcy therefore a claim admitted; reserving the dividend. *Ex parte Boussmaker*, 13 Ves. 71.

2. *It destroys the right of insurance, where the property is lost by capture during war.*

Insurance by a subject of this country upon foreign property, does not cover a loss by capture in a war afterwards taking place between this country and that of the assured. Proof in bankruptcy therefore under such a policy expunged. *Ex parte Lee*, 13 Ves. 64.

## 5. In relation to judicial proceedings.

1. *Plea of alien enmity to a bill for relief.*

Plea of alien enmity allowed to a bill for relief: whether to a bill for discovery merely, as a defence to an action, *quære*. *Albretcht v. Sussman*, 2 Ves. & Beam. 323.

2. *Plea of alien enmity to a bill of discovery.*

Plea of alien enemy to a bill of discovery is good. *Daubigny v. Duvalon*, 2 Anst. 462.

## FORFEITURE.

## Of the forfeiture of chattel interests.

## 1. By conveyance of lease and release.

## 2. By

2. By feoffment.
3. Of the period during which advantage must be taken of a forfeiture.

#### **Of the forfeiture of chattel interests.**

1. By conveyance of lease and release.

Conveyance of a chattel interest by lease and release, cannot work a forfeiture or disseisin: otherwise if it were by feoffment; but in that case the person entitled to take advantage of the forfeiture, is not bound to do so until the expiration of the lease. *Saunders v. Lord Annesley*. 2 Sch. & Lef. 99.

2. By feoffment.

Vide *supra*, pl. 1.

3. Of the period during which advantage must be taken of a forfeiture.
- Vide *supra*, pl. 1.

### **FORGERY.**

#### **In relation to evidence.**

Forgery not conclusive against a fact, proved by other evidence.

Forgery not conclusive against a fact, proved by other evidence. *Lloyd v. Passingham*, 16 Ves. 59.

### **FORMEDON.**

#### **Of the period at which the writ may be sued.**

No formedon for the issue in the life of tenant in tail. 15 Ves. 137.

### **FRAUDS, STATUTE OF.**

#### **I. General observations upon the statute of frauds.**

1. Decisions tending to relax the provisions of the statute, ought not to be carried further.
2. Principle, upon which instruments not duly attested, are rejected.
3. Principle, upon which one part of an instrument not duly attested, may have effect as to the personal estate, though not as to the real.

#### **II. What transactions are within the statute.**

1. Executory contracts.
2. An agreement for an abatement of rent.
3. An agreement that arbitrators shall determine as to a lease to be granted.
4. Sale of land by auction.
5. Appointment of an agent to create or pass an estate.

#### **III. What**

**III. What transactions are not within the statute.**

1. Sale of land under a decree.
2. An agreement to share profit and loss in the trade of a colliery.
3. A settlement reciting an agreement before marriage.
4. Agreements concerning personal estate.
5. The appointment of an agent.

**IV. What writings are sufficient to satisfy the statute.**

1. Distinction between the 4th and 7th sections.
2. Guarantee of a debt, not stating a consideration.
3. In relation to the insertion of the name in the body of the instrument, operating as a signature.
4. It is immaterial in what part of the instrument the name is found, provided it authenticates it.
5. An agreement signed by one party only.
6. A letter acknowledging a verbal contract.
7. A letter acknowledging an instrument not signed.
8. Contract of sale, the result of a correspondence by letters.
9. Letter signed by vendor, combined with his proposal, by a note in the third person, specifying the price.
10. A note by the auctioneer.
11. The written proofs of a trust may be subsequent to its commencement.

**V. What writings are not sufficient to satisfy the statute.**

1. To identify is not sufficient; there must be signature.
2. A paper signed on the first treaty, the bargain being varied as to price, and concluded on the second.
3. In relation to the insertion of the name in the body of the instrument operating as a signature.
4. A letter beginning "my dear Robert" and concluding "your affectionate mother."
5. Signature of an agent without authority.
6. An agreement for a lease, signed, not by the agent, but his clerk.
7. An agreement for a lease in which the term is not mentioned.
8. An agreement for a lease, not containing some of the material terms.
9. A letter to a solicitor, with directions for preparing the conveyance of a purchase, described generally as the land bought of A., not specifying the terms.
10. Auctioneer's receipt for the deposit, not containing expressly or by reference the terms.

**VI. Writings valid within the statute, may be invalidated by subsequent events.**

A written agreement essentially varied by parol.

**VII. Admissibility of parol evidence.**

1. To supply blanks in an agreement for a lease, as to its commencement.

2. To

2. To show what part of a particular, engrafted into a contract, was read upon a sale by auction.
3. The evidence of an attesting witness impeaching the instrument.
4. On the ground of part-performance.

**VIII. Of avoiding the operation of the statute by part-performance.**

1. Observations upon the doctrine.
2. Grounds of the doctrine.
3. Part-performance has no influence at law.
4. General rule.
5. Payment of the consideration money.
6. Payment of the auction duty.
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8. Giving instructions and a particular to prepare a conveyance.
9. Putting a deed into the hands of a solicitor, to perform a conveyance.
10. Acts done by arbitrators in executing their duty.
11. Procuring a release for value.
12. In the case of a verbal agreement for a settlement upon marriage.

**IX. Of avoiding the operation of the statute by other means.**

1. By bonds of arbitration.
2. In the case where a conveyance is made absolute, the agreement being subject to a defeasance.
3. Admission of a verbal agreement by answer.
4. *Vide in tit. PLEADING.*

**X. In relation to contracts respecting an interest in land.**

1. A verbal variation of an agreement for a lease.
2. A contract relating to a decree of foreclosure.
3. Auctioneer's agency, whether sufficient.
4. Miscellaneous cases.

**XI. In relation to contracts to answer for another.**

An undertaking for another's debt is within the statute.

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**I. General observations upon the statute of frauds.**

1. Decisions tending to relax the provisions of the statute, ought not to be carried further.

Decisions tending to relax the provisions of the statute of frauds, ought not to be carried further. 2 Sch. & Lef. 5.

2. Principle, upon which instruments not duly attested, are rejected.

Principle, upon which instruments not duly attested according to the statute of frauds, are rejected, and even one part may have effect, as to the personal estate, though not as to the real; not even raising a case of election. 7 Ves. 375.

3. Principle,



3. Principle, upon which one part of an instrument not duly attested, may have effect as to the personal estate, though not as to the real.

Plea of the statute of frauds overruled, the contract being executory. *Rondeau v. Wyatt*, 3 B. C. C. 154. *et in notis*.

## II. What transactions are within the statute.

### 1. Executory contracts.

Vide 3 B. C. C. 154. *et in notis*.

### 2. An agreement for an abatement of rent.

Agreement for an abatement of rent of lands ought to be signed pursuant to the statute of frauds. 1 Sch. & Lef. 306.

### 3. An agreement that arbitrators shall determine as to a lease to be granted.

In the course of the proceeding between an arbitrator, the parties agree by parol that the arbitrators shall determine as to a lease to be granted. Such an agreement is within the statute of frauds. *Walters v. Morgan*, 2 Cox, 369.

### 4. Sale of land by auction.

1. Sale of land by auction is within the statute of frauds; and the name of the vendee being put down by the auctioneer, is not sufficient. *Buckmaster v. Harrop*, 7 Ves. 341.

2. Sales of land by auction are within the statute of frauds; except sales under decree. *Blagden v. Bradbear*, 12 Ves. 466.

3. Sale of land by auction is within the statute of frauds. Whether the statute is satisfied by the auctioneer, as the agent of both parties, putting down the biddings, &c. *quære*; that fact not being proved to be contemporary; and the auctioneer being also vendor. *Buckmaster v. Harrop*, 13 Ves. 456.

4. See AGREEMENT, 60.

### 5. Appointment of an agent to create or pass an estate.

Agent to contract for the sale, &c. of lands under the 2d sect. of the stat. of frauds, need not be authorized in writing. *Secus*, of agent to create or pass an estate. *Clinan v. Cooke*, 1 Sch. & Lef. 22. 27. 31.

## III. What transactions are not within the statute.

### 1. Sale of land under a decree.

The lord chancellor, upon appeal, affirmed the decree upon the points decided at the rolls in 3 Ves. 696; and held farther, that the case was not within the statute of frauds: the question being, whether a partnership subsisted in the trade of a colliery, a question of fact to be tried by evidence, as upon an issue; the interest in the lease passing as an incident to the trade by operation of law; and the evidence from books and letters was admitted; and an issue refused. *Forster v. Hale*, 5 Ves. 308.

### 2. An agreement to share profit and loss in the trade of a colliery.

Vide 5 Ves. 308.

### 3. A settlement reciting an agreement before marriage.

Parol agreement for a settlement upon marriage, cannot be sued on afterwards on ground of part-performance; but no case of a settlement reciting an agreement before marriage is within the statute. 1 Ves. 199.

4. Agreements concerning personal estate.

A question upon the construction of a will, whether the personal estate was wholly or partially disposed of, was not decided; an agreement upon the subject, though the instrument that was prepared, was not executed, being established as clear, fair, and reasonable, not within the statute of frauds, concluded with full knowledge of the circumstances, and not waived; and the bill in effect, though not in terms, praying a performance. *Gibbons v. Caunt*, 4 Ves. 840.

5. The appointment of an agent.

1. The authority of the agent may be by parol, though the agreement must be in writing. 10 Ves. 311.
2. Vide 1 S. & L. 22. 27. 31.

IV. *What writings are sufficient to satisfy the statute.*

1. Distinction between the 4th and 7th sections.

Distinction between the 4th section of the statute of frauds, requiring the agreement to be in writing, and signed by the party to be charged, and the 7th section, requiring, that the trust shall be manifested, not that it shall be constituted, by writing. 12 Ves. 74.

2. Guarantee of a debt, not stating a consideration.

Undertaking in writing to guarantee the debt of another, sufficient within the statute of frauds; without stating any consideration as between the creditor and the surety. *Ex parte Gardom*, 15 Ves. 286.

3. In relation to the insertion of the name in the body of the instrument, operating as a signature.

1. As to the effect of the insertion of the name in the body of the agreement, as a signature, within the statute of frauds. *Quære*. 9 Ves. 253.

2. Whether a note written in the third person, "Mr. T. proposes," &c. (making an offer to purchase,) being accepted, amounts to a contract in writing signed, within the statute of frauds. *Quære*. *Morison v. Turnour*, 18 Ves. jun. 175.

4. It is immaterial in what part of the instrument the name is found, provided it authenticates it.

Provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requisition of the act, with respect to signature, is complied with, and it does not matter in what part of the instrument the name is found. *Ogilvie v. Foljambe*, 3 Mer. 53.

5. An agreement signed by one party only.

1. An agreement signed by one party only good to charge him within the statute of frauds. *Seton v. Slade*, 7 Ves. 265.

2. An agreement in writing for the sale of an estate binding, though signed only by the vendor; and followed by a direction to his attorney to prepare a proper agreement for both parties to sign. *Fowle v. Freeman*, 9 Ves. 351.

In equity, it is the constant practice to enforce contracts signed only by one party. *Lord Ormond v. Anderson*, 2 B. & B. 371.

6. A letter acknowledging a verbal contract.

1. Plea of the statute of frauds unavailing where the contract has been acknowledged by letter. *Tawney v. Crowther*, 3 B. C. C. 161. 318.

2. Agreement to purchase, established upon a correspondence referring to the terms of such agreement. *Ogilvie v. Foljambe*, 3 Mer. 53.

**7. A letter acknowledging an instrument not signed.**

Though an agreement is not signed, the party bound by a letter containing the terms, &c. so that by the contents it can be connected and identified with the agreement. 9 Ves. 250.

**8. Contract of sale, the result of a correspondence by letters.**

Contract for the sale of an estate, the result of a correspondence by letters, good within the statute of frauds. Effect of admission by answer of letters, stated by the bill; dispensing with the necessity of evidence; and therefore no objection upon the stamp acts. The defendant refusing to produce the office-copy of the bill, the draft could not be read: but a specific performance was decreed upon inspection of the record. *Hudleston v. Briscoe*, 11 Ves. 583.

**9. Letter signed by vendor, combined with his proposal, by a note in the third person, specifying the price.**

Contract for land within the 4th section of the statute of frauds, by a letter signed by the vendor, combined with his proposal, by a note in the third person, specifying the price. *Western v. Russel*, 3 Ves. & Beam. 187.

**10. A note by the auctioneer.**

Specific performance decreed against the purchaser of an estate upon the note, made by the auctioneer, as his agent, lawfully authorized within the statute of frauds. *Kemeys v. Proctor*, 3 Ves. & Beam. 57.

**11. The written proofs of a trust may be subsequent to its commencement.**

The statute of frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it. *Forster v. Hale*, 3 Ves. 696.

**V. What writings are not sufficient to satisfy the statute.**

**1. To identify is not sufficient; there must be signature.**

It is not enough, to satisfy the statute of frauds, to identify; there must be a signing, *i.e.* either an actual signature of the name, or something intended by the writer to be equivalent to a signature; such as a mark by a workman, &c. *Selby v. Selby*, 3 Mer. 2.

**2. A paper signed on the first treaty, the bargain being varied as to price, and concluded on the second.**

A paper signed by the vendor on the first treaty, will not take the case out of the statute, where the bargain was concluded upon a subsequent treaty, and for a different price. *Coke v. Tombs*, 2 Anst. 420.

**3. In relation to the insertion of the name in the body of the instrument operating as a signature.**

1. The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement for a lease, will not constitute a signature without the meaning of the statute of frauds. *Stoke v. Moore & Uxer*, 1 Cox, 219.

2. Vide 9 Ves. 253.

**4. A letter beginning "my dear Robert;" and concluding "your affectionate mother."**

A letter from a mother to her son, beginning, "my dear *Robert*," and concluding, "your affectionate mother," not signed so as to constitute a binding

binding agreement on the part of the mother within the intent of the statute of frauds. *Selby v. Selby*, 3 Mer. 2.

5. Signature of an agent without authority.

1. Specific performance of a contract concerning land not decreed on the signature of an agent without authority. *Howard v. Braithwaite*, 1 Ves. & Beam. 202.

2. The question as to his authority denied by the answer, and by his deposition, stating his declaration to the contrary at the time of execution, to be determined by an issue, the evidence of a witness, impeaching the instrument he has attested, as a witness to a will, denying the sanity of the devisor, &c. being admissible; but to be received with the most anxious jealousy. *Ibid.* 202.

6. An agreement for a lease, signed, not by the agent, but his clerk.

A. tenant for life, with a power to lease by deed duly executed under her hand and seal, reserving the best yearly rent. Plaintiff enters into possession, and expends money in building under an agreement for a lease, evidenced only by the memorandum in writing entered in the book of A.'s authorized agent, signed, not by the agent himself, but by his clerk, although in evidence to have been approved by him, and according to the usual course of business. A. dies; and on a bill for specific performance against the remainderman, *held*, 1. No sufficient agreement in writing; not being signed by an agent properly authorised, and if it had, yet the memorandum not containing some of the material terms of a lease, which were left to be made out by parol evidence. 2. Not to be established as a parol agreement in part performed; both, as it was not the agreement of the principal, nor of the authorized agent, and also, because the remainderman had been guilty of no fraud, upon which to charge him with the consequences of the contract. 3. The plaintiff not entitled to compensation from A.'s representation for money laid out by him on the faith of the alleged agreement; such compensation being in the nature of damages, and the fault lying in the plaintiff's own negligence. *Blore v. Sutton*, 3 Mer. 237.

7. An agreement for a lease, in which the term is not mentioned.

A. by public advertisement offers lands to be let for three lives or thirty-one years; and proposals having been made by B. and accepted, an agreement is executed between B. and the agent of A., authorized to contract for him, for a lease of the lands, in which agreement the term for which the lease is to be made, is not mentioned. A. is not bound to perform this contract, there being no evidence in writing of the term to be demised. *Clinan v. Cooke*, 1 Sch. & Lef. 23.

8. An agreement for a lease, not containing some of the material terms.

Vide 3 Mer. 237.; *supra* pl. 6.

9. A letter to a solicitor, with directions for preparing the conveyance of a purchase, described generally as the land bought of A., not specifying the terms.

A letter to a solicitor, with directions for preparing the conveyance of a purchase, described generally as the land bought of A., not specifying the terms, is not sufficient evidence of a contract within the statute of frauds. Therefore the conveyance being subsequent to the will of the purchaser, and no previous contract according to the statute, giving him an equitable interest, the estate did not pass by his will. *Rose v. Cunynghame*, 11 Ves. 550.

**10. Auctioneer's receipt for the deposit, not containing expressly or by reference the terms.**

Auctioneer's receipt for the deposit, not containing expressly or by reference the terms, viz. the price, cannot have the effect of an agreement, binding the vendor, within the statute of frauds. *Blagden v. Bradbear*, 12 Ves. 466.

**VI. Writings valid within the statute, may be invalidated by subsequent events.**

A written agreement essentially varied by parol.

Plea of statute of frauds allowed, where a written agreement has been essentially varied by parol. 3 B. C. C. 388.

**VII. Admissibility of parol evidence.**

**1. To supply blanks in an agreement for a lease, as to its commencement.**

Agreement in writing between landlord and tenant, signed by the landlord, for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed: but blanks were left for the day of commencement: the repairs being completed, the landlord tendered a lease to commence from that time; and on refusal, filed a bill: the answer admitted, that the agreement was accepted: but insisted that the new lease was not to commence till the expiration of the old; and so it was decreed; parol evidence being refused. *Pym v. Blackburn*, 3 Ves. 34.

**2. To show what part of a particular, engrafted into a contract, was read upon a sale by auction.**

Though a paper, as the particular upon a sale by auction, may by reference, be engrafted into a contract within the statute of frauds, that will not authorise the introduction of parol evidence to show what part was read. 15 Ves. 522.

**3. The evidence of an attesting witness impeaching the instrument.**  
Vide 1 V. & B. 202.

**4. On the ground of part-performance.**

1. Parol evidence may be given of the terms of a contract for a sale; when the possession taken is only referable to it; such being part-performance. 1 Ball & Beatty, 282.

2. Parol evidence is not to be admitted on the ground of part-performance, unless the agreement stated appears clearly to be the very same with that which was partly performed. 2 Sch. & Lef. 8.

**VIII. Of avoiding the operation of the statute by part-performance.**

**1. Observations upon the doctrine.**

The court has gone too far in taking cases out of the statute of frauds, on the ground of part-performance of an agreement: the relief ought to have been confined to compensation. 3 Ves. 712.

**2. Grounds of doctrine.**

The ground of the doctrine of part-performance is fraud. *Buckmaster v. Harrop*, 7 Ves. 341.

**3. Part-**

**3. Part-performance has no influence at law.**

Part-performance does not take a case out of the statute of frauds at law, though it does in equity. *O'Herlity v. Hedges*, 1 Sch. & Lef. 123. 130.

**4. General rule.**

1. The same construction at law and in equity, upon the statute of frauds; and part-performance of a parol agreement, takes it out of the statute. 1 Ves. 333.

2. Parol agreement not enforced upon the ground of part-performance, when the act is equivocal, and easily admits compensation; as, by a tenant rebuilding a party wall. So, a tenant's possession and cultivation of the land would not sustain a parol agreement to purchase. The act must be unequivocal; and such as of itself to infer some agreement: the terms of which may then be proved by parol. *Frame v. Dawson*, 14 Ves. 386.

3. Payment of money, although not merely by way of earnest, is not a part-performance, to take an agreement, touching lands, out of the statute. 1 Sch. & Lef. 40.

4. Nothing is part-performance in such case, that does not put the party into a situation that is a fraud upon him, if the agreement is not performed. 1 Sch. & Lef. 41.

**5. Payment of the consideration money.**

1. Part payment of the consideration money, takes a case out of the statute of frauds. *D. Bartlett v. Pickersgill*, 1 Eden, 516.

2. Though payment of a substantial part of the purchase money will take an agreement as to land out of the statute of frauds, on the ground of part-performance, payment of a small part, as five guineas, the purchase money being 100, will not do. The plea of the statute was allowed, with an intimation from the court, that under the circumstances of the case the bill would be dismissed with costs. *Main v. Melbourn*, 4 Ves. 720.

**6. Payment of the auction duty.**

Payment of the auction duty is not a part-performance, taking an agreement out of the statute of frauds. *Buckmaster v. Harrop*, 7 Ves. 341.; 13 Ves. 436.

**7. Taking possession, expenditure, &c.**

1. Part-performance by taking possession, cutting the crops, &c. *Buckmaster v. Harrop*, 13 Ves. 456.

2. Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expence, and continuance of possession after the expiration of the old lease, and payment of an increased rent under the agreement: plea of the statute of frauds ordered to stand for an answer, with liberty to except. *Wills v. Stradling*, 3 Ves. 378.

3. Possession taken, referable only to a contract of sale, is part-performance: and parol evidence may be given to the terms of it. 1 Ball & Beatty, 282.

4. Parol agreement, proved by one witness, corroborated by others, and not denied by the answer, enforced upon the grounds of part-performance. *Toole v. Medlicott*, 1 Ball & Beatty, 393.

5. Parol evidence may be received to prove an agreement, when possession has been delivered under it; and when money has been expended in permanent improvements. 1 Ball & Beatty, 401.

6. The delivery of possession and expenditure of money in improvements, imply the existence of an agreement, and parol evidence may be admitted to prove the terms of it. 1 Ball & Beatty, 404.

7. An agreement in writing for a lease, not signed by the party, sought to be charged, specifically executed, on the ground of part-performance,

formance, viz. possession taken and rent paid according to the terms of the agreement. *Kine v. Balfe*, 2 B. & B. 343.

8. Giving instructions and a particular to prepare a conveyance.

Both parties giving instructions to an attorney to prepare a conveyance of land, and the vendor delivering to him a particular of the estate, assigned by himself as instructions for the deed, which was accordingly prepared, does not take the case out of the statute. *Cooke v. Tombs*, 2 Anst. 420.

9. Putting a deed into the hands of a solicitor, to perform a conveyance.

Putting a deed into the hands of a solicitor, to perform a conveyance to a son-in-law, not a part-performance to take an agreement out of the statute. *Redding v. Wilkes*, 3 B. C. C. 400.

10. Acts done by arbitrators in executing their duty.

Upon a parol agreement for a compromise and a division of the estate by arbitration, acts done by the arbitrators towards the execution of their duty, as surveying, &c. cannot be considered acts of part-performance to sustain the agreement. 6 Ves. 41.

11. Procuring a release for value.

An agreement by parol, that upon plaintiff's procuring a release of a right from a stranger, defendant would convey. Plaintiff procures the release by paying a valuable consideration. This is not a part-performance, and the statute of frauds may be pleaded to a bill for specific performance of such an agreement. *O'Reilly v. Thompson, Cox*, 271.

12. In the case of a verbal agreement for a settlement upon marriage.

Vide 1 Ves. 199.

IX. Of avoiding the operation of the statute by other means.

1. By bonds of arbitration.

Whether bonds of arbitration are sufficient to take the case of an agreement out of the statute of frauds, *quære*. 6 Ves. 17.

2. In the case where a conveyance is made absolute, the agreement being subject to a defeasance.

Relief against the statute of frauds on the ground of fraud; as against an absolute conveyance upon marriage; the agreement being subject to a defeasance. 11 Ves. 628.

3. Admission of a verbal agreement by answer.

Plea of the statute of frauds allowed, the agreement not being in writing, though a parol agreement was confessed by the answer. *Whitchurch v. Bevis*, 2 B. C. C. 559.

X. In relation to contracts respecting an interest in land.

1. A verbal variation of an agreement for a lease.

Plea of statute of frauds a good defence to parol variation of agreement for a lease: not if it only amounts to waiver of part, or to a declaration of trust. *Jordan v. Sawkins*, 1 Ves. 402.

2. A contract relating to a decree of foreclosure.

Bill to carry into execution a parol agreement between solicitors, that there should be a decree of foreclosure, that the estate should be sold, the mortgagee paid her principal money and interest, the remainder to the mortgagor, dismissed at the rolls, as within the statute of frauds: on an appeal, evidence

evidence of the agreement read, and the decree affirmed. *Cox v. Peele*, 2 B. C. C. 394.

3. Auctioneer's agency, whether sufficient.

Vide 7 Ves. 341.; 13 Ves. 456.

4. Miscellaneous cases.

Plea of the statute of frauds to a bill to have the benefit of a purchase made by the defendant, who was employed for that purpose, but who took the conveyance to himself. *Rastel v. Hutchinson*, Dick. 44.

**XI. In relation to contracts to answer for another.**

An undertaking for another's debt is within the statute.

1. Undertaking for the debt of another within the statute of frauds. 13 Ves. 134.

2. Engagement to pay the debt of another, requiring writing under the statute of frauds. 3 Ves. & Beam. 110.

**FREIGHT.**

**Of the lien for freight.**

1. Where the ship was sold between the two voyages.
2. Revival of on a re-capture.

**Of the lien for freight.**

1. Where the ship was sold between the two voyages.

A ship sailed with ballast from London to Jamaica, and was sold during her voyage there, and afterwards sailed from Jamaica to London, with goods shipped on a contract with the owners of the ship at the time of the shipping. The quondam owners have no lien on the freight due in respect of the voyage from Jamaica. *Ex parte Hill*, 1 Mad. 61.

2. Revival of on a re-capture.

Master being turned out of possession upon the vessel's being captured, does not deprive him of his lien for the freight in case of her re-capture. *Ex parte Cheesman*, 2 Eden, 181.

**FRIENDLY SOCIETY.**

**Of their preference as the creditors of their officers.**

1. It extends only to debts due from officers in their official character.
2. It extends only to debts due from officers in respect of money obtained by virtue of their office.
3. Who are considered officers; who not.
4. Whether it prevails against the crown.
5. Vide in tit. **BANKRUPT.**



**Of their preference as the creditors of their officers.**

1. It extends only to debts due from officers in their official character.

The statute 33 Geo. 3. c. 54. giving preference to friendly societies, having money due to them from their officers dying or becoming bankrupt or insolvent, does not extend to debts due from them individually, and not in their official character. *Ex parte* the Amicable Society of Lancaster, 6 Ves. 98.

2. It extends only to debts due from officers in respect of money obtained by virtue of their office.

The preference given to friendly societies by the statute 33 Geo. 3. c. 54. s. 10. over other creditors, is confined to debts in respect of money in the hands of their officers by virtue of their offices, and independent of contract: therefore does not extend to money, held by the treasurer upon the security of his promissory note, payable with interest upon demand. *Ex parte* Stamford Friendly Society, 15 Ves. 280.

3. Who are considered officers; who not.

1. A person, in the habit of receiving the money of a friendly society, having no treasurer appointed, upon notes carrying interest, payable a month after demand, is not an officer of the society, so as to entitle them to a preference under the statute 33 Geo. 3. c. 54. s. 10. *Ex parte* Ashley, 6 Ves. 441.

2. Money paid by order of a friendly society from time to time upon notes carrying interest, there being no treasurer appointed, is not money in the hands of the party by virtue of any office within the act of parliament 33 Geo. 3. c. 54. s. 10., entitling the society to a preference in case of bankruptcy. *Ex parte* Ross, 6 Ves. 802.

4. Whether it prevails against the crown.

Whether the preference to friendly societies under the statute 33 Geo. 3. would prevail against the crown, *quære*. 6 Ves. 99.

**GIFT.****Of the ceremonial necessary to the transfer of property.**

1. The transfer of interest due upon a mortgage or bond given.
2. To perfect a declared intention in a letter to executors.

**Of the ceremonial necessary to the transfer of property.**

1. The transfer of interest due upon a mortgage or bond given.

1. Whether the interest in money, due upon a mortgage or bond, passes by a mere delivery of the security, as a gift *inter vivos*, *quære*. *Bryson v. Brownrigg*, 9 Ves. 1.

2. A gift of money, due on a mortgage and a bond, by the testator some time before his death to a daughter, not sustained, upon the circumstances; merely a change of the securities from one drawer of a bureau to another by the wife of the testator by his direction: the fact and the declared purpose proved only by the examination of the daughter, claiming the benefit, and the widow, discharging herself, as executrix, by payments under the gift. *Ibid*.

2. To

2. To perfect a declared intention in a letter to executors.

A letter to executors expressing a consent that a sum of 500*l.* was proper to be given to the daughter of the deceased husband, held not to amount to a gift of so much in the executor's hands, the intention to give not being perfected and carried into execution. *Cotteen v. Missing*, 1 *Mad.* 176.

## GRAFT.

### I. General rules.

The principle stated, upon which courts of equity act in considering renewed interests obtained by mortgagees, trustees, &c. Grafts.

### II. In relation to leases.

1. A renewal obtained by the owner of a charge, after an eviction for nonpayment, held a trust for the original lessee, and a graft on the former lease.
2. A lease obtained by a person interfering with assets, and compelling a surrender by executors of a leasehold interest bequeathed to minors, a graft on the former lease so surrendered.
3. A miscellaneous case in which a new lease obtained by an evicted mortgagee, could not, it was held, be grafted.

### III. *Vide in tit. Mortgage.*

### I. General rules.

The principle stated, upon which courts of equity act in considering renewed interests obtained by mortgagees, trustees, &c. Grafts.

The principle on which courts of equity act in considering renewed interests obtained by mortgagees, trustees, &c. Grafts are: that the advantage was procured by being in possession; or when out of it, by a contrivance to oust the lessee of the benefit of the renewal. 1 *Ball & Beatty*, 46.

### II. In relation to leases.

1. A renewal obtained by the owner of a charge after an eviction for nonpayment, held a trust for the original lessee, and a graft on the former lease.

A renewal obtained by a party having a rent-charge on a leasehold interest, evicted for nonpayment of rent, a trust for the original lessee, and a graft on the former lease. *Fitzgerald v. Rainsford*, 1 *Ball & Beatty*, 57.

2. A lease obtained by a person interfering with assets, and compelling a surrender by executors of a leasehold interest bequeathed to minors, a graft on the former lease so surrendered.

A lease obtained by a person interfering with assets, and compelling a surrender by executors of a leasehold interest bequeathed to minors, a graft on the former lease so surrendered. *Mulvany v. Dillon*, 1 *Ball & Beatty*, 40.

3. A miscellaneous case in which a new lease obtained by an evicted mortgagee, could not, it was held, be grafted.

A mortgage of a leasehold interest, evicted for nonpayment of taking a new

new lease after the expiration of the six and nine months, allowed for redemption under the 8th Geo. I., but in pursuance of a contract entered into, in the interval between the six and nine months, provided the parties interested did not redeem. This is not a graft upon the former lease, nor a trust for the original lessee; the mortgagee not being in possession, nor procuring the lease behind the back of the lessee. *Nesbitt v. Fredennick*, 1 Ball & Beatty, 29.

## GRANT.

### I. Qualities essential to the validity of grants.

A person *in esse* capable of taking.

### II. Of exceptions in grants.

An exception of the subject is void.

### III. Of the construction of grants.

1. General rules.

2. Of a grant to Exeter college.

### IV. Of the rights of a grantee.

Where money is given to be laid out in land, or land is to be sold, and the produce given.

### I. Qualities essential to the validity of grants.

A person *in esse* capable of taking.

In all cases of grants of estates in lands, there must be a person *in esse* to take, when the estate vests by the grant. 1 Ball & Beatty, 458. The same principle applies to the case of a will. *Ibid*.

### II. Of exceptions in grants.

An exception of the subject is void.

An exception of the thing that is the subject of the gift, is void. 3 Ves. 325.

### III. Of the construction of grants.

1. General rules.

1. Grant to be taken as strongly in favour of the objects and against the grantor, as fair inference can allow. 3 Ves. 48.

2 Terms, repugnant to the interest, to be rejected. 14 Ves. 413.

3. Although the general words in a deed, taken by themselves would be sufficient to pass the whole interest which the party has to convey, yet where it is clear that those words were used and understood by all the parties to the deed, only in subservience to a particular purpose, they will not be held to have an effect beyond the particular purpose so intended. *Cholmondeley v. Clinton*, 2 Mer. 353.

2. Of a grant to Exeter College.

Grant to trustees and their heirs, of lands in Surry and Hertford, in trust, out of the rents and profits, to raise and pay certain annual sums for the benefit of the rector and scholars of Exeter College, and as to the residue, after taxes, charges of repairs, &c. deducted, to be yearly paid to and among the vicars for the time being, of four several parishes, for the augmentation of their respective livings; they the said vicars to collect the rents, and account

count with the trustees, to view the estates and take care that the same be kept in good repair by the tenants; with a declaration that it should not be lawful for the trustees, during forty years, to cut timber, except such as should be wanted for the necessary repairs of mills, &c., and other appurtenances belonging to the estates; and except such young slabs and tillers in the woods in Hertford, as should be necessary for selling the underwood; and after the expiration of the forty years, then that the trustees should have power to cut as they should think fit, and pay the produce to the said rector, &c. of Exeter College, as a fund for the augmentation of the library. Held, that by the construction of the deed, the estates were given as one fund for the benefit of two distinct institutions — the whole to be managed for the benefit of both, in a due course of provident ownership; that the trustees were not restrained, after the expiration of the forty years, from cutting for the purposes of repairs; nor from cutting timber on one part of the estates for repairs on another part; nor from selling timber when cut, and applying the produce in necessary repairs, so long only as they cut no more timber on the whole property than the repairs on the whole property required; and that the power of cutting young slabs and tillers still continued, with the qualification annexed to it. *Attorney-general v. Geary*, 3 Mer. 513.

#### IV. Of the rights of a grantee.

Where money is given to be laid out in land, or land is to be sold and the produce given.

Money given to be laid out in land to be conveyed, or land to be sold and the produce paid, to A.; though in the one case the money is not given to him, and in the other no interest expressly in the land, he is in equity the owner; and may elect to have the money, or the land conveyed, as he shall direct. 17 Ves. jun. 104.

### GUARANTEE.

#### I. Construction of a contract of indemnity.

1. General rule.
2. Of construing a joint covenant of indemnity, several as well.
3. Its operation as a continuing security to a firm after a change of members.

#### II. Effect of a contract of indemnity.

1. An indemnity of lands settled on B. against certain debts.
2. An indemnity against the consequences of a contempt.

#### III. Of preliminaries to enforcing a contract of indemnity.

Where the loss arose out of an embargo, and the government imposing it had undertaken to indemnify.

#### IV. What acts shall operate to discharge a surety.

Forbearance of the principal by the creditor.

#### V. Whether a misrepresentation is equivalent to a contract of indemnity.

A misrepresentation under ignorance and without fraud.

### I. Construction of a contract of indemnity.

#### 1. General rule.

When the obligation exists only by virtue of the covenant, its extent is to be measured only by the words of the covenant. *Secus* where the obligation is independent of the particular contract, as in the cases of partnership debts, bonds, &c. *Sumner v. Powell*, 2 Mer. 30.

#### 2. Of construing a joint covenant of indemnity, several as well.

Joint covenant of indemnity not extended in equity beyond its legal operation, there being no ground on which to infer mistake in the nature of the instrument, and no previous equity entitling the covenantee to a several indemnity from each of the covenantors. *Ibid*

#### 3. Its operation as a continuing security to a firm after a change of members.

A security to a firm continued after an alteration in the members of it, upon the construction of a letter raising an agreement to that effect. *Ex parte Marsh and others*, 2 Rose, 239.

### II. Effect of a contract of indemnity.

#### 1. An indemnity of lands settled on B. against certain debts.

A. covenants to indemnify lands settled on B. from certain debts, the interest of which B. is afterwards obliged to pay: B. is entitled under the covenant to come against the estate of A. for the sums so paid for interest, with interest thereon. *Executors of Fergus v. Gore*, 1 Sch. & Lef. 107.

#### 2. An indemnity against the consequences of a contempt.

An indemnity given against the consequences of a contempt, involves the party giving it. *Ex parte Dixon*, 8 Ves. 104.

### III. Of preliminaries to enforcing a contract of indemnity.

Where the loss arose out of an embargo, and the government imposing it had undertaken to indemnify.

The plaintiff, a British subject, was guarantee to the owner of an American ship, for a merchant who freighted her to Bourdeaux. She was detained there by an embargo, and dismissed by the freighter; the French government having declared themselves bound to indemnify all *neutral* owners for the effects of the embargo, and the plaintiff not being able to take advantage of that order, the defendant must endeavour to get an indemnity in France, before he can sue the plaintiffs. *Cottin v. Blane*, 2 Anst. 544.

### IV. What acts shall operate to discharge a surety.

Forbearance of the principal by the creditor.

1. Where principal and surety are bound in a bond, if the creditor gives the principal further time for payment, he releases the surety. *Nisbet v. Smith*, 2 B. C. C. 579.

2. A. guarantees the payment of any goods to be supplied by B. to C. between the 2d April 1814 and the 2d April 1815. Although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade. And C. having accepted bills for the amount of the goods delivered, which B. permits him to renew when payable without any communication to A. on the subject of such renewal. Held, that A. was discharged from his guarantee, by virtue of the rule, that a creditor giving further time to the principal debtor, with-

out the consent of the surety, releases the surety. And that, although it was proved that the renewal was given only in consequence of C.'s inability to pay, and that no injury could accrue to A.; the surety being himself the fit judge of what is or is not for his own benefit. *Samuell v. Howarth*, 3 Mer. 272.

**V. Whether a misrepresentation is equivalent to a contract of indemnity.**

A misrepresentation under ignorance and without fraud.

On a treaty of marriage the husband applied to the brother of the wife to know the amount of her fortune, and the manner in which it was secured. The brother represented it fairly, as he then conceived it, and as being charged on a real estate under the father's will; and added, that the husband need not examine the will or the family deeds, the fact being certainly as he represented. A recital to the same effect was made also in the settlement to which the brother was a party. It afterwards turned out that the father had no power to charge the estate by his will; but this fact was unknown to all the family at the time of the marriage. The representation of the brother, under these circumstances, will not bind him to make it good. *Merewether v. Shaw*, 2 Cox, 124.

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**GUARDIAN.**

**I. Who are eligible as guardians.**

1. A dissenter.
2. A mother married again, though with children by second marriage.

**II. Analogy or difference between the several classes of guardians.**

Statute guardians are the same as guardians in socage.

**III. In relation to the appointment of a guardian by will.**

1. By a will not executed pursuant to the statute.
2. Appointment by an unattested will, made good by an attested codicil.
3. Whether a subsequent appointment not duly executed, revokes an antecedent one.
4. Construction, with reference to its extent.
5. Where the child is illegitimate.

**IV. In relation to the appointment of a guardian by the court, the testamentary guardian declining to act.**

May be upon petition, without bill.

**V. In relation to the appointment of a guardian by the court; the testamentary guardian, having acted, misconducting himself.**

The course must be by bill.

**VI. In**

**VI. In relation to the appointment of a guardian by the court, the will, appointing a guardian, not having been duly executed.**

A case in which such appointment was made.

**VII. In relation to the appointment of a guardian by the court, no testamentary guardian having been named.**

1. Cases in which it was made, there being no cause in court.
2. A case in which it was refused, there being no cause in court.

**VIII. In relation to the appointment of a guardian ad litem.**

1. A guardian was appointed to plaintiff on filing the bill.
2. In this case the father was assigned.
3. A guardian will be charged upon his not proceeding with the cause.
4. After answer, plaintiff's guardian will not be removed, on the ground of insolvency.
5. In the case of contempt for want of an answer.
6. Guardian appointed to put in infant's answer, and his presence dispensed with from illness.
7. Commission to assign a guardian, on affidavit of danger of bringing infant into court.
8. A commission must go where the infant is abroad.
9. Guardian assigned for an infant abroad to answer.
10. Guardian appointed to put in infant's examination.
11. In the case of a guardian dying after hearing a decree.
12. In the case of an arrest for necessities.

**IX. In relation to the appointment of a guardian by the court upon other occasions.**

Guardian appointed, on petition, to an orphan infant, without property, to consent to her marriage.

**X. Of the form of a petition to assign a guardian.**

Unless it be to carry on a suit, or protect an interest, it must be pursuant to the statute.

**XI. Of a reference to the master on the appointment of a guardian by the court.**

1. It will be dispensed with only where the property is very small.
2. In the case of a will naming a guardian to an illegitimate child.

**XII. In relation to the mode of changing a guardian.**

The course is by petition.

**XIII. Of the duties of a guardian.**

To account, when called upon by petition or motion.

**XIV. Of the authority of a guardian.**

The act of a guardian, though without authority, yet, if beneficial to the infant, will be protected.

**XV. Of**

**XV. Of the disabilities of a guardian.**

1. Cannot accept a grant from his ward.
2. Transactions beneficial to the guardian, growing out of the relation, will be set aside, though the relation had then ceased.
3. Cannot accept a gift from his late ward, just on his coming of age.
4. Vide in tit. INFANT.

**XVI. Of a guardian's right to his costs and charges.**

Disbursements for maintenance beyond the sum allowed.

**XVII. Devolution of the office, on attainder of the guardian.**

It devolves on the great seal.

**XVIII. Of the control exercised by the court of chancery over guardians.**

1. It will control even natural guardians.
2. Infants were taken from their father.
3. Infants were taken from their father, being insolvent.
4. Infants were taken from their mother.
5. A guardian will be changed upon his not proceeding with the cause.
6. A testamentary guardian will be removed, upon proper grounds.
7. Infants were taken from their testamentary guardians.
8. Infants were taken from their testamentary guardian, being bankrupt.
9. Vide in tit. INFANT.

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**I. Who are eligible as guardians.**

1. A dissenter.

A person is not incapacitated to act as guardian by being a dissenter. 1 Ball & Beatty, 62.

2. A mother married again, though with children by a second marriage.

A mother having children by a second marriage, is not thereby rendered incompetent to be guardian of her children by the first marriage. Ibid. 61.

**II. Analogy or difference between the several classes of guardians.**

Statute guardians are the same as guardians in socage.

Statute guardians are the same as guardians in socage; and if a guardian be attainted, the guardianship devolves on the great seal. *Duke of Beaufort v. Bertie*, Dick. 791.

**III. In relation to the appointment of a guardian by will.**

1. By a will not executed pursuant to the statute.

Guardian having been appointed by a will not executed according to the statute, the appointment declared to be ineffectual. *Ex parte Jordan*, Dick. 294.

2. Ap-



2. Appointment by an unattested will, made good by an attested codicil.

Appointment of guardian by an unattested will, made good by a codicil, with three witnesses, on the same paper, referring to the will, as annexed, making some alterations as to legacies, and confirming it in all other respects; as the case of a devise of land. *De Bathe v. Lord Fingal*, 16 Ves. 167.

3. Whether a subsequent appointment not duly executed, revokes an antecedent one.

Testamentary appointment of guardian not revoked by a subsequent testamentary appointment, not executed according to the statute, and not directly importing revocation. *Ex parte the Earl of Ilchester*, 7 Ves. 348.

4. Construction, with reference to its extent.

The testator, married, but not then having children, gave the guardianship of all his daughters born or to be born to his wife, and of all his sons hereafter to be born to his wife and his brother or the survivor. The guardianship extends to all the children by that or a future marriage. *Ex parte the Earl of Ilchester*. Ibid.

5. Where the child is illegitimate.

If a father by will, appoints guardians to his natural child, the court will appoint them guardians, without a reference to the master. *Ward v. St. Paul*, 2 B. C. C. 583.

IV. In relation to the appointment of a guardian by the court, the testamentary guardian declining to act.

May be upon petition, without bill.

The surviving testamentary guardian declining to act, reference to the master on petition, to approve of a proper person for guardian, without a bill. *Ex parte Champney*, Dick. 350.

V. In relation to the appointment of a guardian by the court; the testamentary guardian, having acted, misconducting himself.

The course must be by bill.

Where a testamentary guardian has not acted, the mode of proceeding in order to have a guardian appointed is, by petition; it is not necessary to file a bill. *Secus*, if after acting he has misconducted himself. *O'Keefe v. Casey*, 1 Sch. & Lef. 106.

VI. In relation to the appointment of a guardian by the court, the will, appointing a guardian, not having been duly executed.

A case in which such appointment was made.

A father having by a will, not properly executed, appointed guardians of his infant children, reference to the master to approve of a proper person for that purpose. *May v. May*, Dick. 527.

VII. In relation to the appointment of a guardian by the court, no testamentary guardian having been named.

1. Cases in which it was made, there being no cause in court.

1. Reference to the master to inquire whether the plaintiff's late father had

had appointed a guardian for the plaintiff; and if not, that the master should approve of a proper person to be appointed guardian of the plaintiff, an infant. *Bettesworth v. Bettesworth*, Dick. 729.

2. Application to approve of a person to be appointed guardian of an infant, and for his maintenance, there being no cause in court. *Ex parte Salter*, Dick. 769.; 3 B. C. C. 500.

3. Order for the appointment of a person to act as guardian, (the father being living), and for a reference as to maintenance, but not for a receiver, upon a petition, without any suit instituted, *Ex parte Mountfort*, 15 Ves. 445.

4. A case in which it was refused, there being no cause in court.

Estate vested in trustees by will, to raise portions and maintenance for younger children, but no guardian appointed. Application to the court to appoint guardians and to settle maintenance, and to have the costs of the application. No cause being in court, lord chancellor refused it, after its standing over for consideration. *Ex parte Proctors*, Dick. 634,

### VIII. In relation to the appointment of a guardian ad litem.

1. A guardian was appointed to plaintiff on filing the bill.

The court, after doubting, granted an order to appoint a guardian of the plaintiff, the infant, on filing the bill, and before the defendant had appeared. *Pendleton v. Mackrory*, Dick. 736.

2. In this case the father was assigned.

Defendant residing abroad, his father, not interested in the suit, assigned his guardian, for the purpose of putting in his answer on motion. *Jonguma v. Pfiel*, 9 Ves. 357.

3. A guardian will be charged upon his not proceeding with the cause.

The court will charge a next friend upon his not proceeding with a cause. Solicitor is not to attach without orders from his client. But where the client is next friend of an infant, and moves to discharge the attachment on that ground, although otherwise regularly issued, it seems that the court will refer it to the master to see whether it is for the interest of the infant that the next friend should be continued. *Ward v. Ward*, 3 Mer. 706.

4. After answer, plaintiff's guardian will not be removed, on the ground of insolvency.

After answer, plaintiff not compelled to change the next friend, on affidavit that she was worth nothing, and not found till after answer, contradicted by her swearing to 4*l.* a-year. Defendant ought not to have answered; but should have said he could not find her. *Anon.* 1 Ves. 490.

5. In the case of contempt for want of an answer.

Infant's being in contempt for want of an answer, brought into court to have a guardian assigned; their father assigned. *Smith v. Edmondson*, Dick. 234.

6. Guardian appointed to put in infant's answer, and his presence dispensed with from illness.

Guardian appointed of an infant to put in his answer, and his presence in court dispensed with, on an affidavit of his inability to attend from illness. *Hill v. Smith*, 1 Mad. 290.

7. Commission to assign a guardian, on affidavit of danger of bringing infant into court.

Commission to assign a guardian, on affidavit of the danger of bringing infant into court. *Duke of Marlborough v. Duchess of Marlborough*, Dick. 74.

8. A commission must go, where the infant is abroad.

An infant defendant, abroad, cannot have a guardian assigned, to put in his answer, on motion: but a commission must go. *Tappen v. Norman*, 11 Ves. 563.

9. Guardian assigned for an infant abroad to answer.

Guardian assigned for an infant abroad to answer. *Lord Howard v. Lord Abergavenny*, Dick. 31.

10. Guardian appointed to put in infant's examination.

Guardian appointed for a defendant to put in his examination. *Attorney-general v. Waddington*, 1 Mad. 321.

11. In the case of a guardian dying after hearing a decree.

After cause heard and decree made, the *prochein amy* died: new *prochein amy* ordered. *Lancaster v. Thornton*, Dick. 346.

12. In the case of an arrest for necessities.

Infant being arrested for necessities, a *habeas corpus* granted to bring him into court, to have a guardian assigned. *Horne v. Lanoy*, Dick. 170.

**IX. In relation to the appointment of a guardian by the court upon other occasions.**

Guardian appointed, upon petition, to an orphan infant, without property, to consent to her marriage.

Guardian appointed on petition to an orphan infant, without property, to consent to her marriage. *In re Woolscombe*, 1 Mad. 213.

**X. Of the form of a petition to assign a guardian.**

Unless it be to carry on a suit, or protect an interest, it must be pursuant to the statute.

A petition to assign a guardian (unless to carry on a suit, or protect an interest) must be pursuant to the statute. *Ex parte Beecher*, 1 B. C. C. 556.

**XI. Of a reference to the master on the appointment of a guardian by the court.**

1. It will be dispensed with only where the property is very small.

Order, appointing a guardian with a reference, only where the property is exclusively small. Refused where it amounted to 1500*l*. *Ex parte Wheeler*, 16 Ves. 266.

2. In the case of a will naming a guardian to an illegitimate child.

In the case of a natural child, the court will appoint the persons named in the father's will to be guardians, without any reference to the master. *Peckham v. Peckham*, 2 Cox. 46.

**XII. In relation to the mode of changing a guardian.**

The course is by petition.

The proper application to change a guardian is by petition. *Ex parte the Earl of Ilchester*, 7 Ves. 348.

**XIII. Of the duties of a guardian.**

To account, when called upon by petition or motion.

Guardians are obliged to account, on application by petition, or motion, being

being bound by recognizance to account regularly, or when called on, being considered as officers of the court. 1 Ball & Beatty, 74.

#### XIV. *Of the authority of a guardian.*

The act of a guardian, though without authority, yet if beneficial to the infant, will be protected.

Act of guardian, without authority, if beneficial to the infant, protected, 18 Ves. jun. 273.

#### XV. *Of the disabilities of a guardian.*

1. Cannot accept a grant from his ward.

1. Conveyance by a ward to her guardian, under the circumstances, set aside upon the grounds of public justice after a great lapse of time. *Hatch v. Hatch*, 9 Ves. 292.

2. Difficulty in sustaining a transaction of bounty in the cases of guardian and ward, attorney and client, trustee and *cestui que* trust. 9 Ves. 296.

2. Transactions beneficial to the guardian, growing out of the relation, will be set aside, though the relation had then ceased.

Transaction, appearing to have grown out of the influence from the relation of guardian and ward, set aside; though all accounts had been settled and the relation had ceased. 13 Ves. 138.

3. Cannot accept a gift from his late ward, just on his coming of age.

Relief against a deed of gift by a ward just of age, to his guardian. 13 Ves. 52,

#### XVI. *Of a guardian's right to his costs and charges.*

Disbursements for maintenance beyond the sum allowed.

If a guardian expends more in the maintenance of an infant than the sum allowed, the court will not make any reference as to such extra expenditure, unless a special case is made for that purpose. *Rainsford v. Freeman*, 1 Cox, 417.

#### XVII. *Devolution of the office, on attainder of the guardian.*

It devolves on the great seal.

Jurisdiction of the court of chancery, representing the king, as *parens patriæ*, to control the right of a father to the possession of his child under circumstances. Order, restraining him from removing the child, or doing any act towards, or for the purpose of, removing it, out of the jurisdiction. The court would not give the possession to the mother, having withdrawn from her husband. *De Manneville v. De Manneville*, 10 Ves. 52.

#### XVIII. *Of the control exercised by the court of chancery over guardians.*

1. It will control even natural guardians.

1. The court of chancery will, under circumstances of improper conduct, prevent a father from interfering in the education, &c. of his son, being a ward of the court. *Creuze v. Hunter*, 2 Cox, 242.

2. Vide 10 Ves. 52.

2. Infants were taken from their father.

Order for a guardian, and maintenance for infants, upon ill-treatment by their father. *Whitfield v. Hales*, 12 Ves. 492.

3. Infants were taken from their father, being insolvent.

The father being insolvent, a person appointed to have the care of his infant son. *Wilcox v. Drake*, Dick. 631.

4. Infants were taken from their mother.

Lord chancellor took the infants from their mother. *Roach v. Garvan*, Dick. 88.

5. A guardian will be changed upon his not proceeding with the cause.

Vide 3 Mer. 706.

6. A testamentary guardian will be removed upon proper grounds.

Reference to the master to appoint a guardian in the room of infant's mother, who was also restrained from giving consent to the infant's marriage. *Lord Shipbrook v. Lord Hinchinbrook*, Dick. 547.

7. Infants were taken from their testamentary guardians.

Lord chancellor took the infant from her testamentary guardian. *Tombes v. Elers*, Dick. 88.

8. Infants were taken from their testamentary guardian, being bankrupt.

1. A testamentary guardian being a bankrupt, a person appointed to have the care of the ward. *Smith v. Bate*, Dick. 631.

2. Law of Guernsey, as to the descent of real estate, and the distribution of personal estate, of persons dying intestate. *Pottinger v. Wightman*, 3 Mer. 69.

3. Under the constitution of the hand-in-hand fire-office, the heir to whom upon the death of the insured, the property, being freehold, descended, cannot have the benefit of the policy without assignment. *Mildmay v. Folgham*, 3 Ves. 471.

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## HEIR.

### I. Rules of descent.

Right of the maternal heir under the conveyance of a seisin *ex parte paternâ*.

### II. Of the consequences of a descent.

To destroy a charge.

### III. Of the force and application of the term "quasi hæretes."

As applied to the lord.

### IV. Of the protection given by courts of equity to expectant heirs.

Of invalidating their sales.

### V. In relation to the conversion of property.

1. Whether the application of the personal estate to complete a contract of purchase, raises a trust in the land for the next of kin.

2. In the case of an option in the tenant to purchase.

3. In the case of a purchase with a partnership fund.

4. Right of the heir to the accumulations of rents and profits under a trust.

5. Right

5. Right of the heir of a lunatic to the produce of timber cut under the order of the court.

6. Vide in tit. ESTATE.

#### VI. Miscellaneous rights of heirs.

1. To be relieved against frauds committed upon their ancestors.
2. An heir out of possession cannot file a bill for the estate and title deeds.
3. In relation to partnership property.

#### VII. Of the obligations of heirs.

1. To perfect the ancestor's conveyance of property sold under a mistaken supposition of right, but which afterwards descended to him.
2. Heir directed to convey unsurrendered copyholds devised, though not devisable by custom.

#### VIII. Of the modes in which an heir may be disinherited.

By conveyance in mortmain to uses valid at the time, but since void.

#### IX. Of a devise to an heir.

1. Devise in fee is inoperative.
2. Of the rule, that a man cannot make his right heir a purchaser.
3. Rule as to when the heir takes by purchase.
4. Devise, with a limitation over, on A. dying under twenty-one without issue; heir takes as purchaser.

### I. Rules of descent.

Right of the maternal heir under the conveyance of a seisin *ex parte paternâ*.

A. being seised in fee *ex parte paternâ*, conveys to trustees, in trust for herself, her heirs, and assigns, to the intent that she should appoint, &c. and for no other use, intent, or purpose whatsoever. A. dying without appointment, and without heirs *ex parte paternâ*. Held, per lord keeper and the master of the rolls, 1. That the maternal heir was not entitled. 2. That there being a terre-tenant, the crown claiming by escheat, had not a title by *subpoena* to compel a conveyance from the trustee, the trust being absolutely determined; no opinion being given upon the rights of the trustee. Per Lord Mansfield, 1. That the heir *ex parte maternâ* was not entitled. 2. That from the analogy between trusts and legal estates, the crown was entitled by escheat; but that, if the conveyance had barred the crown of its right, as between the maternal heir and the trustee, the former was entitled. *Burgess v. Wheate*, 1 Eden, 177.; 1 Blk. 121.

### II. Of the consequences of a descent.

1. To destroy a charge.

A representative must take his interest as fortune has directed it, and has no equity to vary it: therefore, where a lunatic dies entitled to an estate, and also to a charge upon it, the heir takes it discharged; a trust term to secure the charge makes no difference; for it remains inert, unless required

to be executed for proper purposes; the trustees have no discretion. *Lord Compton v. Oxenden*, 2 Ves. 361.

### III. Of the force and application of the term "*quasi hæres*."

As applied to the lord.

1. Though the lord is sometimes called *quasi hæres*, it is always to his prejudice, and never to his benefit. *Burgess v. Wheate*, 1 Eden, 208.

2. So far from the lord taking any benefit as heir or assignee, he is distinguished from both, and excluded from the privilege which the heir had by common law, and the assignee by statute. *Ibid*.

### IV. Of the protection given by courts of equity to expectant heirs.

Of invalidating their sales.

1. Principle, upon which sales of reversions by young heirs, &c. are set aside. 9 Ves. 246.

2. Protection in equity to an expectant heir, dealing for his expectancy, approaching nearly to an incapacity to contract. Relief against a very advantageous purchase from such a person without fraud; though mere inadequacy, unless from its grossness it is of itself evidence of fraud, is between persons, standing precisely equal, of no account. The relief on payment of principal, interest, and costs; the purchaser being considered as a mortgagee. His bill, to establish the purchase, dismissed with costs, except of depositions, used by the other party. *Peacock v. Evans*, 16 Ves. 512.

### V. In relation to the conversion of property.

1. Whether the application of the personal estate to complete a contract of purchase, raises a trust in the land for the next of kin.

The application of the personal estate by the heir, in completing a contract entered into by the ancestor, but not binding on him, raises no trust in the lands for the next of kin, *Savage v. Carroll*, 1 Ball & Beatty, 265.

2. In the case of an option in the tenant to purchase.

Option to a tenant to purchase. The rents, until the option made, belong to the heir; from that time, the conversion takes place; and the purchase money belongs to the personal representative. *Townley v. Bedwell*, 14 Ves. 591.

3. In the case of a purchase with a partnership fund.

Real estate purchased with a partnership fund, held to have descended to the heir against the claim of the residuary legatee. *Ripley v. Waterworth*, 7 Ves. 453.

4. Right of the heir to the accumulations of rents and profits under a trust.

Rents and profits under a trust to accumulate, being in the event not disposed of, belong to the heir at law. *Stanley v. Stanley*, 16 Ves. 491.

5. Right of the heir of a lunatic to the produce of timber, cut under the order of the court.

Timber on estate of lunatic, cut under order of court, sold, and produce paid into the bank on account of the lunatic: after his death, on petition by his heir for the money, lord chancellor was of opinion, that the court may do it for lunatic's benefit, but only on pressing occasions; that when property

## VI. Miscellaneous rights of heirs.

- ## VII. Of the obligations of heirs.

- ### VIII. Of the modes in which an heir may be disinherited.

### IX. Of a devise to an heir.

- A. having covenanted to settle lands of 100*l.* *per annum* on his wife for life, devises  
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devises to her an estate of the annual value of 50*l.*, and directs his executors to purchase sufficient land to make up the annual value of it, 100*l.*; and then devises all his real estates not thereinbefore devised, to A., his eldest son, his heirs, and assigns; but in case he should die without issue before 21, then over. Held, that A. took by devise; and, therefore, that the simple-contract creditors, but not the legatees, were entitled to resort to the real estate for so much of the personal estate as should be exhausted in making up the estate devised to the wife. *Scott v. Scott*, 1 Eden, 458.; Amb. 383.

### HEIR LOOM.

#### Of the descent of personalty as heir looms.

The absolute property vests in the first tenant in tail.

1. Chattels directed to go as heir looms, as far as the rules of law and equity will permit, vest in the first tenant in tail, who comes into *esse*. *Vaughan v. Burslem*, 3 B. C. C. 101.

2. Chattels given as heir looms to be enjoyed by the persons who shall be in possession of certain houses. A son being born, who was tenant in tail, subject to his father's life estate, these chattels will vest in him absolutely, and he dying, in his father. *Foley v. Burnell*, 1 B. C. C. 274.

3. Testator directed, that all his plate, furniture, &c. at his mansion house should remain there as heir looms; and devised the same to trustees upon trust to permit the same to go together with the mansion house to such persons as should from time to time be entitled to it for so long time as the rules of law and equity would permit; and devised his real estates to trustees to the use of several persons, and their first and other sons, &c. successively, in strict settlement. The absolute interest in the personal chattels vested in the first tenant in tail; and upon his death under age, passed to his representative. Whether there is any distinction in the execution of an executory trust by will, and a covenant by marriage articles, for such a limitation of personal chattels, *quære*. *Carr v. Lord Erroll*, 14 Ves. 478.

### IDIOT.

#### In the case of one born deaf and dumb.

Put into possession of property, on giving sensible answers in writing.

A. born deaf and dumb, on her coming of age, applies to be put in possession of her property, which, on her giving sensible answers to questions, in writing, was ordered. *Dickenson v. Blisset*, Dick. 268.

### ILLEGAL OR VOID.

#### I. What transactions are void as illegal.

1. Bond by a father for an annuity to his son, until beneficed; and agreement of same date, reciting bond, that the son would forthwith take orders.
2. Agreement originating in communications by the commissioners, who took the depositions in a cause, and by the witnesses, to the defendant, as to the nature and effect of the evidence.

3. Se-

3. Securities for withdrawing an opposition to a bill in parliament.
4. Contract of exportation contrary to law.
5. A debt arising out of a contract to convey British goods to a market in an enemy's country.
6. Sale, by the owner, of the command of an East India ship.
7. A bill for procuration money to a colonel for a commission.
8. Bond for the purchase of an office to which the groom of the stole had the power of recommendation.
9. A combination of wholesale grocers to purchase all imported fruit.

## II. What transactions are not illegal.

1. Agreements for contribution to the expence of litigation, without a common interest, though not favored, not treated harshly.
2. Contract not to write dramatic pieces for any other theatre.

## III. What transactions are void as immoral.

1. Bond in consideration of future cohabitation.
2. Bond expressly securing the continuance of an illicit connection, by an annuity in case of separation.
3. Bond of remuneration for having assisted obligor in an elopement and marriage without consent.
4. Apothecary giving his patient fifty guineas, to receive five hundred if he should survive a year.

## IV. What transactions are not immoral.

1. Voluntary bond, during cohabitation, to a woman previously of a very loose life.
2. Clause in a deed of assignment of stock, from a married man to a married woman, that she shall live where he resides, is suspicious only.

## V. What transactions are not contrary to the duty of one's office.

1. Transactions by a London broker, in which, though they are in contravention of his office, he was engaged as a principal.

## VI. In relation to rights resulting from acts collateral to illegal transactions.

1. A. employed by B. to buy smuggled goods, pays for them; and they come to the hands of B.: B. shall not pay for them.
2. Upon a contract for smuggled goods, though they are received, the money cannot be recovered.
3. Upon an illegal insurance, though the money was received by the broker, it cannot be recovered.
4. Bill indorsed to broker for payments by him, effecting illegal insurances.
5. Securities given for money advanced for stock-jobbing.

6. *Quare,*

6. *Quere*, whether a valid contract can arise out of illegal transactions.

7. If an illegal transaction is *malum prohibitum* only, the plaintiff may recover, unless it be directly upon the contract precluded.

VII. *Of bills for discovery and relief.*

To rescind the transaction.

VIII. *Of a bill for an account of the profits of an illegal partnership.*

It will not lie.

IX. *Of the right to set off illegal items.*

In accounting.

X. *Of the duty imposed upon a court of justice, where the illegality of a transaction appears.*

Want of allegation shall not prevent the court from looking into the consideration.

XI. *Of the duty imposed upon a court of justice, where the immorality of a transaction appears.*

Want of allegation shall not prevent the court from looking into the consideration.

I. *What transactions are void as illegal.*

1. Bond by a father for an annuity to his son, until benefited; and agreement of same date, reciting bond, that the son would forthwith take orders.

Bond by a father to secure an annuity to his son, until he should be in possession of a living of a certain value; and an agreement of the same date, reciting the bond, declaring, that the son would forthwith enter into holy orders, and accept such living; the lord chancellor expressed a strong opinion, that upon grounds of public policy by the effect of the agreement the transaction was illegal; but the decision was upon the ground, that the son had not complied with the condition; having received the annuity nine years, and being still only in deacon's orders, and that the annuity was determinable by the father or his representatives. *Lord Kircudbright v. Lady Kircudbright*, 8 Ves. 51.

2. Agreement originating in communications by the commissioners, who took the depositions in a cause, and by the witnesses, to the defendant, as to the nature and effect of the evidence.

Bill for specific performance of an agreement originating in communications by the commissioners, who took the depositions in a cause, and by the witnesses, to the defendant, as to the nature and effect of the evidence. Though the plaintiff was not implicated in the transaction, the bill was dismissed on grounds of public policy. *Cooth v. Jackson*, 6 Ves. 12.

3. Securities for withdrawing an opposition to a bill in parliament.

Securities given in consideration of withdrawing an opposition to a bill in parliament, are, on grounds of public policy, illegal; and on a bill to have such

such securities delivered up, and stock, &c. transferred to plaintiff, a demurrer being put in, the same was overruled. *Vauxhall Bridge Company v. Lord Spencer*, 2 Mad. 356.

4. Contract of exportation contrary to law.

Agreement between a citizen of the United States and an American and English subject, for the exportation of goods from England to America, on their joint account in time of war, "provided a peace should not be likely to take place at the time of shipping the goods." On a bill for an account, as a set off against a separate demand, for which the defendant had brought an action against the plaintiff, an injunction, which had been obtained on the filing of the bill, was dissolved, on the ground of its being an illegal contract, although the goods shipped in pursuance of the contract, did not sail till after a peace was made, and although the defendant had not relied on the illegality of the contract as a ground of defence; the court itself setting up the objection. *Evans v. Richardson*, 3 Mer. 469.

5. A debt arising out of a contract to convey British goods to a market in an enemy's country.

A debt arising out of a contract to convey British goods to a market in an enemy's country, cannot be proved under a commission of bankrupt after peace has been established between that country and Great Britain. *Ex parte Schmalzing in re Aldebert*, 1 Buck, 93.

6. Sale, by the owner, of the command of an East India ship.

1. Sale (by the owner) of the command of a ship in the service of the East India company without their knowledge, is illegal, and cannot be the subject of an action. 4 Ves. 815.

2. The command of an East India ship is a public trust; and the sale of it contrary to a public regulation of the company, is a breach of public duty. 5 Ves. 181.

3. A contract for sale of the command of an East India ship is illegal; and therefore cannot be enforced by suit upon the equity against the fund paid by the company as a compensation, under the regulation of 1796, to restrain the practice in future. *Thompson v. Thompson*, 7 Ves. 470.

7. A bill for procuration money to a colonel for a commission.

A bill of exchange given to secure procuration money stipulated to be paid to the colonel of a regiment for a commission, is void, and equity will interfere, even after the money is in the hands of the sheriff, on an execution at law. *Whittingham v. Burgoyne*, 3 Anst. 900.

8. Bond for the purchase of an office to which the groom of the stole had the power of recommendation.

A bond given for the purchase of an office, to which the groom of the stole had the power of recommendation, is within the mischief of marriage brokerage: a perpetual injunction therefore granted. *Hanington v. Du Chatel*, 1 B. C. C. 124.

9. A combination of wholesale grocers to purchase all imported fruit.

Demurrer allowed to a bill for a discovery, and injunction against an action: the effect being a contract for participation in an illegal transaction; the result of a combination of wholesale grocers, by the title of "the fruit club," acting by a select committee, of which the defendants were members, to purchase all imported fruit; though not strictly forestalling, regrating, or monopoly. *Cousins v. Smith*, 13 Ves. 542.

## II. What transactions are not illegal.

1. Agreements for contribution to the expence of litigation, without a common interest, though not favored, not treated harshly.

Agreements for contribution to the expence of litigation, without a common interest, though not favored, not treated harshly. 2 Ves. & Beam. 112.

2. Contract not to write dramatic pieces for any other theatre.

Contract with the proprietors of a theatre, not to write dramatic pieces for any other, legal; as a similar restraint of a performer would be; not resembling a covenant restraining trade generally. *Morris v. Colman*, 18 Ves. jun. 437.

## III. What transactions are held as immoral.

1. Bond in consideration of future cohabitation.

Bond in consideration of future cohabitation, void at law. 3 Ves. 371.

2. Bond expressly securing the continuance of an illicit connection, by an annuity in case of separation.

Voluntary bond during cohabitation to a woman previously of a very loose life; soon afterwards another bond, expressly securing a continuance of the connection by an annuity in case of separation. Bill by the executor to have the bonds delivered up, was dismissed with costs; the former being considered as unimpeached, the latter void at law as *pro turpi causa*. *Gray v. Mathias*, 5 Ves. 286.

3. Bond of remuneration for having assisted obligor in an elopement and marriage without consent.

A bond given as a remuneration to obligee for having assisted obligor in effecting an elopement, and a marriage without the consent of the friends of the wife, declared void; though given voluntary, after the marriage, and without any previous agreement for the same. *Williamson v. Gihon*, 2 Sch. & Lef. 357.

4. Apothecary giving his patient fifty guineas, to receive five hundred if he should survive a year.

Apothecary gave his patient fifty guineas, to receive five hundred or an annuity of one hundred, if he should survive a year, which he did: bill against executors dismissed, as plaintiff could not succeed at law; but without costs, on account of the money actually advanced, which must have been repaid upon a bill to set aside the agreement. *Priestley v. Wilkinson*, 1 Ves. 214.

## IV. What transactions are not immoral.

1. Voluntary bond, during cohabitation, to a woman previously of a very loose life.

Vide 5 Ves. 286.

2. Clause in a deed of assignment of stock, from a married man to a married woman, that she shall live where he resides, is suspicious only.

Clause in a deed of assignment of stock from a married man to a married woman, that she shall live where he resides, though suspicious, is not sufficient ground to hold it *pro turpi causa*. Want of allegation shall not prevent the court from looking into the consideration. 1 Ves. 51, 52.

V. ~~What transactions~~ are not contrary to the duty of one's office.

Transactions by a London broker, in which, though they are in contravention of his office, he was engaged as a principal.

A sworn broker of the city of London entitled to prove in respect of debts arising out of transactions in which he has engaged as principal, notwithstanding such transactions were in contravention of his bond and of the oath taken to his employers, under an authority given them by statute for imposing the same. Not, however, if the debt has arisen out of any transactions in which he was so concerned both as broker and principal, such acting being in itself a gross fraud, and the debt arising out of it, void upon principles of common law. *Ex parte Dyster*, 1 Mer. 155.; 2 Rose, 349.

VI. In relation to rights resulting from acts collateral to illegal transactions.

1. A. employed by B. to buy smuggled goods, pays for them; and they come to the hands of B.: B. shall not pay for them.

A. employed by B. to buy smuggled goods, pays for them; and they come to the hands of B.: B. shall not pay for them. 3 Ves. 373.

2. Upon a contract for smuggled goods, though they are received, the money cannot be recovered.

Upon a contract for smuggled goods, though they are received, the money cannot be recovered. So, upon an illegal insurance contrary to the act of parliament, though the money was received by the broker, it cannot be recovered. 7 Ves. 473.

3. Upon an illegal insurance, though the money was received by the broker, it cannot be recovered.

*Ibid.*

4. Bill indorsed to broker for payments by him, effecting illegal insurances.

Bill indorsed to a broker in consideration of money paid by him in effecting insurances, one of which was illegal: the acceptor becoming bankrupt, the petition of the indorsee to prove was dismissed as to what arose upon the illegal insurance; and the bankruptcy being some years ago, an inquiry was directed as to the rest. *Ex parte Mather*, 3 Ves. 373.

5. Securities given for money advanced for stock-jobbing.

Promissory notes given by a stockbroker for the balance of an account of money advanced to him to be employed in stock jobbing transactions, contrary to the statute 7 Geo. 2. c. 8. Part of the consideration consisting of the profits upon those transactions, proof under his bankruptcy was restrained to the residue; viz. the money received, which he had applied to his own use. *Ex parte Bulmer*, 13 Ves. 313.

6. *Quære*, whether a valid contract can arise out of illegal transactions.

Whether a legal contract, giving a right of action, can arise out of illegal transactions, as by payments made on account of another in settling differences upon transactions within the stock-jobbing act, *quære*. *Ex parte Daniels*, 14 Ves. 191.

7. If an illegal transaction is *malum prohibitum* only, the plaintiff may recover, unless it be directly upon the contract precluded.

Principle upon actions, arising out of illegal transactions: if *malum prohibitum*

*habitus* only, the plaintiff may recover; unless it be directly upon the contract precluded. 13 Ves. 315.

## VII. Of bills for discovery and relief.

To rescind the transaction.

1. Relief on grounds of public policy to *particeps criminis*. Hatch v. Hatch, 9 Ves. 291.

2. Where the transaction is against policy, relief to a *particeps criminis*. 11 Ves. 535.

3. In general cases, where a debt is cut down by the policy of the law, the complaint may be by *particeps criminis*. 15 Ves. 469.

4. The rule, "*in pari delicto melior est conditio possidentis*," preventing suit is not universal; admitting degrees of guilt by concurring in the same criminal act. Therefore against a private agreement, obtained by a father from his son, in derogation of an allowed sale of the command of a post-office packet by the former to the latter, an account was decreed. Osborne v. Williams, 18 Ves. jun. 379.

5. Lord Thurlow's opinion, that in all cases money paid for an illegal purpose may be recovered. 18 Ves. jun. 382.

6. Whether the court has gone farther than to restrain enforcing a security *pro turpi causâ*, and has taken the property out of possession of the party, except as to creditors. *Quære*. 10 Ves. 366.

7. Equity will relieve even after the money is in the hands of the sheriff on an execution at law, against a bill of exchange given for unlawful procurement of a commission in the army. Whittingham v. Bourgoyne, 3 Anst. 900.

8. Plaintiffs having brought an action against the defendant, to recover payments made for insuring lottery tickets, prayed a discovery and account, offering to allow payments made by the defendant; as the defendant could not have that advantage at law, a demurrer was overruled. Brandon v. Johnson, 2 Ves. 517.

## VIII. Of a bill for an account of the profits of an illegal partnership.

It will not lie.

The profits of a partnership in underwriting, illegal by the statute 6 Geo. 1. c. 18. s. 12. cannot be the subject of account in equity. 11 Ves. 168.

## IX. Of the right to set off illegal items.

In accounting.

Smuggling transactions or illegal dealings in stock shall be brought into an account; though the court would not execute the contract. 3 Ves. 613.

## X. Of the duty imposed upon a court of justice, where the illegality of a transaction appears.

Want of allegation shall not prevent the court from looking into the consideration.

Vide 3 Mer. 469.

**XI. Of the duty imposed upon a court of justice, where the immorality of a transaction appears.**

Want of allegation shall not prevent the court from looking into the consideration.

Vide 1 Ves. 51, 52.

## INCLOSURE ACT.

**I. Of awards under inclosure acts.**

1. They rather furnish evidence of, than constitute title.
2. Under the circumstances, specific performance decreed of a sale concluded before the award.
3. In a miscellaneous case.

**II. An inclosure under an inclosure act, how regulated.**

It must not be *ad libitum*.

**I. Of awards under inclosure acts.**

1. They rather furnish evidence of, than constitute title.

Award under inclosing act, rather evidence of, than constituting title.  
18 Ves. jun. 208.

2. Under the circumstances, specific performance decreed of a sale concluded before the award.

Specific performance of a contract for sale of an allotment under an inclosing act before the award; the act expressly enabling a sale, and declaring the conveyance valid, before the award; and the purchaser having notice of the circumstances. *Kingsley v. Young*, 18 Ves. jun. 207.

3. In a miscellaneous case.

Under an act for inclosing lands in the townships of A., S., and W., directing the commissioners to allot to the rector of the parish of W., in lieu of the tithes of the townships of S. and W., so much of the lands to be inclosed in the township of S., and of the titheable parts of the township of W., as should, quantity, quality, and situation considered, contain or be equal in value to two-fifteenth parts of the titheable places thereof, and to make to the rector of W. and the vicar of B., in lieu of the tithes of a part of the lands in the townships of S. and A., to which they were entitled, a like allotment, equal to two-fifteenth parts of such lands, and declaring that after the enrolment of the award of the commissioners, all tithes arising within the lands enclosed should cease; an award by which the commissioners allotted to the rector of W., "in lieu of the tithes of S. and A.," lands more in quantity than two-fifteenth parts of the lands enclosed in S. and A., but less than two-fifteenth parts of the lands enclosed in S., A., and W., without any allotment in lieu of the tithes of W., is a bar to the claim of tithes in W. The award would not only be vitiated by error in the allotment. The act having directed the commissioners, in estimating the proportion, to have regard to quality and situation; deficiency in quantity is not proof of error. *Cooper v. Thorpe*, Swanst. 92.

**II. An inclosure under an inclosure act, how regulated.**

It must not be *ad libitum*.

" Inclosure under an inclosing act must not be *ad libitum*. 1 Ves. 82.

INDICT-



## INDICTABLE OFFENCE.

I. *Felony.*

To constitute felony, breach of trust is not sufficient; there must be a felonious taking.

II. *Conspiracy.*

1. A conspiracy to prevent a prosecution for felony is indictable.
2. Vide in tit. WARD of COURT.

III. *Inciting another to crime.*

1. General rule.
2. Offering a bribe to a police-officer to assist in obtaining possession of a ward of court.

I. *Felony.*

To constitute felony, breach of trust is not sufficient; there must be a felonious taking.

To constitute felony; breach of trust is not sufficient. There must be a felonious taking. But that is satisfied by an act not warranted by the purpose, for which the property was delivered; as a tailor taking notes out of a pocketbook left in the pocket of a coat delivered to him to mend; or a hackney coachman, in whose coach it was left, &c. 8 Ves. 410.

II. *Conspiracy.*

A conspiracy to prevent a prosecution for felony is indictable.

1. A conspiracy to prevent a prosecution for felony is an offence. 14 Ves. 65.
2. Vide in tit. WARD of COURT.

III. *Inciting another to crime.*

## 1. General rule.

The endeavour to bribe a man to commit an offence is itself a very serious offence. 3 Ves. & Beam. 173.

2. Offering a bribe to a police-officer to assist in obtaining possession of a ward of court.

Affidavit of a bribe, offered to a police officer to assist in obtaining possession of a ward of the court, ordered to be laid before the attorney-general. *Wade v. Broughton*, 3 Ves. & Beam. 172.

## INFANT.

I. *Of the derivative rights of infants.*

1. To a specific performance of his ancestor's agreement for a lease.
2. Vide in tit. HEIR.

II. *Of the parental jurisdiction of the court of chancery.*

1. The authority, as *parens patriæ*, is exercised exclusively by the court of chancery.

2. An

2. An infant was ordered to return to the university.
3. The court never removes an infant beyond its jurisdiction.
4. A father of suspicious character restrained from interfering in his children's education.
5. Vide in tit. GUARDIAN.

### III. Of the personal protection which the court of chancery throws around infants.

An infant wrote to the chancellor for protection.

### IV. In relation to the mode of controlling his guardian.

1. Where there is fraud in carrying on or defending his suit.
2. Vide in tit. GUARDIAN.

### V. In relation to the statute 7 Anne, c. 19.

1. The heir of the vendor of real property dying before contract completed, is within the statute.
2. The surviving life in a bishop's lease, not beneficially interested, is within the statute.
3. A case in which the chancellor held an infant to be a trustee within the statute, in opposition to the master.
4. A mortgagee, though beneficially interested, is within the statute.
5. The heir of a mortgagee in fee, though one of his next of kin, is within the statute.
6. Miscellaneous case, in which an infant was held a mortgagee within the statute.
7. Miscellaneous case, in which infant was held trustee within the statute.
8. Infant directed to convey though abroad.
9. Infant directed to convey charity estates to new trustees.
10. A trustee to come within the statute must be a dry trustee.
11. Where a trust to be executed vests in an infant, he is not within the statute.
12. A conveyance to a new trustee upon trusts to be executed, is not within the act.
13. Though a trustee be not within the act, yet he will be restrained from invalidating a conveyance which he would, when adult, have been bound to execute.
14. The statute extends to Ireland.
15. The statute extends to the colonies.
16. The statute extends to the East Indies.

### VI. In relation to contracts made by infants.

1. An infant's marriage settlement is binding upon him.
2. An infant's marriage settlement is binding upon him, provided it be fair and reasonable.
3. An infant is liable for necessities.
4. A stranger advancing money for necessities will be more favoured than a trustee.
5. An infant's covenant will not bind him.
6. An infant's interest is not affected by the recitals of a deed.

7. A *feme sole* infant cannot bar her right under her husband's intestacy.
8. Female infant not bound by agreement to settle her freehold estate on marriage, without an option, when twenty-one, to refuse.
9. An election to repudiate his contract cannot be made during infancy.
10. Whether obligatory upon the heir.
11. Whether obligatory upon the remainder-man.

**VII. In relation to election.**

1. An infant cannot elect.
2. Vide in tit. ELECTION.

**VIII. In relation to partition.**

1. Where the *cestui que* trust, the estate being in trustees, was an infant.
2. Where one of the *cestui que* trusts, the estate being in trustees, was an infant.

**IX. In relation to sales under a decree.**

1. Infant heir decreed to join in sale of leasehold for lives.
2. Purchaser ordered to hold and enjoy, and conveyance by a party an infant, respited.

**X. In relation to foreclosure.**

1. An infant may be foreclosed, subject only to error.
2. Form of the decree.

**XI. In relation to the administration of an infant's estate.**

1. Payments to infants to be discountenanced.
2. Payment to infant of his legacy, payable at twenty-one, not justifiable unless for necessities.
3. The course pursued where legacies given to infants and adults were charged upon a real fund, and those of the adults were raised immediately.
4. An infant's legacy raised out of another fund on failure of the specific fund.
5. The property being small, the estate was, under certain restrictions, let without a reference.
6. Personalty laid out in land, though not directed by the will.
7. Property upon security in India, not called in; it being beneficial.
8. A trustee of his own authority cannot break in upon capital.
9. Rent paid to save an ejectment, reimbursed out of capital.
10. A party acting as agent or executor, cannot purchase an infant's estate.
11. Purchase of the estate, decreed to be sold, by the receiver and acting guardian, declared void under the circumstances.

**XII. In**

**XII. In relation to the obligations and disabilities of an infant, arising from the acts of others.**

1. Agreements before marriage, on behalf of infants, by parents and guardians, binding on the infants.
2. A male infant is bound by the covenant of his wife, an adult, in her marriage settlement.
3. A decree, by consent, binds an infant, without a reference.
4. Infant persons not existing, or under disabilities, having contingent interests, not barred from reviving a decree by twenty years' lapse.
5. Infant heir not bound by admission, in deceased heir's answer, of testator's will.

**XIII. Where an infant shall be bound by a law.**

General rule upon the subject.

**XIV. In relation to infants *en ventre sa mere*.**

They are considered as existing, except in regard to descent, at common law.

**XV. In relation to an infant executor.**

To whom administration, during infancy, shall be granted.

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**Of the derivative rights of infants.**

1. To a specific performance of his ancestor's agreement for a lease.

1. An infant cannot avail himself of his infancy to excuse the non-assertion of his right under an executory agreement made with his ancestor; where the immediate performance of his part of the contract is essential to the interest of the other contracting party. *Griffin v. Griffin*, 1 Sch. & Lef. 352.

2. Vide in tit. **HEIR.**

**II. Of the parental jurisdiction of the court of chancery.**

1. The authority, as *parens patriæ*, is exercised exclusively by the court of chancery.

The court of king's bench has not any of the delegated authority as to infants, existing in the king, as *parens patriæ*, and residing in the court of chancery, as representing the king. 10 Ves. 59.

2. An infant was ordered to return to the university.

Infant ordered to return to the university. *Mitchel v. Duke of Manchester*, Dick. 149.

3. The court never removes an infant beyond its jurisdiction.

The court never makes an order for taking an infant out of its jurisdiction. *Mountstuart v. Mountstuart*, 6 Ves. 363.

4. A father of suspicious character, restrained from interfering in his children's education.

A father, a bankrupt, and separated from his wife, and on bail to articles of the peace sworn against him by his wife, ordered not to remove the children from the schools at which they were placed, and not to interfere in their education. *Skinner v. Warner*, Dick. 779.

5. Vide in tit. **GUARDIAN.**

### III. Of the personal protection which the court of chancery throws around infants.

An infant wrote to the chancellor for protection.

Case of an infant's writing to the lord chancellor for protection. *Newport v. Moore*, Dick. 166.

### IV. In relation to the mode of controlling his guardian.

Where there is fraud in carrying on or defending his suit.

Where there is any fraud in carrying on or defending the cause of an infant, he may seek his satisfaction against his guardian, or bring his bill to be relieved against the fraud. *Richmond v. Taylour*, Dick. 38.

### V. In relation to the statute 7 Anne, c. 19.

1. The heir of the vendor of real property dying before contract completed, is within the statute.

The vendor of a real estate dying before the contract entered into by him for the sale was completed, his heir at law, an infant, declared to be a trustee, within the statute of 7th Anne, and directed to convey. *Smith v. Hibbard*, Dick. 730.

2. The surviving life in a bishop's lease, not beneficially interested, is within the statute.

An infant, the surviving life in a bishop's lease, not beneficially interested, held to be an infant trustee within the statute of 7th Anne. *Ex parte Hodgson*, Dick. 737.

3. A case in which the chancellor held an infant to be a trustee within the statute, in opposition to the master.

Infant reported not to be a trustee within the 7th Anne; lord chancellor thinking that he was, ordered him to convey. *Ex parte Benton*, Dick. 394.

4. A mortgagee, though beneficially interested, is within the statute.

An infant mortgagee is within the statute, notwithstanding he may be beneficially interested in the mortgage money. *Ex parte Bellamy*, 2 Cox, 422.

5. The heir of a mortgagee in fee, though one of his next of kin, is within the statute.

The mortgagee of a mortgage in fee dying intestate, and his heir being an infant, and one of his next of kin, and consequently entitled to a share of the mortgage money; the master would not find him to be an infant mortgagee, within the statute of 7th Anne, for that he was not, as he conceived, a mere naked mortgagee; but lord chancellor was clear that he was. *Ex parte Carter*, Dick. 609.

6. Miscellaneous case, in which an infant was held a mortgagee within the statute.

Report of infant mortgagee being within the statute 7th Anne being confirmed, the infant ordered to convey. *Ex parte Bosanquet*, Dick. 540.

7. Miscellaneous case, in which infant was held trustee within the statute.

Infant trustee within the statute 7th Anne, c. 19., notwithstanding an interest as co-executor and co-residuary legatee, entitled to the mortgage money: the receipt and discharge of the other executor leaving the infant a mere trustee. ——— *v. Handcock*, 17 Ves. jun. 383.

8. Infant

## 8. Infant directed to convey though abroad.

Infant trustee directed to convey the trust estate, though abroad. *Ex parte Prosser*, 2 B. C. C. 325.

## 9. Infant directed to convey charity estates to new trustees.

An infant directed to convey charity estates to new trustees under the act of 7th Anne, he having nothing to do but to make such conveyance. But where the infant has any duty to perform as such trustee beyond the mere conveyance, the case is not within the statute. *Attorney-general v. Pomfret*, 2 Cox, 221.

## 10. A trustee to come within the statute must be a dry trustee.

1. Infant trustee within the statute 7th Anne, c. 19. must be a dry trustee. 17 Ves. 384.

2. Where a trust to be executed vests in an infant, he doth not come within the 7th Anne, to enable infant to convey; but he must be decreed to convey on a suit for that purpose. *Riggs v. Sykes*, Dick. 400.

## 11. Where a trust to be executed vests in an infant, he is not within the statute.

Vide Dick. 400.

## 12. A conveyance to a new trustee upon trusts to be executed, is not within the act.

Order upon petition under the statute 7th Anne, c. 19. for an infant trustee to convey to the persons absolutely entitled, or as they shall appoint; but not to convey to a new trustee, upon trusts to be executed, without a bill. *Ex parte Anderson*, 5 Ves. 248.

## 13. Though a trustee be not within the act, yet he will be restrained from invalidating a conveyance which he would, when adult, have been bound to execute.

Conveyance by infant trustee voidable as not within the statute; if he would be bound to convey when adult, he would in equity be restrained from setting it aside. 17 Ves. jun. 384.

## 14. The statute extends to Ireland.

Estate in Ireland ordered to be conveyed by an infant mortgagee under the statute 7th Anne, c. 19. *Evelyn v. Forster*, 8 Ves. 96.

## 15. The statute extends to the colonies.

Infant mortgagee of land in Saint Christopher's ordered to convey, after a doubt, whether the statute of queen Anne extended to estates out of the kingdom. *Ex parte Fenniliteau*, Dick. 569.

## 16. The statute extends to the East Indies.

An infant trustee ordered to convey an estate in Calcutta, under the statute 7th Ann. c. 19. *Ex parte Anderson*, 5 Ves. 240.

VI. *In relation to contracts made by infants.*

## 1. An infant's marriage settlement is binding upon him.

The marriage settlement of a female infant held to be binding upon her, and no act done by her and her husband can avoid it: mortgages made by them, to parties having notice of the trusts, ordered to be assigned to the trustee, but the profits, during the lives of the husband and wife, to be applied to the payment of the mortgages, without prejudice to any remedy the

the wife might have against the husband's estate. *Durnford v. Lane*, 1 B. C. C. 106.

2. An infant's marriage settlement is binding upon him, provided it be fair and reasonable.

1. A female infant's marriage settlement, in order to bind her, must be fair and reasonable, not tend to deprive her of every thing: a covenant that whatever should come to the wife, or to the husband in her right, from the mother or otherwise, should be bound by the settlement, controlled to what came from the mother, not extending to property coming from other quarters. *Williams v. Williams*, 1 B. C. C. 152.

2. An infant to express his consent, joins in a settlement by a woman in contemplation of marriage with him: he is bound thereby, if, on fair consideration, and no fraud, as where the transaction is public, and with consent of the family; though his being privy would not have concluded him from any rights as being an infant. 1 Ves. 28.

3. An infant is liable for necessities.

Infant liable for necessities; but more consideration will be had for a stranger advancing him money than a trustee. 1 Ves. 249.

4. A stranger advancing money for necessities will be more favoured than a trustee.

Vide 1 Ves. 249.

5. An infant's covenant will not bind him.

Infant not bound by his covenant. *Johnson v. Boyfield*, 1 Ves. 314.

6. An infant's interest is not affected by the recitals of a deed.

Interest of an infant not affected by the recital of a deed during infancy. 18 Ves. jun. 374.

7. A *feme sole* infant cannot bar her right under her husband's intestacy.

A woman, being an infant, cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty in case of his dying intestate. *Drury v. Drury*, 2 Eden, 39. But reserved on appeal. *Earl of Buckinghamshire v. Drury*, 2 Eden, 60.; 3 Tomb. P. C. 492.; 4 B. C. C. 505. n.

8. Female infant not bound by agreement to settle her freehold estate on marriage, without an option, when twenty-one, to refuse.

Female infant not bound by agreement to settle her freehold estate on marriage, without an option, when twenty-one, to refuse; but her heir bound under the circumstances, claiming a special occupant, the subject being leaseholds for lives, frequently during, and since the coverture, renewed by the husband, who had settled his own estate; the settlement confirmed by her repeated acts and fines, though not of the life-estates; and by orders of court; children having existed, though deceased under age; no claim for many years; and during eighteen, an adverse possession against a former heir by the husband; the bill claiming, not against his assets, but merely an account since his death against his devisee for life, whose possession commenced long since the fall of the surviving life in the original leases. *Milner v. Lord Harewood*, 18 Ves. jun. 259.

9. An election to repudiate his contract cannot be made during infancy.

Though a female infant is not bound by an agreement on marriage to settle her real estate, if she does not, when of age, choose to accede to it, her husband

husband would not be permitted to aid her in defeating it; nor is her act during coverture effectual. 18 Ves. jun. 276.

10. Whether obligatory upon the heir.

Vide 18 Ves. 259.

11. Whether obligatory upon the remainder-man.

Articles executed on the marriage of a *feme* infant, tenant in *quasi* tail, whereby she covenanted to settle her estate when of age, not binding upon the remainder-man, she dying before twenty-one. *Lecky v. Knox*, 1 Ball & Beatty, 210. — A bill by the husband of the infant, for a specific execution of the articles, giving him an estate for life, dismissed. *Ibid*.

VII. In relation to election.

An infant cannot elect.

Incapacity of infant to elect. 18 Ves. jun. 393.

VIII. In relation to partition.

1. Where the *cestui que* trust, the estate being in trustees, was an infant.

There being on a bill for a partition, infant *cestuis que* trust-defendants, the conveyance was directed to be respited until they attained twenty-one. *Attorney-general v. Hamilton*, 1 Mad. 214.

2. Where one of the *cestui que* trusts, the estate being in trustees, was an infant.

Partition of an estate, the legal estate being in trustees, one of the *cestui que* trusts being an infant, the conveyance respited until he should attain twenty-one, and the parties to hold and enjoy in the mean time. *Tuckfield v. Buller*, Dick. 240.

IX. In relation to sales under a decree.

1. Infant heir decreed to join in sale of leasehold for lives.

Infant heir decreed to join in sale of leasehold for lives, unless he show cause against it. *Parfit v. Sherston*, Dick. 801.

2. Purchaser ordered to hold and enjoy, and conveyance by a party an infant, respited.

Though infant were not a trustee within stat. 7th Anne, the purchaser ordered to hold and enjoy till the infant attained twenty-one, and then to apply that he might convey. *Chandler v. Beard*, Dick. 392.

X. In relation to foreclosure.

1. An infant may be foreclosed, subject only to error.

An infant may be foreclosed, subject only to error. 3 Ves. 317.

2. Form of the decree.

1. Decree of foreclosure against an infant, with a day to shew cause. *Goodier v. Ashton*, 18 Ves. jun. 83. But see *Monday v. Monday*, 1 Ves. & Beam. 223.

2. Foreclosure against an infant. The decree absolute repeats the clause *nisi*, as in the original decree, giving six months after age to shew cause; which can only be error. *Williamson v. Gordon*, 19 Ves. 114.



**XI. In relation to the administration of an infant's estate.****1. Payment to infants to be discountenanced,**

Payments to infants during minority to be discountenanced. 4 Ves. 369.

**2. Payment to infant of his legacy, payable at twenty-one, not justifiable unless for necessities.**

1. Executors cannot justify paying a legacy payable at twenty-one, to the infant, or for his use, except for necessities. *Davies v. Austen*, 3 B. C. C. 578.

2. Legacy payable at twenty-one, with 5 *per cent.* till payable: executrix advanced a sum larger than the legacy, by discharging disbursements, all paid *bonâ fide* for the infant, though some were improper. Legatee, when of age, assigned the legacy. Assignee entitled, against executrix, to the legacy, with 4 *per cent.* from the time it was payable. *Davis v. Austen*, 1 Ves. 247.

**3. The course pursued where legacies given to infants and adults were charged upon a real fund, and those of the adults were raised immediately.**

Where there are adult and infant legatees, whose legacies are charged on a real fund; though the adult legatees have a right to have their legacies immediately raised, and for that purpose a sale may be necessary, and the heir offers the purchase money to be laid out as a security for the interest of the legacies given to the infants when due, the court will not deprive them in case of deficiency of recourse of the real fund. *Dickinson v. Dickinson*, 2 B. C. C. 19.

**4. An infant's legacy raised out of another fund on failure of the specific fund.**

Legacy given to an infant in one fund, which failed, not opposing; his legacy was ordered out of another fund. *Finch v. Inglis*, 3 B. C. C. 420.

**5. The property being small, the estate was, under certain restrictions, let without a reference.**

Order for liberty to let an infant's estate, without a reference to the master; the property being small: but not to extend to building leases, nor beyond minority. *P — v. Bell*, 6 Ves. 419.

**6. Personalty laid out in land, though not directed by the will.**

Personal property of an infant ordered to be laid out in the purchase of land, though there was no authority in the will for changing the nature of the property: but it was ordered, that the estate purchased should be conveyed in trust for the infant, his executors and administrators, until he should attain twenty-one, and afterwards for him and his heirs. *Lord Ashburton v. Lady Ashburton*, 6 Ves. 6.

**7. Property upon security in India, not called in; it being beneficial.**

The court did not call in the property of an infant, upon security in India; the master reporting to be for his benefit that it should remain. *Sadler v. Turner*, 8 Ves. 617.

**8. A trustee of his own authority cannot break in upon capital.**

General rule, that a trustee shall not of his own authority break in upon the capital of an infant's fortune. *Walker v. Wetherell*, 6 Ves. 473.

**9. Rent paid to save an ejectment, reimbursed out of capital.**

Rent, paid for minors in order to save their estate, from the costs of an ejectment,

ejectment, allowed out of the principal of their fortune. *Ex parte M'Key*, 1 Ball & Beatty, 405.

10. A party acting as agent or executor, cannot purchase an infant's estate.

The estate of an infant cannot be purchased by a party acting as agent or executor. 1 Ball & Beatty, 418.

11. Purchase of the estate, decreed to be sold by the receiver and acting guardian, declared void under the circumstances.

Under a decree for a sale of a competent part of certain leasehold interests, the property of a minor, (held partly for lives and partly chattel,) the person who acted as receiver of the estate, and appeared in the cause as a guardian to the minor, purchased a lease for lives. The sale (though for full value) decreed fraudulent and void under these circumstances: the minor's interest not having been properly attended to in suffering the decree to pass, &c. *Cary v. Cary*, 2 Sch. & Lef. 173. 192.

## XII. In relation to the obligations and disabilities of an infant arising from the acts of others.

1. Agreements before marriage, on behalf of infants, by parents and guardians, binding on the infants.

Agreements before marriage, on behalf of infants, by parents and guardians, binding on the infants. 9 Ves. 19.

2. A male infant is bound by the covenant of his wife, an adult, in her marriage settlement.

A male infant marries an adult female, who, by settlement, covenants that her estate shall be settled to certain uses: he is bound by her covenant. *Slocombe v. Glubb*, 2 B. C. C. 545.

3. A decree, by consent, binds an infant, without a reference.

An infant is bound by an order made by the court, by consent, although there was no reference to the master to inquire whether it would be for his benefit. *Wall v. Bushby*, 1 B. C. C. 484.

4. Infant persons not existing, or under disabilities, having contingent interests, not barred from reviving a decree by twenty years' lapse.

Infant persons not existing, or under disabilities, having contingent interests, not barred from bringing a bill of review, though a decree has been pronounced and enrolled twenty years. *Lytton v. Lytton*, 4 B. C. C. 441.

5. Infant heir not bound by admission, in deceased heir's answer, of testator's will.

Infant heir not bound by the admission, in the deceased heir's answer, of the will of the testator. *Cartwright v. Cartwright*, Dick. 545.

## XIII. Where an infant shall be bound by a law.

General rule upon the subject.

Where the words of a law, in their ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature manifested by other parts of the law, from the general purpose and design of the law, and the subject matter of it. Thus, the statutes of limitation and of fines would have bound infants, &c. without an express exception. 17 Ves. jun. 92.

#### XIV. In relation to infants *en ventre sa mère*.

They are considered as existing, except in regard to descent, at common law.

1. A child *en ventre sa mère* is a life in being to all intents and purposes, except in the case of a descent at common law. 4 Ves. 334.

2. A child *en ventre sa mère* may be vouched, may be an executor, may take under the statute of distributions, by devise, under a charge for portions, may have an injunction and a guardian. 4 Ves. 322.

3. The object of the statute 10 & 11 W. 3. c. 16. was not to affirm the case of *Reeve v. Long*: but it established, that the same principle should govern, where the limitation was by deed of settlement. 4 Ves. 342.

#### XV. In relation to an infant executor.

To whom administration, during infancy, shall be granted.

Where an infant is sole executor, administration shall be granted to the guardian, or such person as the spiritual court shall think fit, till the infant is twenty-one; at which time and not before probate shall be granted to him. 4 Ves. 149.

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### INHABITANT.

#### The term defined.

Various senses of the term "inhabitant," with reference to the nature of the subject. 10 Ves. 339.

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### INHERITANCE.

#### Of terms to attend the inheritance.

##### 1. What terms are attendant, what in gross.

If a man purchase for a term of years in the name of a trustee, and the inheritance in his own name, or *vice versa*, the terms are in gross, not attendant upon the inheritance. *Scott v. Fenhoulett*, 1 B. C. C. 69.

##### 2. Determination of.

A term created by a marriage settlement to raise 1000*l.* to be paid to such of the relations of A. as the survivor of A. and B. shall appoint; the inheritance afterwards come to A., who devises the estates to B.; the term continues to be a subsisting term, and goes to the heirs at law of A. *Cantle v. Morris*, *Ibid.* 113. n.

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### INN OF COURT.

#### Relative to chambers.

Bill will not lie against the benchers of an inn of court, relative to a grant of chambers. *Cunningham v. Wagg*, 2 B. C. C. 241.

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### INSOLVENT ACT.

#### I. What property is, or is not, assignable under an insolvency.

A miscellaneous case.

II. Of

**II. Of the plea of insolvency.**

Where the assignment was after bill filed.

**III. Miscellaneous transactions.**

Rights of an assignee subsequent to an insolvency, and antecedent assignment in trust for creditors.

**I. What property is, or is not, assignable under an insolvency.**

A miscellaneous case.

A. on his marriage, executed a bond, conditioned for payment of one-third part of the real and personal estate he should die seised and possessed of, equally amongst his children who should be then living; he left two children, B. a son, and C. a daughter. C. married W. in her father's lifetime without settlement: W. took the benefit of an insolvent debtor's act. A. died afterwards, and by will gave to C. 8000*l.* in lieu of the interest she took under the bond: the legacy appeared to be the most beneficial provision. On a bill filed by C. for her legacy, and a cross bill by the assignee of W. to have the benefit of it, it was decreed, that the assignee could have no interest beyond the amount of one-sixth part of the real and personal estate, and that he and W. should lay proposals before the master, for a settlement on C. and her children. The assignee proposed to settle one moiety on the wife and children, and to divide the other moiety amongst the creditors of W.: this proposal was approved by the master, and was carried into execution by the court. *Worrall v. Marlar*, Cox, 153.

**II. Of the plea of insolvency.**

Where the assignment was after bill filed.

Plea to a bill for specific performance of an agreement for a lease to the plaintiff, and an injunction against an ejectment, &c. that the plaintiff had since the bill filed taken the benefit of an insolvent act, overruled. *De Minckwitz v. Udney*, 16 Ves. 466.

**III. Miscellaneous transactions.**

Rights of an assignee subsequent to an insolvency, and antecedent assignment in trust for creditors.

Bill by the assignee of a person, who had made a general conveyance in trust for his creditors, and afterwards taken the benefit of an insolvent act, in respect of the surplus against the assignee, the trustee, and mortgagees, dismissed with costs. *Spragg v. Binkes*, 5 Ves. 583.

**INSURANCE.****I. What are subjects of insurance.**

1. Freight, as distinct from ship.
2. The expectancy in a prize,
3. A trustee's legal interest.
4. A *cestui que* trust's beneficial interest.

**II. Of the ceremonial necessary to an insurance.**

A policy.

**III. Of**

**III. Of the modes in which a policy may be discharged.**

Non-compliance with a condition, though immaterial.

**IV. In relation to the underwriter.**

His right to restitution on satisfaction *aliunde*.

**V. In relation to the stat. 6 Geo. 1. c. 18. s. 12.**

Insuring each other is not within the statute.

**I. What are subjects of insurance.****1. Freight, as distinct from ship.**

The property in the freight may be distinct from that in the ship, as in an insurable interest. 11 Ves. 629.

**2. The expectancy in a prize.**

The expectation, arising from the habit of the crown as to prize, has been held an insurable interest. 10 Ves. 157.

**3. A trustee's legal interest.**

Insurable interest in a trustee in respect of the legal interest in a ship; as in the *cestui que* trust in respect of the equitable. 15 Ves. 67.

**4. A *cestui que* trust's beneficial interest.**

*Ibid.*

**II. Of the ceremonial necessary to an insurance.**

A policy.

Insurance without a policy is illegal. 2 Ves. 18.

**III. Of the modes in which a policy may be discharged.**

Non-compliance with a condition, though immaterial.

Variation from policy of insurance, though perfectly immaterial, discharges the insurer. 2 Ves. 541.

**IV. In relation to the underwriter.**

His right to restitution on satisfaction *aliunde*.

Satisfaction having been made under a royal commission for distribution of prizes, to the insured; such of the insurers as had paid, held entitled to restitution, though foreigners; but not those who had compounded and renounced salvage. *Blaamopot v. Da Costa*, 1 Eden, 130.

**V. In relation to the stat. 6 Geo. 1. c. 18. s. 12.**

Insuring each other is not within the statute.

Insuring each other is not within stat. 6 Geo. 1. c. 18. s. 12. 3 Ves. 613.

**INTEREST.****I. When it will be given.****1. In relation to the person — agents in general.****2. In relation to the person — agent of an administrator keeping money, to be invested, in hand.**

3. In relation to the person — bankrupt assignee using money.
4. In relation to the person — executors keeping money in hand.
5. In relation to the person — executors using money.
6. In relation to the person — executors unnecessarily calling in property.
7. In relation to the person — executors under direction to accumulate.
8. In relation to the person — guardian keeping money in hand.
9. In relation to the person — legatee, erroneously paid, refunding.
10. In relation to the person — committee of lunatic.
11. In relation to the person — receivers in general.
12. In relation to the person — receiver not passing his accounts.
13. In relation to the person — steward, upon fraud, wilful concealment, &c. notwithstanding lapse.
14. In relation to the person — trustees keeping money in hand.
15. In relation to the person — trustees not paying money into court pursuant to order.
16. In relation to the demand — general rule as to rests by bankers.
17. In relation to the demand — bills of exchange.
18. In relation to the demand — bonds, but only to extent of penalty.
19. In relation to the demand — bonds, under a devise in trust for debts.
20. In relation to the demand — apportionment *de die in diem* on bonds, notwithstanding condition reserving by periodical payments.
21. In relation to the demand — simple-contract debts.
22. In relation to the demand — contract to pay on demand, or on a day certain.
23. In relation to the demand — contract to pay by instalments.
24. In relation to the demand — contract to give notes.
25. In relation to the demand — upon farther directions in general.
26. In relation to the demand — upon farther directions, though question was not reserved.
27. In relation to the demand — judgments, in bankruptcy, and a surplus.
28. In relation to the demand — legacies in general.
29. In relation to the demand — legacy to a son, having no other provision.
30. In relation to the demand — interest by way of maintenance, upon a legacy, in the case of parent and child only.
31. In relation to the demand — legacy payable *in futuro*, and maintenance given generally.
32. In relation to the demand — legacy with remainder over, on dying under age.
33. In relation to the demand — *quære*, upon legacy to grand-child, payable *in futuro* or contingent.

34. In

34. In relation to the demand — legacy to grandchildren, where grandfather stood *in loco parentis*.
35. In relation to the demand — legacy to natural child of a son, where testator stood *in loco parentis*.
36. In relation to the demand — master's report in general.
37. In relation to the demand — against mortgagee in possession.
38. In relation to the demand — in case of mortgage, upon the whole sum liquidated by report.
39. In relation to the demand — notes.
40. In relation to the demand — presumption of agreement to pay interest, from acquiescence in banker's accounts.
41. In relation to the demand — presumption of agreement to pay interest from previous payment.
42. In relation to the demand — presumption of agreement to pay interest, from previous payments upon similar securities.
43. In relation to the demand — purchase money.
44. In relation to the demand — possession and purchase money retained by vendor.
45. In relation to the demand — arrears of rent-charge, where legal proceedings have been restrained.
46. In relation to the demand — residue payable *in futuro*.
47. In relation to the demand — a fund wrongfully withheld.

## II. When it will be refused.

1. In relation to the person — responsible agent keeping money in hand.
2. In relation to the person — administrator *pendente lite*, with respect to a balance in his hands.
3. In relation to the person — executor keeping money in hand.
4. In relation to the person — legatee erroneously paid, refunding.
5. In relation to the person — steward keeping money in hand, with implied consent of principal.
6. In relation to the person — slight difference in sums admitted and reported in trustee's hands.
7. In relation to the demand — balance of a mutual account.
8. In relation to the demand — account taken in India, and settled with difficulty, by a third person.
9. In relation to the demand — arrears of annuity, though interest was reserved by decree.
10. In relation to the demand — arrears of annuity, though liquidated by report.
11. In relation to the demand — arrears of annuity in bar of dower.
12. In relation to the demand — rests made by bankers at the end of three months.
13. In relation to the demand — book debts.
14. In relation to the demand — simple contract debts, though liquidated by report.

15. In

15. In relation to the demand — payment by co-surety.
16. In relation to the demand — upon farther directions in general.
17. In relation to the demand — arrears of separate annuity to feme covert.
18. In relation to the demand — arrears of jointure.
19. In relation to the demand — judgments.
20. In relation to the demand — judgment, subsequent to the recovery.
21. In relation to the demand — judgment of assets *quando*.
22. In relation to the demand — interest, by way of maintenance, upon a legacy, in the case of parent and child only.
23. In relation to the demand — legacies from parent to child, payable *in futuro*, with maintenance.
24. In relation to the demand — legacy to son, with maintenance.
25. In relation to the demand — legacy payable *in futuro*, with maintenance.
26. In relation to the demand — legacy payable *in futuro*, and annual sum, less than interest, for maintenance.
27. In relation to the demand — legacy payable *in futuro*, and contingent.
28. In relation to the demand — legacy payable at twenty-one.
29. In relation to the demand — *quare*, upon legacy to grandchild, payable *in futuro*, or contingent.
30. In relation to the demand — no interest, by way of maintenance, upon a legacy, simply to a grandchild or natural child.
31. In relation to the demand — arrears of maintenance.
32. In relation to the demand — master's report in general.
33. In relation to the demand — against mortgagee in possession.
34. In relation to the demand — partnership account, long unsettled, and rendered intricate by neglect.
35. In relation to the demand — portions, with maintenance, increased by will.
36. In relation to the demand — deposit on a purchase.
37. In relation to the demand — stale demand.

### III. From what period it will be given.

1. In relation to the demand — annuity, the payment of which was neglected to be enforced.
2. In relation to the demand — contract to pay on demand, or on a day certain.
3. In relation to the demand — a case in which the lands charged were subject to a jointuring power.
4. In relation to the demand — legacies, in general.
5. In relation to the demand — legacies to be raised by sale.
6. In relation to the demand — legacies from parent to child payable *in futuro*.
7. In relation to the demand — legacies from parent to child payable *in futuro*, with maintenance.

8. In



8. In relation to the demand — legacies to grandchildren.
9. In relation to the demand — legacies to collaterals, payable at twenty one, or marriage.
10. In relation to the demand — legacies from husband to wife.
11. In relation to the demand — legacies from husband to wife, payable *in futuro*.
12. In relation to the demand — legacies to natural children.
13. In relation to the demand — legacy in a miscellaneous case.
14. In relation to the demand — life-interest.
15. In relation to the demand — tenant for life of the residue.
16. In relation to the demand — master's report.
17. In relation to the demand — notes.
18. In relation to the demand — stale demand.

#### IV. To what amount it will be given.

1. In relation to the person — compound interest against executor's keeping money in hand.
2. In relation to the person — compound, against executors under direction to accumulate.
3. In relation to the person — executors keeping money in hand.
4. In relation to the person — executors using money.
5. In relation to the person — executors unnecessarily calling in property.
6. In relation to the person — executors under direction to accumulate.
7. In relation to the person — trustee, under trust to accumulate.
8. In relation to the demand — general rule.
9. In relation to the demand — bonds.
10. In relation to the demand — bonds, with judgment assigned for same demands.
11. In relation to the demand — bonds, with mortgages for same demands.
12. In relation to the demand — compound interest, in general.
13. In relation to the demand — compound interest on remainder-man's proportion of fine for renewal.
14. In relation to the demand — judgments.
15. In relation to the demand — judgment, subsequent to the recovery.
16. In relation to the demand — legacies.
17. In relation to the demand — master's report.
18. In relation to the demand — mortgage.
19. In relation to the demand — of rests against mortgagee in possession.
20. In relation to the demand — a fund wrongfully withheld.
21. In relation to the demand — power to charge a sum in gross.
22. In relation to the demand — demand established as a debt against the funds of others.
23. In relation to the demand — West India interest.
24. In relation to the demand — miscellaneous.

### V. The persons entitled to accumulations of interest ascertained.

1. Where legacies to children are payable at twenty-one.
2. Where legacies are contingent.
3. In a miscellaneous case.

### VI. Of refunding interest.

Where the court cancels a bond.

#### I. When it will be given.

1. In relation to the person — agents in general.

No difference between the implied contract of trustees, assignees, and executors, and of a receiver or agent, bound to account faithfully, at least when called upon, and not to suppress, conceal, or overcharge; liable therefore to interest; as a receiver. 14 Ves. 510.

2. In relation to the person — agent of an administrator, keeping money, to be invested, in hand.

Agent for an administrator, keeping money of the intestate's in his hands, which he had proposed to the principal to lay out in the funds, shall pay interest. *Browne v. Southouse*, 3 B. C. C. 107.

3. In relation to the person — bankrupt assignee using money.  
Vide 1 B. C. C. 348.

4. In relation to the person — executors keeping money in hand.

1. Interest against executors, for balances in their hands: with costs, upon the circumstances; not of course, merely as charged with interest. *Ashburnham v. Thompson*, 13 Ves. 402.

2. Interest given against trustees and executors keeping money in their hands in breach of trust. 1 Ves. 452.

3. Executors charged with interest upon balances in their hands. *Longmore v. Broom*, 7 Ves. 124.

4. Instances, where interest has been charged on balances, in the hands of executors, and receivers. 1 Ball & Beatty, 231-2.

5. Executor charged for withholding money, and not putting in his examination, with interest; but not beyond the general rate of the court; viz. four *per cent.* and costs. For five *per cent.*, a special case, beyond mere negligence, is necessary; as that he employed the money in his trade. *Rocke v. Hart*, 11 Ves. 58.

6. Executor in trust for infants, unnecessarily calling in the property, out upon good security at five *per cent.*, except a small part, keeping large balances in his hand, and using it as his own, charged with interest at five *per cent.* and costs. *Mosley v. Ward*, 11 Ves. 581.

7. Executor, directed not to derive any advantage from keeping money in his hands without accounting for legal interest, and to accumulate for the *cestui que trust*. Decree, directing a computation of interest at five *per cent.* on all sums received by him, while in his hands; "and that the master do in such computation make half-yearly rests." The object of that direction is to charge compound interest; and the decree, though perhaps going farther than usual, was held under the circumstances properly executed by a computation of interest upon each receipt from the day it was received; the balance of receipts, with the interest so calculated, and payments being struck at the end of the half-year; and that balance, so composed of princi-

pal and interest, being carried forward as an item in the account, producing interest. *Raphael v. Boehm*, 11 Ves. 92. Affirmed on re-hearing.

5. In relation to the person — executors using money.

Executor making use of the money ought to pay the interest he made; as he ought not to derive any advantage from the trust-property. 11 Ves. 60.

6. In relation to the person — executors unnecessarily calling in property.

Vide 18 Ves. 581.

7. In relation to the person — executors under the direction to accumulate.

Under a direction to accumulate, having become a bankrupt, his estate was charged with interest, at five *per cent.* with rests. *Dornford v. Dornford*, 12 Ves. 127.

8. In relation to the person — guardian keeping money in hand.

A guardian will be charged with interest on balances of his ward's property, kept in his banker's hands. *Dawson v. Massey*, 1 Ball & Beatty, 219.

9. In relation to the person — legatee, erroneously paid, refunding.

On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds making interest in the hands of the court, is to be charged with interest; not a legatee who has no farther concern in the estate. *Gittins v. Steele*, *Swanst.* 199.

10. In relation to the person — committee of lunatic.

Brother of lunatic, committee of the estate, had managed it nine years before the commission; during which time there were considerable savings; to pay interest, though alleged, he made no use of it; unless particular circumstances to justify that. *Ex parte Chumley*, 1 Ves. 156.

11. In relation to the person — receivers in general.

Vide 14 Ves. 510.

12. In relation to the person — receiver not passing his accounts.

1. Receiver not passing his accounts shall always pay interest upon the balances in his hands. — *v. Jolland*, 8 Ves. 72.

2. Instances, where receivers have been made to pay interest on balances in their hands. 1 Ball & Beatty, 231. *n.*

13. In relation to the person — steward, upon fraud, wilful concealment, &c. notwithstanding lapse.

Interests and costs decreed against a steward, upon fraud, wilful concealment, &c.; and in such cases, generally, there is no limitation of time. *Earl of Hardwicke v. Vernon*, 14 Ves. 504.

14. In relation to the person — trustees keeping money in hand.

1. Trustee charged with interest. *Younge v. Combe*, 4 Ves. 101.

2. Interest will be decreed on money, retained by a trustee in his hands for a length of time. 1 Ball & Beatty, 385.

15. In relation to the person — trustees not paying money into court pursuant to order.

Trustee charged with interest for wilful misconduct, as not paying money into court pursuant to an order: but slight difference in the sums admitted and reported in his hands is not sufficient; and farther inquiry, whether he made interest, not to be directed, unless a strong case. *Sammes v. Rickman*, 2 Ves. 96.

## 16. In relation to the demand — general rule as to rests by bankers.

1. Banker's accounts with their customers are taken by charging interest on their advances in a separate column, up to the day of a lodgment made, deducting the lodgment from the principal, and so on till the end of the year, when a rest is made; the balance of principal and interest constituting the first item in the next account. *Lord Clancarty v. Latouche*, 1 Ball & Beatty, 420.

2. And from the long acquiescence in the accounts thus furnished, the annual balances directed to carry interest. *Ibid.*

## 17. In relation to the demand — bills of exchange.

Interest is computed and given upon bills of exchange, in an action at law, in the nature of damages, not strictly as interest; and for a breach of the contract, not in pursuance of it. *Ex parte Williams*, 1 Rose, 399.

## 18. In relation to the demand — bonds, but only to extent of penalty.

Creditors by bond entitled to interest only to the extent of the penalty; creditors by note, though not on demand, or on a day certain, or on contract to pay interest, to have interest, and to be considered as creditors by specialty. Creditors by book debts not allowed interest. *Grosvenor v. Cook*, Dick. 305.

## 19. In relation to the demand — bonds, under a devise in trust for debts.

Devise in trust to sell, and apply the money to and among such persons as the trustees in their discretion should think had or have any just or indisputable demand upon A. at his death, to each in equal degree and proportion according to the principal sum, as far as the money would extend; the securities to be delivered up: but the money to be given and received in no other manner than as voluntary bounty. The fund, being more than sufficient, is liable to interest of bonds to the extent of the penalties. *Aston v. Gregory*, 6 Ves. 151.

20. In relation to the demand — apportionment *de die in diem* on bonds, notwithstanding condition reserving by periodical payments.

Of interest upon a bond, according to the general rule, as accruing *de die in diem*, not as dividend, or rent, not provided for by the statute, is not prevented by the condition, reserving it by equal half-yearly payments. *Banner v. Lowe*, 13 Ves. 135.

## 21. In relation to the demand — simple-contract debts.

Interest given in equity for a simple contract-debt; as at law for every debt detained, either by the contract or in damages. 1 Ves. 63.

## 22. In relation to the demand — contract to pay on demand, or on a day certain.

1. A written undertaking to pay at a day certain, or on demand, as a promissory note, carries interest from the day, or the demand; as at law it is given by way of damages. *Upton v. Lord Ferrers*, 5 Ves. 801.

2. Under a written contract for a sum of money payable on demand, or a day certain, interest is in equity, as at law, payable from the time of demand made, or from the fixed period of payment. *Lowndes v. Collens*, 17 Ves. jun. 27.

## 23. In relation to the demand — contract to pay by instalments.

Allowed upon a written agreement to pay by instalments. *Parker v. Hutchinson*, 3 Ves. 133.

24. In relation to the demand — contract to give notes.

Interest at 5 *per cent.* under a contract to give promissory notes. *Lowndes v. Collens*, 17 Ves. jun. 27.

25. In relation to the demand — upon farther directions in general.

Interest is computed by the master's report, upon such debts only as carry interest, according to the rate they carry; and upon farther directions subsequent interest is directed only on those upon which the report has already computed interest; but no interest is computed on simple-contract debts by the report, or by order afterwards. 2 Ves. 165.

26. In relation to the demand — upon farther directions, though question was not reserved.

Upon farther directions the court may add to the decree, and may therefore give interest, though the question of interest was not reserved. 2 Ves. 164.

27. In relation to the demand — judgments, in bankruptcy, and a surplus.

1. Vide in tit. *BANKRUPT*.

2. Interest out of a surplus in bankruptcy, given to judgment-creditors, from the date of the commission to the time when the principal sums were paid; notwithstanding the securities were at the time delivered up to the assignees, with receipts in full indorsed on them; the creditors apprehending that the estates would not produce a surplus, which proved to be a mistake. *Ex parte Deey*, 2 B. & B. 77.

28. In relation to the demand — legacies in general.

The general rule, that a legacy payable in future shall not carry interest before the time of payment, applies to a legacy to infants payable at twenty-one: the exceptions are the case of parent and child, the case of a residue, and where from other special circumstances an intention to give interest clearly appears. *Tyrrell v. Tyrrell*, 4 Ves. 1.

29. In relation to the demand — legacy to a son, having no other provision.

In case of a legacy left by a father to child, the child having no other provision, it is a necessary implication that the legacy should bear interest; but this implication is ousted if he provides any maintenance for the child, however small the maintenance, and however large the legacy. *Ellis v. Ellis*, 1 Sch. & Lef. 5.

30. In relation to the demand — interest by way of maintenance, upon a legacy, in the case of parent and child only.

Interest by way of maintenance upon a legacy in the case of parent and child only. 3 Ves. 287.

31. In relation to the demand — legacy payable *in futuro*, and maintenance given generally.

Legacy from parent to child payable *in futuro*: if maintenance is given generally, it shall carry interest: but if an annual sum less than the interest is given for maintenance, the executor paying that shall have the rest. 3 Ves. 17.

32. In relation to the demand — legacy with remainder over, on dying under age.

A residue being devised to an infant, with a remainder over, in case she should die under age, which she did; the interest, between the death of the testator

testator and that of the infant, shall go to her representative. *Chaworth v. Hooper*, 1 B. C. C. 82.

33. In relation to the demand — *quare* upon legacy to grandchild, payable *in futuro*, or contingent.

Whether a legacy to a grandchild, payable upon a contingency, or at a future day, shall carry interest, as in the case of a child, *quare*. 12 Ves. 23.

34. In relation to the demand — legacy to grandchildren, where grandfather stood *in loco parentis*.

1. A grandfather having taken the children of a son who had ruined himself, educated them entirely, and by his will gave the son an annuity, provided he did not interfere with the children, and then gave legacies to the children. Lord Bathurst held, that the grandfather had put himself *in loco parentis*, and decreed interest on the legacies. 1 Sch. & Lef. 5.

2. So, *per* Lord Roslyn, where a testator gave legacies to the natural children of his son, payable at a future day, and gave no maintenance in the mean time; but gave directions how they should be educated, and attempted to make testamentary guardians. *Ibid.* 6.

35. In relation to the demand — legacy to natural child of a son, where testator stood *in loco parentis*.

*Ibid.*

36. In relation to the demand — master's report in general.

Vide 2 Ves. 165.

37. In relation to the demand — against mortgagee in possession.

Interest will be charged on sales of rents received by mortgagee in possession, after his debt has been paid off. *Lord Trimleston v. Hamill*, 1 B. & B. 377.

38. In relation to the demand — in case of mortgage, upon the whole sum liquidated by report.

In the case of a mortgage, the whole sum liquidated by the report, carries interest. 2 Ves. 159.

39. In relation to the demand — notes.

Vide 3 Ves. 135. *Dick*. 305.

40. In relation to the demand — presumption of agreement to pay interest, from acquiescence in banker's accounts.

Vide 1 B. & B. 429.

41. In relation to the demand — presumption of agreement to pay interest, from previous payment.

When interest has for a length of time been paid upon a consolidated sum of principal and interest; an agreement to that effect will be inferred, and a decree made accordingly. *McCarthy v. Lord Llandaff*, 1 Ball & Beatty, 375.

42. In relation to the demand — presumption of agreement to pay interest, from previous payments upon similar securities.

An implied contract to pay interest may be raised from the dealings between the parties: as, where the debtor has been in the habit of paying interest upon such, or similar securities. *Ex parte Williams*, 1 Rose, 399.

43. In relation to the demand — purchase money.

1. Interest against a purchaser for delaying payment. *Child v. Lord Abingdon*, 1 Ves. 94.

2. A purchaser taking possession without a conveyance, was compelled to pay

pay interest; though the money was to be paid at a particular day on the execution of the conveyance. *Fludyer v. Cocker*, 12 Ves. 25.

3. Purchase money remaining in the purchaser's hands to pay off incumbrances, shall bear interest. *Hughes v. Kearney*, 1 Sch. & Lef. 134.

44. In relation to the demand — possession and purchase money retained by vendor.

Vide *Swanst.* 255.

45. In relation to the demand — arrears of rent-charge, where legal proceedings have been restrained.

Interest will be allowed upon the arrears of a rent-charge, where the annuitant has been restrained from proceeding at law, to recover them. *O'Donel v. Browne*, 1 Ball & Beatty, 262.

46. In relation to the demand — residue payable *in futuro*.

Bequest of a residue, payable at a future time, carries interest; though the legatee does not live to receive the principal. 9 Ves. 289.

47. In relation to the demand — a fund wrongfully withheld.

Interest decreed to the full amount, produced by a fund wrongfully withheld from the proprietor. *Earl of Oxford v. Churchill*, 3 Ves. & Beam. 59.

## II. When it will be refused.

1. In relation to the person — responsible agent keeping money in hand.

Agent, by the desire of his principal, keeping large sums in his hands, for which he was to be responsible from time to time, and duly accounting, not liable to interest, even supposing he employed it. 8 Ves. 48.

2. In relation to the person — administrator *pendente lite*, with respect to a balance in his hands.

An administrator *pendente lite*, is not liable to interest on a balance in his hands, during the pendency of the suit in the ecclesiastical court. *Gallivan v. Evans*, 1 Ball & Beatty 191.

3. In relation to the person — executor keeping money in hand.

1. Executor not charged with interest for a balance in his hands, retained under a fair misapprehension of his right to it. *Bruere v. Pemberton*, 12 Ves. 386.

2. Interest, upon balances, in the hands of executors, cannot be charged, unless the purposes for which the money is retained appear to be answered. 1 Ball & Beatty, 231.

4. In relation to the person — legatee erroneously paid, refunding.

Vide *Swanst.* 199.

5. In relation to the person — steward keeping money in hand, with implied consent of principal.

There may be cases, in which interest would not be decreed against a steward, holding money in his hands: where that practice can be said to have the sanction of the principal. 14 Ves. 509.

6. In relation to the person — slight difference in sums admitted, and reported in trustee's hands.

Vide 2 Ves. 36.

7. In relation to the demand — balance of a mutual account.

Interest refused on the balance of a mutual account, and held to be a simple-contract debt. *Borret v. Goodere*. 1 Dick. 428.

8. In

8. In relation to the demand — account taken in India, and settled with difficulty, by a third person.

Interest not allowed on an account taken in India, and not settled by the parties, but with difficulty, by a third person. *Boddam v. Ryley*, 2 B. C. C. 2.

9. In relation to the demand — arrears of annuity, though interest was reserved by decree.

Interest refused on arrears of annuities, though interest were reserved by the decree. *Signal v. Brereton*, 1 Dick. 278.

10. In relation to the demand — arrears of annuity, though liquidated by report.

Arrears of annuity, and simple-contract debts, though liquidated by the report, do not carry interest. *Bedford v. Coke*, 1 Dick. 178.

11. In relation to the demand — arrears of annuity, in bar of dower.

1. Interest not given on arrears of an annuity in bar of dower. *Tew v. Earl of Winterton*, 3 B. C. C. 489.

2. For interest of arrears of annuity in bar of dower, some contract for interest upon forbearance is necessary: compassion, poverty, or that she borrowed money, not sufficient. 1 Ves. 451.

3. Interest of arrears of annuity in bar of dower, refused. *Tew v. Earl of Winterton*, 1 Ves. 451.

12. In relation to the demand — rests made by bankers at the end of three months.

Rests, made by bankers at the end of three months, cannot be sustained. 1 Ball & Beatty, 360.

- \*13. In relation to the demand — book debts.

Interest given at law upon a written undertaking to pay, on notes payable on a day certain: not upon notes payable at a day uncertain, shop debts, &c. 3 Ves. 135.

14. In relation to the demand — simple-contract debts, though liquidated by report.

Simple-contract creditors not entitled to interest from the confirmation of the report stating the amount of the testator's debts. *Lloyd v. Baldwyn*, Dick. 139.

15. In relation to the demand — payment by co-surety.

Two persons having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against "all actions, suits, costs, charges, damages, sums of money, and expences," which might be incurred by reason of the nonpayment thereof; one on the insolvency of the other had made payments on account of his moiety, is not entitled to interest on such payments. *Bell v. Free, Swanst.* 90.

16. In relation to the demand — upon farther directions in general.

Vide 2 Ves. 165.

17. In relation to the demand — arrears of separate annuity to *feme covert*.

Interest on the arrear of an annuity bequeathed to a married woman for her sole and separate use, not given, though the fund was productive, and though there was a large residuum. *Anderson v. Dwyer*, 1 Sch. & Lef. 301.

18. In relation to the demand — arrears of jointure.

Interest not given upon arrears of maintenance any more than upon arrears of a jointure. *Mellish v. Mellish*, 14 Ves. 516.



## 19. In relation to the demand — judgments.

No interest is allowed upon a judgment in an account before the master, or in an action upon it. 2 Ves. 719.

## 20. In relation to the demand — judgment, subsequent to the recovery.

Under a judgment at law no interest, subsequent to the judgment, can be recovered; but a fresh action may be brought for it, 2 Ves. 162.

21. In relation to the demand — judgment of assets *quando*.

Upon a bill by executors to have the assets administered, no interest is to be allowed upon a judgment on assets *quando acciderint*. Deschamps v. Vanneck, 2 Ves. 716.

## 22. In relation to the demand — interest by way of maintenance, upon a legacy, in the case of parent and child only.

Where a father gives a legacy to a child, payable at a future day, and makes an express provision for maintenance out of another fund, the legacy shall not carry interest until the time of payment. Wynch v. Wynch, 1 Cox, 433.

23. In relation to the demand — legacies from parent to child, payable *in futuro*, with maintenance.

Upon the ground of an express maintenance, and other indications of the intention, the lord chancellor inclined to the opinion, that the rule for interest upon a legacy, given by a parent to a child, till the time of payment, was not applicable: but the bill of the children was dismissed upon circumstances of acquiescence, laches, and the consequent difficulty of taking the accounts. Mitchell v. Bower, 3 Ves. 283.

## 24. In relation to the demand — legacy to son, with maintenance.

Vide 1 S. & L. 5.

25. In relation to the demand — legacy payable *in futuro*, with maintenance.

Vide 3 Ves. 283.

26. In relation to the demand — legacy payable *in futuro*, and annual sum, less than interest, for maintenance.

Vide 3 Ves. 17.

27. In relation to the demand — legacy payable *in futuro*, and contingent.

Testator gave to A., B., C., D., and E. 500*l.* each, to be paid to them at their respective ages of 23 years, and if they should die before that time, then their respective legacies were to sink into the residue of his personal estate. These legacies do not carry interest, and no maintenance can be allowed to the legatees. Descrambes v. Tomkins, 1 Cox, 133.

## 28. In relation to the demand — legacy payable at twenty-one.

Vide 3 Ves. 13.

29. In relation to the demand — *quære* upon legacy to grandchild, payable *in futuro*, or contingent.

Vide 12 Ves. 3.

## 30. In relation to the demand — no interest, by way of maintenance, upon a legacy, simply to a grandchild or natural child.

No interest by way of maintenance upon a legacy simply to a grandchild or a natural child. 6 Ves. 546.

31. In relation to the demand — arrears of maintenance.  
Vide 14 Ves. 516.
32. In relation to the demand — master's report in general.  
Vide 2 Ves. 165.
33. In relation to the demand — against mortgagee in possession.  
Annual rests are not directed in the accounts against a mortgagee in possession from the middle of the time, but only from the beginning in a special case, or not at all. *Davis v. May, Cooper, 238.*
34. In relation to the demand — partnership account, long unsettled, and rendered intricate by neglect.  
In a long unsettled partnership account, rendered intricate by neglect of the party, he or his representative shall have no interest on the balance when settled. *Bodham v. Riley, 1 B. C. C. 239.*
35. In relation to the demand — portions, with maintenance, increased by will.  
Portions under a settlement for younger children, were increased by the will of the father: there being an express maintenance of 2 *per cent.* upon the original portion, the rule for interest upon the legacies does not apply; but the court continued the 2 *per cent.* upon them. *Long v. Long, 3 Ves. 286.*
36. In relation to the demand — deposit on a purchase.  
Purchaser not to pay interest on the deposit, even where he has rendered a suit necessary by refusing to perform the contract on the ground of an objection to the title, which could not be supported. *Bridges v. Robinson, 3 Mer. 694.*
37. In relation to the demand — stale demand.  
Interest refused upon a stale demand. *Merry v. Ryves, 1 Eden, 1.*

### III. *From what period it will be given.*

1. In relation to the demand — annuity, the payment of which was neglected to be enforced.  
Interest directed to be computed on the arrears of an annuity from the time of filing the bill, till which time the nonpayment was attributed to the neglect of the annuitant, in not using means to enforce payment, the fund being effective. *Morgan v. Morgan, Dick. 643.*
2. In relation to the demand — contract to pay on demand, or on a day certain.  
Vide 5 Ves. 801.; 17 Ves. 27.
3. In relation to the demand — a case in which the lands charged were subject to a jointuring power.  
Devise to A. for life, with remainder to his first and other sons, remainder to his daughters; and in default of such issue, the premises to stand charged with two sums, to be paid after the death of A. without issue; and subject to such charge over, with a power to A. of jointuring the whole estate, which he executed. A. dying without issue, held, that the sums only carried interest from the death of the jointress, who survived him. *Reynolds v. Meyrick, 1 Eden, 48.*
4. In relation to the demand — legacies, in general.
  1. Interest not allowed on legacies until the end of one year after the testator's death. 2 Sch. & Lef. 455.
  2. Interest

2. Interest of legacies to be computed from a year after testator's death, unless some other time appointed by testator : but he cannot make executor answer interest beyond what the law has done. 1 Ves. 367.

3. In all cases of legacy, interest only from the end of a year from the death ; unless otherwise directed : the old rule, depending upon the fund, as productive or barren, being exploded. 7 Ves. 97.

4. Interest upon legacies from a year after the death, upon the presumption, that the property is got in by that time, and making interest. 10 Ves. 333.

5. General rule, for convenience, considering the personal estate to be reduced into possession a year from the death of the testator ; and therefore, interest upon legacies from that period, unless some other is fixed by the will ; though actual payment within that time may, in many instances, be impracticable. 13 Ves. 333.

6. Reference by the will to the time when the personal estate shall be got in, does not, without the most plain, distinct intention, affect the legal presumption, that it may be got in within a year. 13 Ves. 334.

7. A legacy out of a personal fund, bequeathed generally, without assigning any time for payment, bears interest only from a year after the death of the testator, though the fund out of which it is to be paid consist of stock and other matters yielding immediate profit. *Pearson v. Pearson*, 1 Sch. & Lef. 10. — In such case, interest is payable from the end of the year, though the fund does not come to be disposable for the payment of the legacies until long after ; and if the fund is productive within the year, the intermediate profits belong to residuary legatee. Sch. & Lef. 12. But if the legacy be charged on lands, interest is payable from the death of the testator, or not at all. *Ibid.* 11.

8. A wife as well as a child is within the exception to the rule, that a legacy does not bear interest till it is payable. 3 Ves. 16.

5. In relation to the demand — legacies to be raised by sale.

1. Devise upon trust, by demise, sale, or mortgage, or by rents and profits, to raise and pay with all convenient speed after the decease of the deviser a sum, and subject thereto upon other trusts. Interest decreed at 4 *per cent.* from the death. *Spurway v. Glynn*, 9 Ves. 483.

2. Legacies charged on a reversion, directed to be raised by sale or mortgage, and declared to carry interest from the death of the testator, it not appearing from the will that the estate charged was a reversion. *Davies v. Davies*, 1 Dan. 84.

6. In relation to the demand — legacies from parent to child payable *in futuro*.

Legacy from a parent to a child bears interest before the time of payment, and from the death of the testator. 3 Ves. 13.

7. In relation to the demand — legacies from parent to child payable *in futuro*, with maintenance.

Vide 1 Cox, 433.

8. In relation to the demand — legacies to grandchildren.

Interest from testator's death, upon legacies to his grandchildren, by implication : the object being a provision and maintenance for the legatees, described as infant orphans, and some of them illegitimate. *Hill v. Hill*, 3 Ves. & Beam. 183.

9. In relation to the demand — legacies to collaterals payable at twenty-one, or marriage.

A legacy from an uncle to a niece, to be paid at twenty-one or marriage, does

does not carry interest before the time of payment. *Crickett v. Dolvy*, 3 Ves. 10.

10. In relation to the demand — legacies from husband to wife.

Interest upon a legacy to a wife or a natural child, not allowed from testator's death; as it is in favour of a legitimate child by way of maintenance. *Lowndes v. Lowndes*, 15 Ves. 301.

11. In relation to the demand — legacies from husband to wife, payable *in futuro*.

No exception in favour of a wife, as for a child, to the rule, that a legacy does not bear interest, before it is payable. *Stent v. Robinson*, 12 Ves. 461.

12. In relation to the demand — legacies to natural children.

Vide 15 Ves. 301.

13. In relation to the demand — legacies in miscellaneous cases.

A testator bequeathed a sum to trustees to place out at interest, and pay and apply the interest for and towards the maintenance and support of F. R., and the maintenance, education, and bringing up of all and every her children until the youngest should attain twenty-one, and then to pay the interest to the plaintiff during such part of her life as she should remain the wife of L. R., for her sole use, and after her death to F. R., whilst she should be his widow; and in case of her death or marriage, then to apply the interest towards the maintenance of her children, till the youngest should attain twenty-one. Held, that F. R. was not entitled to the interest until the end of a year after the testator's death, although the testator (who was her husband's uncle) was in his lifetime in the habit of allowing her an annuity for her support: the exception in favour of legacies by parents or persons in *loco parentis* never having been extended to the case of an adult legatee; and the testator having, in the bequest of annuities to other persons, directed the first payments to be made within the first year after his death. *Raven v. Waite*, 1 W. C. C. 204.

14. In relation to the demand — life-interest.

To tenant for life, whether from the death of the testator, or a year afterwards. 9 Ves. 553.

15. In relation to the demand — tenant for life of the residue.

The tenant for life of the residue under a will, has no claim to interest until one year after the testator's death. *Stott v. Hollingworth*, 3 Mad. 161.

16. In relation to the demand — master's report.

Interest ordered to be calculated on sums reported due from the date of the master's report. *Cruise v. Lowth*, 4 B. C. C. 157. But this order discharged (S. C.) *Ibid.* 316.

17. In relation to the demand — notes.

Interest given on a note of hand from the time of its becoming payable. *Lithgow v. Lyon, Cooper*, 29.

18. In relation to the demand — stale demand.

Vide 1 B. & B. 180.

#### IV. To what amount it will be given.

1. In relation to the person — compound interest against executors keeping money in hand.

Vide 11 Ves. 92.

2. In

2. In relation to the person — compound, against executors under the direction to accumulate.

Executor charged with compound interest, at five *per cent.* under a direction for half-yearly rests, as not having attempted to execute a trust to accumulate; though no loss happened, and a due execution of the trust could not have produced so much. Allowed subsequent costs of proceedings, consequential upon those, of which the costs were allowed him by the original decree; not as to the inquiries and accounts, relating to the breach of trust: nor charged with those costs arising principally from a necessary investigation as to the rule, by which they ought to be charged. *Raphael v. Boehm*, 13 Ves. 590.

3. In relation to the person — executors keeping money in hand.

Vide 11 Ves. 58.; 12 Ves. 127.

4. In relation to the person — executors using money.

Vide 11 Ves. 60.; 12 Ves. 127.

5. In relation to the person — executors unnecessarily calling in property.

Vide 12 Ves. 127.

6. In relation to the person — executors under direction to accumulate. *Ibid.*

7. In relation to the person — trustee, under trust to accumulate.

A trustee in a will which directs money to be laid out at the best interest, keeps it with the co-trustee's consent, at four *per cent.*: ordered to pay five *per cent.* *Forbes v. Ross*, 2 B. C. C. 430.

8. In relation to the demand — general rule.

The reason of the rule in chancery to give interest at four *per cent.* only, is, that money is generally to be had at that rate; but the rule is not inviolable. 2 Ves. 511.

9. In relation to the demand — bonds.

1. Bond creditors not to have interest beyond the penalties of their bonds. *Gibson v. Egerton*, Dick. 409.; *Kettleby v. Kettleby*, Id. 514.

2. Interest not to be calculated on old bonds beyond the penalty. *Tew v. Earl of Winterton*. 3 B. C. C. 489. *S. P. Knight v. Maclean*, *Ibid.* 496.

3. Interest on mortgages, calculated upon the principal and interest reported due: but on bonds and legacies, on the principal only. *Perkins v. Baynton*. 1 B. C. C. 574.

4. No interest beyond the penalty of a bond; except under special circumstances. *Clark v. Seton*, 6 Ves. 411.

5. If the party is, by injunction, prevented from recovering his debt at law; or if an *elegit* creditor is called to an account in equity; interest may be recovered beyond the penalty. 1 Ball & Beatty, 239.

6. Interest beyond the penalty is not, in the master's office, recoverable against the assets of a deceased debtor. *Ibid.*

10. In relation to the demand — bonds, with judgment assigned for same demands.

Bond and judgment assigned: interest must be calculated to the date of the report, so as not to exceed the penalty. *Sharp v. Earl of Scarborough*, 3 Ves. 557.

11. In relation to the demand — bonds, with mortgages for same demands.

Interest beyond the penalty of a bond upon a mortgage for the same debt; though by a surety. *Clarke v. Lord Abingdon*, 17 Ves. jun. 106.

12. In

## 12. In relation to the demand — compound interest, in general.

1. Interest upon interest not given. *Waring v. Cunliffe*, 1 Ves. 99.
2. Though compound interest cannot be taken under an antecedent contract, accounts may be settled, even half-yearly, upon that principle. Exception as to real securities. *Ex parte Bevan*, 9 Ves. 223.
3. An agreement *à priori*, that interest should bear interest, is void; but one at the end of the year, that it should, is valid. 1 Ball & Beatty, 430.
4. Award not to be impeached for allowing compound interest; for it may be allowed in case of a contract for it, either express or to be inferred from the nature of the dealings between the parties; as if it is according to the course of their trade; therefore it is a conclusion of fact, on which the judgment of the arbitrators is final; but this doctrine, as to interest, has no relation to mortgages. *Morgan v. Mather*, 2 Ves. 15.

## 13. In relation to the demand — compound interest on remainder-man's proportion of fine for renewal.

Compound interest at four *per cent.* allowed to the tenant for life, for the remainder-man's proportion of fines paid for the renewal of a beneficial lease. *Nightingale v. Lawson*, 1 B. C. C. 440.

## 14. In relation to the demand — judgment.

1. Interest, beyond the penalty, allowed to a judgment creditor, trustee in possession, under the will of his debtor; as such applying the entire of the rents, in discharge of other debts, and not retaining any part for his own. *Atkinson v. Atkinson*, 1 Ball & Beatty, 258.

2. Judgment creditors, coming in under a decree, and proving debts in the master's office, are not entitled to interest beyond the penalty. *Moore v. M'Namara*, *Ibid.* 309.

## 15. In relation to the demand — judgment, subsequent to the recovery. Vide 2 Ves. 162.

## 16. In relation to the demand — legacies.

1. Interest at five *per cent.* decreed on a legacy for mourning under special circumstances. *Swinifen v. Scawen*, *Dick.* 117.

2. A legacy to be paid at twenty-one, with interest at four *per cent.* given to an infant; ordered to be invested in the funds, and if greater interest made, to be for the benefit of the legatee. *Green v. Pigot*, 1 B. C. C. 103.

3. General rule, that legacies, where no interest is given by the will, shall carry interest at four *per cent.* only, and from the end of a year after death of the testator, except where it is given by way of maintenance; though the fund produces more; and the interest shall not be increased by the effect of appropriation. *Sitwell v. Bernard*, 6 Ves. 520.

4. Claim of five *per cent.* upon a legacy, as being given out of a capital in trade, not decided. *Stent v. Robinson*, 12 Ves. 461.

## 17. In relation to the demand — master's report.

Interest to be computed on the sum reported due to the plaintiff, not confining it to the principal. *Wainwright v. Healy*, 1 *Dick.* 444.

## 18. In relation to the demand — mortgage.

Vide 1 B. C. C. 574.

## 19. In relation to the demand — of rest against mortgagee in possession.

Vide *Cooper*, 238.

## 20. In relation to the demand — a fund wrongfully withheld.

Interest at four *per cent.* upon a demand established as a debt against the funds of others. *Earl of Oxford v. Churchill*, 3 Ves. & Beam, 59.

21. In

21. In relation to the demand — power to charge a sum in gross.

A power to charge a sum in gross, implies a power to give any rate of legal interest; and the rule of the court to give four *per cent.* applies only where no rate is specified by the party having power to fix it. *Lewis v. Freke*, 2 Ves. 507.

22. In relation to the demand — demand established as a debt against the funds of others.

Vide 3 Ves. & Beam. 59.

23. In relation to the demand — West India interest.

1. Legacy of a sum of money Jamaica currency, decreed with Jamaica interest from the death of the testator. *Raymond v. Brodbelt*, 5 Ves. 199.

2. West India interest. 9 Ves. 267.

3. Legacies in the currency of Jamaica, where the testator resided: assets and executors in both countries. The legatees, living in this country, not entitled to Jamaica interest. *Bourke v. Ricketts*, 10 Ves. 330.

24. In relation to the demand — miscellaneous.

1. Interest given at four and a half *per cent.* *Cox v. Chamberlain*, 4 Ves. 631.

2. Under an agreement to take off a discount above five *per cent.* for prompt payment, though according to the custom of the trade, the creditor cannot upon failure charge more than five *per cent.* *Ex parte Aynsworth*, 4 Ves. 678.

3. Upon a contract for 18 month's credit, as to the usage of a trade to include the current year, *quære*. *Lord Courteney v. Godschoall*, 9 Ves. 473.

#### V. The persons entitled to accumulations of interest ascertained.

1. Where legacies to children are payable at twenty-one.

Vide 1 B. C. C. 335.

2. Where legacies are contingent.

Interest of a contingent legacy between the death of tenant for life, and the contingency happening, falls into the residue. *Shaw v. Canliffe*, 4 B. C. C. 144.

3. In a miscellaneous case.

Gift of a special residue, the interest to wife for life, then to the niece for life, then the principal to her children, if any; if not, to the younger children of A., if any; if not to B.: the general residue to his wife; the nephew and niece had no children; the interest from death of the niece to that of the nephew, falls into the residue. *Wyndham v. Wyndham*, 3 B. C. C. 58.

#### VI. Of refunding interest.

Where the court cancels a bond.

An equity attaching to a bond attaches also to interest paid on it; and where the court orders a bond to be cancelled, they will also order the interest paid on it to be refunded. *Hitchcock v. Giddings*, 4 Price, 135.

### JOINT-TENANCY.

#### I. What words create a joint-tenancy.

1. An interest to two or more is joint, unless there are words of severance, or unless a contrary inference arises in equity from the nature of the transaction.

2. Set-

2. Settlement to permit all and every the children to take profits to them and their heirs for ever.
3. Vide in tit. DEVISE. — WILL.

## II. When a joint-tenancy is severed.

By one covenanting to sell.

## III. When a joint-tenancy remains unsevered.

Where the tenants perish by one blow.

## IV. There is no survivorship amongst merchants.

Not therefore in the case of expenditure, in the way of trade, upon land.

### I. What words create a joint-tenancy.

1. An interest to two or more is joint, unless there are words of severance, or unless a contrary inference arises in equity from the nature of the transaction.

Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as "equally among," &c., or an inference of that sort arises in equity from the nature of the transaction; as in partnerships, a joint mortgage, &c. *Morley v. Bird*, 3 Ves. 628.

2. Settlement to permit all and every the children to take profits to them and their heirs for ever.

Settlement to permit all and every the children to take rents and profits to them and their heirs for ever; they are joint-tenants. *Stratton v. Best*, 2 B. C. C. 233.

### II. When a joint-tenancy is severed.

By one covenanting to sell.

Covenant by joint-tenant to sell, severs the joint-tenancy in equity, though not at law. 3 Ves, 257.

### III. When a joint-tenancy remains unsevered.

Where the tenants perish by one blow.

If two persons being joint-tenants, perish by one blow, the estate will remain as it was. *Bradshaw v. Toulmin*, Dick. 633.

### IV. There is no survivorship amongst merchants.

Not therefore in the case of expenditure, in the way of trade, upon land.

If joint-tenants of leasehold or freehold, lay out money jointly upon it in the way of trade, there is no survivorship. 1 Ves. 435.

## IRELAND.

### In relation to judicial proceedings.

Outlawry is at this day the common process in Ireland. 4 Ves. 738.

LACHES.



## LACHES.

## I. General rules and observations.

1. Principle of equity, that the demand of relief should be prompt.
2. Where no excuse exists, the effect of laches is the same in equity as at law.
3. Equity will not relieve after a great lapse of time.
4. Reason of the doctrine.
5. Consequences of the principle, that the demand of relief should be prompt.
6. Laches may be excused from ignorance.
7. Laches may be excused from the obscurity of the transaction.
8. Laches are excused by the pendency of a suit.
9. Lapse will not affect one seeking discovery of title from one in possession of its evidences.
10. Laches not applicable to a large body of creditors.
11. Laches not imputable to creditors under a devise for debts.
12. Distress or embarrassment will not excuse laches.
13. The neglect to obtain the legal title, by one in possession under an equitable title, is not laches.
14. Effect of non-user of a right.

## II. Influence of laches in particular cases.

1. Account — acquiescence alone in accounts furnished, does not amount to a settlement.
2. Account — laches, permitting a distribution.
3. Account — account of interest against tenant for life, not limited to six years.
4. Account — capture by a privateer.
5. Account — account of rents and profits confined to six years.  
*Vide infra.*
6. Annuity act — effect of laches with reference to.
7. Charge — effect of laches upon equitable charge on real estate.
8. Charity — mortgage given to charity by will in 1754, and no bill filed till 1792.
9. Contracts — the time at which a contract is to be performed material.  
*Vide in tit. CONTRACT.*
10. Contracts — see *infra* “Specific performance.”
11. Creditors — the doctrine does not apply to a large body of creditors.
12. Creditors — laches not imputable to creditors under a devise for debts.
13. Election — influence of laches in a case of election.
14. Fraud — no lapse of time shall operate as a direct bar of fraud.
15. Fraud — but it may as evidence.
16. Fraud — laches of twenty-five years bars relief.
17. Fraud — specific performance decreed, the lapse of time being trifling, and the result of fraud.

18. Fraud

18. Fraud — rendering contracts impeachable.
19. Fraud — equity will relieve, where lessee has lost his right by fraud in lessor.
20. Fraud — ignorance of fraud, or excuses for laches in *cestui que* trust.
21. Impeachable transactions — contracts.
22. Impeachable transactions — misapplication of purchase money of *feme covert's* separate estate.
23. Impeachable transactions — leases.
24. Impeachable transactions — lease at under value.
25. Impeachable transactions — recovery.
26. Incorporeal rights — laches operate as evidence for and against.
27. Infancy — defendant's infancy, no excuse for plaintiff's delay.
28. Landlord and tenant — nonpayment of rent no bar to recovery at the expiration of the term.
29. Landlord and tenant — equity will relieve, where lessee has lost his right by fraud in lessor.
30. Landlord and tenant — laches in lessee accounted for, no bar to relief.
31. Legacy — lapse raises a presumption of payment.
32. Legal proceedings — effect of laches in not proceeding with a suit.
33. Legal proceedings — bill being dismissable; excuses, laches.
34. Mines — inference of abandonment of a right from non-user, not applicable to the case of mines.
35. Mortgage — laches are a bar to redemption.
36. Presumption — of release.
37. Presumption — against stale demands.
38. Release — presumption of.
39. Remainder-man — effect of laches in creditor not demanding interest from tenant for life.
40. Remainder-man — laches precludes remainder-man turning round tenant to seek compensation against the assets of tenant for life.
41. Specific performance — the time at which a contract is to be performed material. Vide in tit. CONTRACT.
42. Specific performance — refused on laches of plaintiff.
43. Specific performance — refused on laches and trifling conduct of plaintiff.
44. Specific performance — laches in not proceeding with a suit, a bar.
45. Specific performance — delay, injurious to the adverse party, precludes a performance.
46. Specific performance — trifling laches, the result of fraud, excused.
47. Trust — effect of laches of *cestui que* trust.
48. Trust — ignorance of fraud excuses laches in *cestui que* trust.
49. Miscellaneous — a case between heir and residuary legatee, and a redeemable interest the subject.

**III. Influence of laches upon forms of procedure.**

As rendering necessary a bill, where otherwise a motion would suffice.

**IV. In relation to proceedings at law.**

1. Effect of laches by analogy to the statutes of limitation.
2. At law, length of time raises a presumption against claims the most solemnly established.

**I. General rules and observations.**

1. Principle of equity, that the demand of relief should be prompt.  
Principle of equity, that the demand of relief should be prompt. 1 Ves. & Beam. 246.
2. Where no excuse exists, the effect of laches is the same in equity as at law.
  1. Length of time is a bar to an equitable title. 1 Ball & Beatty, 503.
  2. Where facts constituting fraud are known, when no subsisting trust, or continuing influence is proved to exist; an equitable title is barred in the same manner, as a legal title in a possessory action. 1 Ball & Beatty, 166.
  3. Equity will not relieve after a great lapse of time.  
Equity will not give relief after a great length of time. Underwood v. Lord Courtown, 2 Sch. & Lef. 41.

**4. Reason of the doctrine.**

It would be mischievous to encourage claims founded on transactions that took place in remote periods. 2 Sch. & Lef. 71.

5. Consequences of the principle, that the demand of relief should be prompt.

Distinction, whether, though it would be difficult to maintain under that principle upon the loss of other remedies a security invalid in law and equity, the court would take away that benefit. 1 Ves. & Beam. 246.

**6. Laches may be excused from ignorance.**

1. There can be no acquiescence in acts which the party is ignorant, at the time, that he has any right to dispute. Cholmondeley v. Clinton, 2 Mer. 362.

2. Upon a bill by a lessee evicted for nonpayment of rent seventeen years before, though imputing fraud unsupported in proof, but praying for liberty to try the validity of the eviction at law, by the removal of a temporary bar, a mortgage of the tenant's interest, vested in the landlord: Held, that he was entitled to such relief, there being no equitable circumstances to bar him of that right; he having acquiesced in ignorance of his rights; and the defendant having, by the concealment of a fact, obtained a legal advantage, which, consistent with good conscience, should not be allowed to protect his title on such a trial. Blennerhassett v. Day, 2 B. & B. 104.

**7. Laches may be excused from the obscurity of the transaction.**

Lapse of time, imputed as laches, may be excused by the obscurity of the transaction, whereby the plaintiff was disabled from obtaining full information of his rights. Murray v. Lord Palmer, 2 Sch. & Lef. 487.

**8. Laches are excused by the pendency of a suit.**

Parties obtaining wrongful possession, and setting up a false title (under colour of instruments finally condemned), during the investigation of which they

they are protected in their possession by the court, shall not avail themselves of any length of possession, pending the investigation, as a bar to the person who ultimately proves to have the right. *Bond v. Hopkins*, 1 Sch. & Lef. 413.

9. Lapse will not affect one seeking discovery of title from one in possession of its evidences.

Lapse of time shall not prejudice a person who has a title, while seeking a discovery of that title from persons who have possessed themselves of the evidences of it. 1 Sch. & Lef. 413. 425.

10. Laches not applicable to a large body of creditors.

Laches does not apply to a large body of creditors. *Whichcote v. Lawrence*, 3 Ves. 740.

11. Laches not imputable to creditors under a devise for debts.

Laches not to be imputed to creditors, under a devise for debts, as to an individual devisee, to prevent or limit the account of rents and profits, even against an infant heir. *Williams v. Coussmaker*, 12 Ves. 136.

12. Distress or embarrassment will not excuse laches.

The court cannot attend to circumstances of distress or embarrassment, as an excuse for laches, whereby the demand has become barred by length of time. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 639.

13. The neglect to obtain the legal title, by one in possession under an equitable title, is not laches.

A person in possession under an equitable title, merely neglecting to obtain the legal title is not guilty of laches which will defeat his right. *Crofton v. Ormsby*, 2 Sch. & Lef. 603.

14. Effect of non-user of a right.

The inference of abandonment of a right from non-user, not applicable to the case of mines. 16 Ves. 392.

## II. *Influence of laches in particular cases.*

1. Account — acquiescence alone in accounts furnished, does not amount to a settlement.

Acquiescence alone in accounts furnished, does not amount to a settlement. 1 Ball & Beatty, 428.

2. Account — laches, permitting a distribution.

Creditors are not relieved in equity after gross laches; therefore, where a creditor, seven years after coming of age, filed a bill to obtain the benefit of a decree to account, and after answer took no step for thirty-three years, and then filed another bill against residuary legatees of a party, whose assets were distributed with notice to the plaintiff and against other representatives, the bill was dismissed upon the laches only, though the question of satisfaction was doubtful. *Hercy v. Dinwoody*, 2 Ves. 87.; 4 B. C. C. 257.

3. Account — account of interest, against tenant for life, not limited to six years.

Equitable charge on real estate not barred by lapse of time without demand, though considerable; and though at length brought forward under circumstances not favourable; yet not equivalent to, or affording a presumption of, a release. Account of the interest against a tenant for life; not limited to six years. *Stackhouse v. Barnston*, 10 Ves. 453.

4. Account — capture by a privateer.

Bill for an account of the produce of the captures by the Royal Family privateers

privateers of Bristol, dismissed on the ground of laches: the original bill having been filed in 1749: but the length of time cannot be pleaded in bar. *Pearson v. Belchier*, 4 Ves. 627.

5. Account — account of rents and profits, confined to six years. Vide *infra*.

Account of rents and profits confined to six years by analogy to the action for mesne profits. *Reade v. Reade*, 5 Ves. 744.

6. Annuity act — effect of laches with reference to.

Effect of laches with reference to the annuity act. 12 Ves. 378.

7. Charge — effect of laches upon equitable charge on real estate.

Vide 10 Ves. 453.

8. Charity — mortgage given to charity by will in 1754, and no bill filed till 1792.

Where a mortgage was given to a charity by will in 1754, no bill filed till 1792, referred to enquire into circumstances. *Pickering v. Earl of Stamford*, 4 B. C. C. 214.

9. Contracts — the time at which a contract is to be performed material.

1. Vide in tit. CONTRACT.

2. The time at which a contract is to be performed, material. 4 Ves. 497.

10. Contracts. — See *infra* "specific performance."

11. Creditors — the doctrine does not apply to a large body of creditors. Vide 3 Ves. 740.

12. Creditors — laches not imputable to creditors under a devise for debts.

Vide 12 Ves. 136.

13. Election — influence of laches in a case of election.

Bill against the devisee and personal representatives, on the ground of an election by the testatrix to take under a will, dismissed with costs, on the conduct of the plaintiff; who eighteen years ago had compromised a suit instituted by him upon the subject; in consequence of which the right to compel an election, depending on a doubtful question on the will, was not ascertained: and the party possessed under the will during her life had disposed of her estate real and personal by will. *Yate v. Moseley*, 5 Ves. 480.

14. Fraud — no lapse of time shall operate as a direct bar of fraud.

Length of time may bar an equity: twenty years possession bars an equity of redemption; but no time can cover a fraud. 2 Ves. 280.

15. Fraud — but it may as evidence.

Effect of length of time, not as a bar to relief against fraud; but by way of evidence. 12 Ves. 374.

16. Fraud — laches of twenty-five years bars relief.

Where the facts constituting fraud are in the knowledge of the party, and he lies by for twenty-five years, he cannot get relief. *Blennerhassett v. Day*, 2 B. & B. 118.

17. Fraud — specific performance decreed; the lapse of time being trifling, and the result of fraud.

Specific performance; the lapse of time being trifling, and the result of fraud. *Savage v. Brocksopp*, 18 Ves. jun. 335.

18. Fraud

## 18. Fraud — rendering contracts impeachable.

Where a party rests satisfied with an agreement, and for some time treats it as fair, it is most material to ascertain the time he first impeaches it; for although he may be entitled to relief, if applied for in due time, by his laches he may lose it. 2 Ball & Beatty, 118.

## 19. Fraud — equity will relieve, where lessee has lost his right by fraud in lessor.

Equity will relieve where there is mere lapse of time unaccounted for, without misconduct in the lessee, or where the lessee has lost his right by fraud in the lessor. Lennop v. Napper, 2 Sch. & Lef. 682. 689.

20. Fraud — ignorance of fraud, or excuses for laches in *cestui que* trust.

When the inheritor, *cestui que* trust, is ignorant of the facts constituting the fraud, the trust continuing; he is not barred of relief against the trustee by length of time. 1 Ball & Beatty, 170.

## 21. Impeachable transactions — contracts.

Vide 2 B. & B. 118.

22. Impeachable transactions — misapplication of purchase-money of *feme covert's* separate estate.

A purchaser of part of the separate estate of a *feme covert*, under a decree, cannot, after twenty-two years, be disturbed; though the purchase-money might have been misapplied. Burke v. Crosbie, 1 Ball & Beatty, 489.

## 23. Impeachable transactions — leases.

By the acquiescence of a debtor for nineteen years, in a lease granted by him, to secure a debt, he is precluded from proving the rent to be an under-value. Morony v. O'Dea, 1 Ball & Beatty, 109.

## 24. Impeachable transactions — lease at under-value.

1. The question of under-value is not, after a great length of time, entertainable. 1 Ball & Beatty, 130.

2. After an acquiescence for twenty years, reversionary leases, obtained by an agent from his principal, at under-value, the relation of creditor and debtor also subsisting, will not, from the laches of the plaintiff, be set aside; the fiduciary character having, during that period, ceased to exist, and the transaction being recognised on the oath of the principal as fair. Medlicott v. O'Donel, 1 Ball & Beatty, 156.

3. After an acquiescence in the sale of the reversion, calculated on the rents reserved in such leases; it cannot from the laches of the plaintiff, being in other respects fair, be impeached. 1 Ball & Beatty, 156.

## 25. Impeachable transactions — recovery.

A son, tenant in tail in remainder, when just of age, in 1769, joined his father, tenant for life, in a recovery, for the purpose of raising 3000*l.* for the father, and reselling the estate, the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father in 1793; though under the circumstances there was no probability of issue. Upon that ground a bill by the trustees under a general trust for his creditors, claiming as purchasers under the statute of 27 Eliz. c. 4. was dismissed, without deciding whether they could sustain that character; or, how far a settlement, merely as being voluntary is affected by the statutes of Elizabeth. Brown v. Carter, 5 Ves. 862.

26. Incorporeal rights — laches operate as evidence for and against.

Effect of length of time, as evidence, in the instance of incorporeal hereditaments. 12 Ves. 377.

27. Infancy — defendant's infancy, no excuse for plaintiff's delay.

Infancy of defendant. no excuse for plaintiff's delay. 2 Ves. 12.

28. Landlord and tenant — nonpayment of rent no bar to recovery at the expiration of the term.

Nonpayment of rent reserved on a lease, though for upwards of twenty years, shall not bar the lessor from recovering possession at the end of the term. *Saunders v. Lord Annealey*, 2 Sch. & Lef. 106.

29. Landlord and tenant — equity will relieve, where lessee has lost his right by fraud in lessor.

Vide 2 S. & L. 682. 689.; 2 B. & B. 104.

30. Landlord and tenant — laches in lessee accounted for, no bar to relief.

Vide 2 S. & L. 682. 689.

31. Legacy — lapse raises a presumption of payment.

1. Lapse raises a presumption that a legacy has been paid. *Jones v. Turberville*, 4 B. C. C. 115.

2. After thirty-five years a legacy would be barred on presumption of satisfaction. 2 Ves. 280.

32. Legal proceedings — effect of laches in not proceeding with a suit.

In cases seeking a specific execution, laches is equally as strong against a plaintiff in not prosecuting, as in not commencing a suit. 1 Ball & Beatty, 69.

33. Legal proceedings — bill being dismissable, excuses laches.

Where there is a suit pending for forty years, and not abated, but remaining in such a situation that the defendant might at any time have applied to dismiss the bill if he had thought fit; he shall not avail himself of laches in the plaintiff in not proceeding, in bar of the relief sought. *Gifford v. Host*, 1 Sch. & Lef. 386. 405. *Secus semble*, if the suit had abated in the mean time. *Ibid*.

34. Mines — inference of abandonment of a right from non-user, not applicable to the case of mines.

Vide 16 Ves. 392.

35. Mortgage — laches are a bar to redemption.

Demurrer on the ground of length of time to a bill for redemption of a mortgage, is good. 4 Ves. 479.

36. Presumption — of release.

Testator gave the residue of his personal to his executors for their own use and benefit; afterwards by a codicil, he directed them to dispose of it in charities; and part was accordingly applied in founding a school. Thirty-five years after the testator's death, all the next of kin and the acting trustee being dead, a bill was filed by the representative of one of the next of kin, on the ground that part of the personal was secured by mortgage, therefore as to that the charitable bequest was void, and that the right of the next of kin was but lately discovered; the bill therefore prayed an account of the personal, and that the charitable bequest of what was out  
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on mortgage should be declared void, and that it should result to the next of kin: held, that by the codicil the executors were trustees of the whole, and could not claim for themselves: that at all events the next of kin could not recal what had been laid out; that the length of time alone was not sufficient to raise a presumption that they knew their right, and released it or acquiesced; therefore an account was decreed, but with special inquiry into all the circumstances, and whether the next of kin released, assigned, or in any manner gave up their right. Upon the report, the special circumstances affording no presumption of a release, an issue being declined, the accounts being clear, the trustees not being called on to refund what had been applied, and the widow being barred by the will, or her right of election having become impracticable, so much of the personal residue bequeathed to the charity, as was secured on mortgage, was notwithstanding the length of time, decreed to the next of kin, with interest from the filing of the bill. *Pickering v. Lord Stamford*, 2 Ves. 272. 581.

### 37. Presumption — against stale demands.

Vide 2 Ves. 583.

### 38. Release — presumption of.

Vide 2 Ves. 272. 581.

### 39. Remainder-man — effect of laches in creditor not demanding interest from tenant for life.

The mere laches of a creditor, in not demanding interest from the tenant for life, from 1755 to 1802, was not sufficient to deprive him of it as against the remainder-man: though otherwise, *semble*, if his not demanding had not arisen from any collusion between him and tenant for life. *Loftus v. Swift*, 2 Sch. & Lef. 642.

### 40. Remainder-man — laches precludes remainder-man turning round tenant to seek compensation against the assets of tenant for life.

After lying by for a length of time, remainder-man shall not turn round the tenant to seek compensation against the assets of tenant for life. 1 Sch. & Lef. 74.

### 41. Specific performance — the time at which a contract is to be performed, material.

1. Vide in tit. CONTRACT.

2. With respect to the performance of a contract, the time is material. Therefore a bill for specific performance was upon the gross laches of the plaintiff, dismissed with costs. *Harrington v. Wheeler*, 4 Ves. 686.

### 42. Specific performance — refused on laches of plaintiff.

1. Specific performance refused on account of the laches of the plaintiff, the vendor. *Guest v. Homfray*, 5 Ves. 818.

2. Bill for specific performance of an agreement dismissed upon the lapse of time without proceeding in the performance. *Alley v. Deschamps*, 13 Ves. 225.

3. Specific performance of a lease was refused from the laches of the plaintiff; who, after bill filed and answer put in, controverting his rights, being put out of possession, acquiesced for nineteen years in the adverse title and possession of the defendant, without prosecuting the suit. *Moore v. Blake*, 1 Ball & Beatty, 62.

4. *Eaton v. Lyon*. 3 Ves. 690.

5. A., by an instrument, demised or agreed to demise lands to B. for three lives, (not named), at a yearly rent, and further agreed that leases should be perfected at the request of either party. B., being in possession under the agreement, on his marriage, conveyed his interest in the lands to trustees in



strict settlement; A. afterwards served an ejectment for nonpayment of rent on B., but not on the trustees, or the eldest son of the marriage, and recovered the lands, which he then leased to C., and sold the reversion; neither B. nor the trustees ever attempting to recover the possession. A bill, on the death of B. twenty years after, by the eldest son of the marriage, for a specific execution of the agreement, dismissed; as the title of the plaintiff, after such a lapse of time, and from the circumstances, could not be sustained against a *bona fide* purchaser of the legal interest, accompanied by twenty years' possession. *Pentland v. Stokes*, 2 B. & B. 68.

43. Specific performance — refused on laches and trifling conduct of plaintiff.

Specific performance refused on the laches and trifling conduct of the plaintiff; the contract being for a sale to the plaintiff under a bankruptcy of a reversionary interest for life; which in the interval fell into possession. The defendants having also been in some degree remiss, the bill was dismissed without costs upon delivering up the agreement. *Spurrier v. Hancock*, 4 Ves. 667.

44. Specific performance — laches in not proceeding with a suit, a bar.  
Vide 1 B. & B. 69.

45. Specific performance — delay, injurious to the adverse party, precludes a performance.

1. Where the object of one of the parties contracting would be defeated by delay in the execution of it; if the other party delay, he shall not afterwards be allowed to insist on performance. 2 Sch. & Lef. 604.

2. So, if the delay were injurious to one of the parties. *Ibid.*

46. Specific performance — trifling laches, the result of fraud, excused.  
Vide 18 Ves. 335.

47. Trust — effect of laches of *cestui que* trust.

R. P. being entitled to two copyholds, surrendered one to the use of his will, and bequeathed both copyholds to his trustees and executors in trust, for his grandson. The trustees and executors renounced probate, and were not admitted. The son of R. P. was afterwards admitted to the copyholds, and he surrendered for a valuable consideration, to one Holloway, who surrendered to the father of the plaintiff, by whom the copyholds were bequeathed to the plaintiff. Held, as to the copyhold which R. P. surrendered to the use of his will, that the plaintiff his grandson was entitled, though thirteen years had elapsed from the time he became adult, and that the defendant was a trustee for, and must surrender to, him; and an account was directed of timber cut; and also of the rents and profits for the last six years. *Pearce v. Newlyn*, 3 Mad. 186.

48. Trust — ignorance of fraud excuses laches in *cestui que* trust.  
Vide 1 B. & B. 170.

49. Miscellaneous — a case between heir and residuary legatee, and a redeemable interest the subject.

Residuary legatee having been admitted to a copyhold estate, was in possession above nineteen years, when the heir obtained possession by ejectment; after acquiescence for nine years, the residuary legatee filed a bill, claiming the estate, as having been a redeemable interest in the testator; and, having been treated as such, it was so decreed. An account was directed of the money expended in repairs, &c.; and inquiries as to incumbrances; the court inclining strongly to support the acts of the heir, while in possession. *Hardy v. Reeves*, 4 Ves. 466.

**III. Influence of laches upon forms of procedure.**

As rendering necessary a bill, where otherwise a motion would suffice.

The court refused upon petition or motion to prosecute an enquiry, directed by a decree many years ago, but never pursued; the party applying being born some years after the decree; only two months old at the date of the general report; and made a party some years afterwards, but several years before the application. *Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 387.

**IV. In relation to proceedings at law.**

1. Effect of laches by analogy to the statutes of limitation.

Effect of length of time at law by analogy to the statute of limitation. 13 Ves. 306.

2. At law, length of time raises a presumption against claims the most solemnly established.

At law, length of time raises presumption against claims the most solemnly established. 2 Ves. 13.

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**LANDLORD AND TENANT.**
**I. What instruments shall operate as agreements only, not as leases.**

1. An agreement to let, if a future executory act is in view.
2. An instrument looking to some future instrument, and a more permanent interest than from year to year.
3. Instruments, which though containing words of present demise, do not ascertain all the terms of the contract.
4. An instrument in which an essential part of the contract, the nomination of the lives, was wanting.

**II. Of the construction of agreements for leases.**

1. Proper covenants are implied in an agreement for a lease.
2. Where the agreement is written, the custom of the country is not an implied term.
3. Agreement to manage and quit the premises agreeably to the manner of former tenants.

**III. Of the specific performance of agreements for leases.**

1. Notwithstanding no definite term is expressed.
2. Notwithstanding lessee's insolvency.
3. Notwithstanding lessee's insolvency, and other circumstances.
4. Notwithstanding lessee's breach of contract.
5. Notwithstanding lessee's insolvency and breach of contract.
6. Notwithstanding a contract to underlet, contrary to the agreement.
7. In opposition to a stipulation against assignment.
8. Notwithstanding refusal of tenant to execute a lease tendered.
9. Notwithstanding suppression of facts by the lessee, and other circumstances.

10. Not-

10. Notwithstanding notice given by plaintiff to quit.
11. Notwithstanding the term expires before the hearing.
12. Notwithstanding the lease would be void against those in remainder.
13. Proof of the agreement.

#### IV. Of the construction of covenants.

1. A covenant not to let, set, or demise for all or any part of the term, restrains assignment.
2. A covenant against assignment does not restrain under-letting.
3. A covenant against under-letting without licence in writing, not satisfied by a parol licence.
4. Proviso against assignment, in a lease to lessee, his executors, and assigns, not repugnant.
5. Covenants against assignments are strictly construed.
6. A licence once granted, determines a covenant against assignment.
7. A covenant for quiet enjoyment implied in the words "grant and demise."
8. A covenant for payment of rent implied in the words "yielding and paying."
9. Covenants for penal rents.
10. The construction of covenants for perpetual renewal is the same in equity as at law; and where express, will be executed.
11. The leaning is against covenants for perpetual renewal.
12. Unless the words of a covenant clearly import a continued interest, it shall not be inferred against the party covenanting.
13. Construction of a covenant for renewal.
14. A covenant to renew on the falling in of one life, does not extend to the falling in of two.
15. A covenant for renewal is not included in a covenant to renew on the same covenants.
16. Whether, under the circumstances, a covenant for renewal is included in a covenant to renew on the same covenants.
17. Restraint of leasing applicable to a covenant for renewal, as well as a lease originally exceeding the limits.
18. Construction of a covenant to renew on a renewal by the lessor, paramount.
19. A renewal lease not inconsistent with a covenant to let and manage to the best advantage.
20. A covenant to repair includes a destruction by fire.

#### V. Of the construction of bonds for the performance of covenants.

They extend to implied, as well as to express, covenants.

#### VI. What are usual covenants.

Covenants not contradicting the incidents of the lessee's estate.

#### VII. What

**VII. What are not usual covenants.**

1. Covenants not contradicting the incidents of the lessee's estate.
2. A covenant against assignment.
3. But in this case a covenant against assignment was held to be a usual covenant.
4. A covenant against under-letting.
5. But in this case a covenant against under-letting was held to be a usual covenant.

**VIII. Of the renewal of terms.**

1. Renewal lease may, for the protection of legal interests, be considered as the original lease.
2. A renewal by tenant for life, under a settlement, shall operate to the uses of the settlement. Vide in tit. CHARGE.
3. Right of renewal may be forfeited by the laches of the tenant.
4. What acts are a dereliction, negligence, or wilful default in the tenant.
5. A covenant for perpetual renewal is valid.
6. A covenant for perpetual renewal, obtained without consideration, will not be enforced.
7. Implication of a covenant for perpetual renewal.

**IX. Of the determination of terms.**

1. An option to determine, not expressly limited to either party, is confined to the lessee.
2. Under a proviso if the premises should be wanted for building.
3. Miscellaneous.

**X. Of conditions of re-entry.**

1. An advertisement does not work a forfeiture.
2. A case of no notice of the condition, and no interest for the term prohibited, certainly passed.
3. May be waived by acts *in pais*.
4. May be waived by accepting rent, with notice.
5. May be waived by laches.
6. May be waived by the lessor assigning his reversion.

**XI. Of the jurisdiction of courts of equity to relieve against conditions of re-entry.**

1. Where compensation can be made.
2. Re-entry for nonpayment of rent.
3. Re-entry for not insuring.
4. Re-entry for not repairing.
5. Re-entry for assigning.
6. In relation to the statute 4 Geo. 2. c. 28.

**XII. Of the jurisdiction of courts of equity to set aside leases.**

1. On the ground of fraud.
2. See in tit. CHANCERY.

XIII. Of

**XIII. Of terms attendant.**

1. Distinction between terms in gross and terms attendant.
2. They belong, when satisfied, to the owner of the inheritance.

**XIV. Of the landlord's rights.**

1. To a decree to prevent a breach of covenant.
2. The possession of the tenant is that of the landlord.
3. On the tenant embarrassing the tenure.
4. On disclaimer by tenant.
5. After a recovery against him in ejectment, through his own negligence.
6. An action for use and occupation will not lie where there is a deed.

**XV. Of the tenant's rights.**

1. To a discovery of the landlord's title.
2. To defeat the landlord's title.
3. To set up a title adverse to his landlord.
4. To compel the landlord to interplead.
5. To assign.
6. To set-off for repairs.
7. To relief upon expenditure permitted.

**XVI. Of the tenant's obligations.**

1. To preserve his landlord's rights.
2. Distinction between the original lessee and his assignee.

**XVII. Of the rights of the tenant's assignee.**

To set up an adverse title.

**XVIII. With reference to the Irish tenantry act.**

1. General observations.
2. The six months to redeem are calendar months.
3. The right to renew may be lost by laches.
4. As to what shall be deemed reasonable time after demand for paying renewal fines.
5. Under the circumstances, a tender was held to be in time.
6. Form of the demand.
7. Of a bill to perpetuate the evidence of a demand.

**I. What instruments shall operate as agreements only, not as leases.**

1. An agreement to let, if a future executory act is in view.

Agreement to let, not held a lease; if a future executory act was in view.  
14 Ves. 413.

2. An instrument looking to some future instrument, and a more permanent interest than from year to year.

Paper, entitled "memorandum of an agreement" between A. and B. and signed by them; expressing, that in consideration of 40*l.* A. "doth agree to let," and B. "doth agree to take a messuage," &c. at 40*l.* *per annum* rent; "and it is farther agreed," that A. "shall not raise the rent nor turn out"

out" B. so long as the rent is duly paid quarterly, and he does not sell any article injurious to A. in his business. Though the terms do not exclude the construction of actual demise, yet, the import of the whole looking to some future instrument, and a more permanent interest than from year to year, a demurrer to a bill for specific performance against A., who had succeeded in an ejectment, was over-ruled. The injunction against the ejectment continued. *Brown v. Warner*, 14 Ves. 156. 409.

3. Instruments, which though containing words of present demise, do not ascertain all the terms of the contract.

When instruments containing words of present demise have operated as actual leases, although something farther was covenanted to be done, all the terms of the contract were specified and ascertained, and nothing but a more regular conveyance was wanting. *Pentland v. Stokes*, 2 B. & B. 73.

4. An instrument in which an essential part of the contract, the nomination of the lives, was wanting.

A. by an instrument, demised or agreed to demise lands to B. for three lives, (not named,) at a yearly rent, and further agreed that leases should be perfected, at the request of either party. As an essential part of the contract, the nomination of the lives was wanting, this cannot operate as a lease for three lives; nor as a lease for the life of a tenant, that not being the intention of the grantor; but merely as an executory agreement for a lease. *Pentland v. Stokes*, 2 B. & B. 68.

## II. *Of the construction of agreements for leases.*

1. Proper covenants are implied in an agreement for a lease.

Proper covenants implied in an agreement for a lease; as connected with the character and title of the lessor. 15 Ves. 265.

2. Where the agreement is written, the custom of the country is not an implied term.

No inquiry as to the custom of the country where there is a written agreement. *Liebenrood v. Vines*, 1 Mer. 15.

3. Agreement to manage and quit the premises, agreeably to the manner of former tenants.

Tenant under an agreement to manage and quit the premises agreeably to the manner in which the same had been managed and quitted by the former tenants, not bound by the terms upon which they held, without notice. *Liebenrood v. Vines*, 1 Mer. 15.

## III. *Of the specific performance of agreements for leases.*

1. Notwithstanding no definite term is expressed.

The court will not decree a specific performance of an agreement for a lease to be collected from letters, where there is no definite term expressed for which the lease was to be granted, nor any reference *aliunde*, by which it might be ascertained. But *semble*, otherwise if the letters had been more explicit, or had afforded any criterion for defining the object of the parties. *Gordon v. Trevelyan*, 1 Price, 64.

2. Notwithstanding lessee's insolvency.

Upon a contract for a lease, the solvency or insolvency of the tenant is an objection of weight; depending upon the circumstances. Upon that and other circumstances an injunction against an ejectment by the landlord was dissolved. *Buckland v. Hall*, 8 Ves. 92.

3. Not-

## 3. Notwithstanding lessee's insolvency, and other circumstances.

A. being in insolvent circumstances, suffers another person to become the apparent owner of his farm, though under a secret trust for him. A. shall not have, against the landlord, a specific execution of an agreement made by him with the trustee, the landlord supposing the trustee to have been the rightful owner, and confiding in his solvency. *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

## 4. Notwithstanding lessee's breach of contract.

Tenant having committed breaches of covenant by waste, treating the land in an unhusbandlike manner, &c.; not entitled to specific performance of an agreement for a lease. 18 Ves. jun. 63.

## 5. Notwithstanding lessee's insolvency and breach of contract.

Bill for specific performance of a parol agreement to grant a farm lease with the usual and customary covenants of the neighbourhood, and an injunction to prevent an ejectment; the plaintiff having taken possession. Upon the answer, stating the insolvency of the plaintiff and various breaches of the agreement during five years' possession, to the ruin of the estate, the injunction was continued on an undertaking to give judgment in ejectment, go to commission, and set down the cause for next term, paying the rent into court. Defendant also insisting on a covenant not to assign, that is, the subject of inquiry as to the custom of the neighbourhood. *Boardman v. Mostyn*, 6 Ves. 467.

## 6. Notwithstanding a contract to underlet, contrary to the agreement.

Specific performance of articles to grant a lease to the plaintiff, decreed; though he had contracted to underlet, contrary to those articles. *Williams v. Cheney*, 3 Ves. 59.

## 7. In opposition to a stipulation against assignment.

Whether a person, entitled under an agreement for a lease, to be void upon assignment without licence, having assigned without licence, can enforce a specific performance, *quære*. 12 Ves. 511.

## 8. Notwithstanding refusal of tenant to execute a lease tendered.

Refusal of tenant to execute a lease tendered, as satisfied with, not as repudiating, the agreement, is no ground for refusing him a specific performance. *Gourlay v. Duke of Somerset*, 1 Ves. & Beam. 68.

## 9. Notwithstanding suppression of facts by the lessee, and other circumstances.

Specific performance of an agreement for a lease, in consideration of the surrender of a former one, was refused; 1st, Because the tenant suppressed the fact, that the life, on which the old lease depended, was, when the agreement was signed, *in extremis*. 2dly, Because the new lease would, under a power of leasing at the highest rent, be void against the remainder-man, the surrender of the old lease forming part of the consideration. 1 Ball & Beatty.

## 10. Notwithstanding notice given by plaintiff to quit.

Bill for specific performance of a contract to make a lease to the defendant, dismissed: the plaintiff having after answer, given a notice to quit according to a proviso for determining the lease. *Western v. Perrin*, 3 Ves. & Beam. 197.

## 11. Notwithstanding the term expires before the hearing.

1. Specific performance refused of an agreement to grant a lease for a term expired before the hearing of the cause, the acts of waste committed during the possession of the premises, not entitling the plaintiff in an action on

on the covenants to be inserted in the lease, to more than nominal damages. *Nesbitt v. Meyer*, Swanst. 223.

2. Whether specific performance of an agreement to grant a lease will, in any case, be decreed after the expiration of the term, *quære*. *Nesbitt v. Meyer*, Ibid. 226.

12. Notwithstanding the lease would be void against those in remainder.

A contract for a new lease, entered into by tenant for life, and void as against a remainder-man, the surrender of a former lease constituting part of the consideration, will not be specifically executed, being contrary to the leasing power of letting at the best rent. *Ellard v. Lord Llandaff*, 1 Ball & Beatty. 241.

#### 13. Proof of the agreement.

1. Decree for specific performance of an agreement to grant a lease, of which only one part, signed by the plaintiff, was found in the possession of the defendant, upon the circumstances; possession, drafts prepared and approved, and the execution deferred only till repairs completed. An extension of the term according to a variation of the agreement, also in writing, was refused on the ground of want of consideration. *Robson v. Collins*, 7 Ves. 130.

2. Agreement for a lease in part-performed by possession taken, though without express assent, acquiesced in, and expenditure permitted; specific performance according to the plaintiff's evidence against the assertion of a right of resumption by the answer and one witness, not proving that it was admitted. *Gregory v. Migbell*, 18 Ves. jun. 328.

3. Specific execution of a parol agreement for a lease for three lives; proved by one witness, refused: the answer admitting an agreement for one life only, supported by the testimony of one witness, and not inconsistent with the evidence of part-performance given by plaintiff. *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

#### IV. Of the construction of covenants.

1. A covenant not to let, set, or demise for all or any part of the term, restrains assignment.

Covenant in a lease not to let, set, or demise the premises, or any part, for all or any part of the term, without consent, restrains assignment. *Greenaway v. Adams*, 12 Ves. 395.

2. A covenant against assignment does not restrain under-letting.

Covenant restraining assignment of a lease, would not prevent under-letting. 15 Ves. 265.

3. A covenant against under-letting without licence in writing, not satisfied by a parol licence.

Proviso in lease, that lessees should not demise the premises, without a licence in writing. A parol licence to under-let insufficient; but if such licence is given as a snare and under circumstances of fraud, equity will relieve. *Richardson v. Evans*, 3 Mad. 218.

4. Proviso against assignment, in a lease to lessee, his executors, and assigns, not repugnant.

Proviso against assignment without licence in a lease to the lessee, his executors, administrators, and assigns, not repugnant; the construction being such assigns as he may lawfully have: viz. by licence; or by law, as assignees in bankruptcy. *Weatherall v. Geering*, 12 Ves. 504.

5. Co-



## 5. Covenants against assignments are strictly construed.

Covenants, restraining lessee from alienation without licence, construed with jealousy. 15 Ves. 265.

## 6. A licence once granted, determines a covenant against assignment.

1. Covenant against assigning without licence, determined by a licence once granted. 12 Ves. 191.

2. Proviso in a lease for re-entry upon assignment by the lessee, his executors, administrators, or assigns, without licence ceases by assignment with licence, though to a particular individual. *Brummell v. Macpherson*, 14 Ves. 173.

3. Covenant not to assign without licence, once dispensed with, the condition is gone both in law and equity; but the principle questionable, and not to be extended: for instance, to a mere act; where the licence is to be in writing. 1 Ves. & Beam. 191.

## 7. A covenant for quiet enjoyment implied in the words "grant and demise."

Implied covenant for quiet enjoyment under the words "granted and demised," and for payment of rent, under "yielding and paying." 9 Ves. 330.

## 8. A covenant for payment of rent implied in the words "yielding and paying."

*Ibid.*

## 9. Covenants for penal rents.

In construing covenants for penal rents, the court looks to the intention of the parties. 1 B. & B. 558.

## 10. The construction of covenants for perpetual renewal is the same in equity as at law; and where express will be executed.

A contract for perpetual renewal will be specifically executed, if clearly appearing; but is not to be inferred from a general provision for the same covenants. The construction of such a covenant is the same in equity as at law, and is not affected by the acts of the parties. The bill of the tenant was retained, with liberty to bring an action. *Iggulden v. May*, 9 Ves. 325.

## 11. The leaning is against covenants for perpetual renewal.

The court leans against a construction for perpetual renewal, unless clearly intended. *Baynham v. Guy's Hospital*, 3 Ves. 295.

## 12. Unless the words of a covenant clearly import a continued interest, it shall not be inferred against the party covenanting.

Unless the words of a covenant clearly import a continued interest, it shall not be inferred against the party covenanting. 2 Sch. & Lef. 557.

## 13. Construction of a covenant for renewal.

Construction of a covenant for renewal. *Eaton v. Lyon*, 3 Ves. 690.

## 14. A covenant to renew on the falling in of one life, does not extend to the falling in of two.

Covenant in a corporation lease, to renew upon the falling in of one life for ever, there is no equity to extend it to the case where two are suffered to fall in, although a compensation is offered. *Bayley v. Corporation of Leominster*, 3 B. C. C. 529.; 1 Ves. 476.

## 15. A covenant for renewal is not included in a covenant to renew on the same covenants.

1. Covenant in a lease to renew under the same covenants, is exclusive of the covenants of renewal. *Tritton v. Foote*, 2 Cox, 174.; 2 B. C. C. 636.

2. Con-

2. Construction of a covenant for renewal under the like covenants, &c.; that it was not for perpetual renewal: the courts leaning against that construction, unless clearly intended. *Moore v. Foley*, 6 Ves. 232.

16. Whether, under the circumstances, a covenant for renewal is included in a covenant to renew on the same covenants.

*Quære* whether on a covenant in a lease for 99 years, determinable on three lives, that upon the death of either of the lives, &c., on request and payment of 20*l.*, &c., to grant a new lease for another term of 99 years determinable with the life of a new person to be named, under the same yearly rents, covenants, &c., the lessee is entitled to a covenant for renewal in such new lease. *Dowling v. Mill*, 1 Mad. 541.

17. Restraint of leasing applicable to a covenant for renewal, as well as a lease originally exceeding the limits.

Restraint of leasing applicable to a covenant for renewal as well as a lease originally exceeding the limits. 14 Ves. 333.

18. Construction of a covenant to renew on a renewal by the lessor, paramount.

A., holding under a corporation, (of which he was a member,) and in the habit of obtaining renewals on favourable terms, demised to B. at a certain rent, with a covenant to renew at the same rent as often as the corporation should renew to him. The corporation raised the rent payable by A. A. was held bound notwithstanding to renew to B. on the former terms. *Evans v. Walshe*, 2 Sch. & Lef. 519.

19. A renewal lease not inconsistent with a covenant to let and manage to the best advantage.

A renewable lease not inconsistent with a covenant to let and manage to the best advantage; with reference to the subject: a trust for creditors. Distinction as to a charity estate, let upon a long lease. *Kirkham v. Chadwick*, 13 Ves. 547.

20. A covenant to repair includes a destruction by fire.

Tenant covenanting to keep and leave the premises in repair, must rebuild in case of fire. *Pym v. Blackburn*, 3 Ves. 34.

## V. Of the construction of bonds for the performance of covenants.

They extend to implied, as well as to express, covenants.

Bond, generally, for the performance of covenants, extends to implied, as well as express, covenants. 9 Ves. 330.

## VI. What are usual covenants.

Covenants not contradicting the incidents of the lessee's estate.

Execution of an agreement for a lease with proper covenants; viz. according to the general practice as to such leases; and not contradicting the incidents of the lessee's estate; one of which is the right to have it without restraint, except what is imposed by law; unless an express contract for more. 15 Ves. 264.

## VII. What are not usual covenants.

1. Covenants not contradicting the incidents of the lessee's estate. Vide 15 Ves. 264.

## 2. A covenant against assignment.

1. Covenant not to assign without licence, does not come within a contract to grant a lease with common and usual covenants. *Henderson v. Hay*, 3 B. C. C. 632.

2. *Quere*, whether an agreement for a lease with usual covenants, includes a covenant against assigning or under-letting without licence. In this instance, upon the particular construction of the agreement, for the lease of a farm, the words "such other clauses as are usual in such cases" had not that effect. *Vere v. Loveden*, 12 Ves. 170.

3. Whether under an agreement for a lease, containing all proper covenants, a covenant against assigning or under-letting should be included, *quere*. *Jones v. Jones*, 12 Ves. 186.

4. Under an agreement for a lease, the lessor is not, without express stipulation, entitled to a covenant, restraining alienation without licence; as a proper and usual covenant. *Church v. Brown*, 15 Ves. 258.

5. Under an agreement for a lease, "with usual covenants," the lessor is not entitled to a covenant against assigning or under-letting without licence. *Brown v. Raban*, 15 Ves. 528.

3. But in this case a covenant against assignment was held to be a usual covenant.

An agreement for a lease, "with all usual and reasonable covenants," a covenant not to under-lease or assign is implied, where the custom of the place is not generally otherwise. *Folkingham v. Croft*, 3 Anst. 700.

## 4. A covenant against under-letting.

*Vide supra*, div. 2.

5. But in this case a covenant against under-letting was held to be a usual covenant.

*Vide supra*, div. 3.

## VIII. Of the renewal of terms.

1. Renewal lease may, for the protection of legal interests, be considered as the original lease.

*Vide* 3 Ves. 260.

2. A renewal by tenant for life, under a settlement, shall operate to the uses of the settlement.

1. *Vide in tit.* CHARGE.

2. Where a lease for lives is renewed by the tenant for life, under a settlement, the renewal shall be to the uses of the settlement. *Pickering v. Vowels*, 1 B. C. C. 197.

3. Right of renewal may be forfeited by the laches of the tenant.

1. Right of renewal forfeited by the laches of the tenant. *Baynham v. Guy's Hospital*, 3 Ves. 295.

2. Covenant for perpetual renewal. Specific performance refused under circumstances: laches; and alteration of the property, so that it could not be enjoyed according to the stipulations. *City of London v. Mitford*, 14 Ves. 41.

3. A renewal of lease refused; the lessee omitting to nominate the lives, within the time limited by the covenant; and the injury sustained by the lessor, not admitting of compensation. *M'Alpine v. Swift*, 1 Ball & Beatty, 285.

4. Lease for twenty-one years at 1*l.* a year (with covenant to renew from twenty-one years to twenty-one years, to make up ninety-nine years,) at the expiration

expiration of the first term, there being an arrear of rent due, and no application for renewal, lessor brought ejectment, and got possession; bill filed for a renewal (accounting for the delay) on payment of arrears and interest, decreed. *Rawstone v. Bentley*, 4 B. C. C. 415.

4. What acts are a dereliction, negligence, or wilful default in the tenant.

When all the lives of a lease are gone, if the tenant, after a demand made on him, neglects to renew, it is dereliction. 1 Ball & Beatty, 374. When, but one or two of the three lives have dropped, it is negligence in the tenant, not to renew, after a demand made. *Ibid.* But when there is a refusal, or neglect on the part of the tenant, to renew within a reasonable time after a demand had been made upon him, it is wilful default. *Ibid.*

5. A covenant for perpetual renewal is valid.

Covenant for perpetual renewal, valid. 16 Ves. 84.

6. A covenant for perpetual renewal, obtained without consideration, will not be enforced.

Bill for a specific performance of a covenant for renewal, dismissed; it being either a covenant for perpetual renewal, and if so, obtained without consideration from the lessor; or else inserted by mistake. But there being no proof of its having been improperly obtained, a cross bill, to have it declared void, was dismissed with costs. *Redshaw v. Bedford Level*, 1 Eden, 346.

7. Implication of a covenant for perpetual renewal.

Bill to enforce a claim of perpetual renewal upon usage, sanctioned by decrees, and expenditure, dismissed; as not supported by the custom of the country, or contract; not within the powers of the lessor, a charitable foundation; nor according to the true construction of the decrees. *Watson v. the Master, &c. of Hemsworth Hospital*, 14 Ves. 324.

## IX. Of the determination of terms.

1. An option to determine, not expressly limited to either party, is confined to the lessee.

1. Whether a lease for seven, fourteen, or twenty-one years, is determinable at either of the intervening periods at the option of both parties, or of the lessee only, nothing being expressed as to that, *quære*. *Dann v. Spurrier*, 7 Ves. 231. Determined that the option is confined to the lessee. 3 B. & P. 399. 442.

2. An agreement for a lease for seven, fourteen, or twenty-one years, gives the option to the lessee alone. 17 Ves. jun. 363.

2. Under a proviso if the premises should be wanted for building.

1. Under a proviso in a lease to deliver possession, if the premises should be wanted for building, a demand on the ground of having entered into a treaty, is not sufficient: otherwise, if an agreement was alleged. *Russell v. Coggins*, 8 Ves. 34.

2. Construction of a covenant in a lease, that if the lessor shall be minded to set out any part of the premises for a street or streets, or to set or sell any part to build upon, he may resume upon certain terms. If he resumed, having a *bonâ fide* intention to build, though that cannot be acted upon, there is no equity for the tenant. 2dly, The generality of the latter words are not restrained by the former to buildings of any particular species; therefore, a contract with a canal company for the lands resumed was enforced: warehouses being within the meaning of the lease; and wharfs, at least

least as appurtenant, and wanted for the enjoyment of the warehouses. A compensation was decreed for the land covered with water; and as to towing-paths, and the banks of basons, though strictly subjects of compensation, yet, upon a re-hearing, and after great litigation, the court would not reverse the decree, and direct another reference to the master, merely on that account. *Gough v. the Worcester and Birmingham Canal Company*, 6 Ves. 354.

### 3. Miscellaneous.

Particular, describing a lease, as subject to notice to quit, not inconsistent with a covenant, that the tenant shall hold over for a certain time "after the end of the term;" that being upon the context distinguished from the "other sooner determination;" and time, generally, not being of the essence of the contract. *Hall v. Smith*, 14 Ves. 426.

## X. Of conditions of re-entry.

### 1. An advertisement does not work a forfeiture.

Under a right of re-entry upon under-letting, an advertisement does not work a forfeiture; but was made the ground for imposing terms. *Gourley v. Duke of Somerset*, 1 Ves. & Beam. 68.

### 2. A case of no notice of the condition, and no interest for the term prohibited, certainly passed.

Clause of re-entry in a lease for three lives in case lessee or his executors, &c. should lease for more than seven years without licence, the third life being in possession under his father's will, and being his executor, leased for fourteen years; held no forfeiture, as he had not notice of the condition, and as the lease could not extend beyond the life of the lessor, it could not pass an interest for fourteen years certain. *Northcote v. Duke*, 2 Eden, 319.; *Amb.* 511.

### 3. May be waived by acts *in pais*.

After an eviction for nonpayment of rent under the ejectment statutes, and after the expiration of six months, allowed the tenant to redeem; evidence of acts *in pais* is admissible, to show a waiver of the forfeiture. *Malone v. Malone*, 1 Ball & Beatty, 32.

### 4. May be waived by accepting rent, with notice.

Acceptance of rent, with notice of a forfeiture, is a waiver thereof at law. 1 Ball & Beatty, 561.

### 5. May be waived by laches.

To permit a tenant to remain in possession and expend his money in building with the knowledge of the landlord, after an eviction for nonpayment of rent, is a waiver of the forfeiture under the ejectment statutes. *Hume v. Kent*, 1 Ball & Beatty, 554.

### 6. May be waived by lessor assigning his reversion.

Where a reversioner conveys his legal title, he cannot maintain an ejectment for nonpayment of rent, for arrears due in his own time; but there being some doubts, when the deed conveying the reversion was delivered, an inquiry, to ascertain that fact, was directed. *Blennerhassett v. Day*, 2 B. & B. 104.

## XI. Of the jurisdiction of courts of equity to relieve against conditions of re-entry.

### 1. Where compensation can be made.

1. Relief against forfeiture, where compensation can be made; as against a clause

a clause of re-entry for a breach of covenant to lay out a specific sum in repairs in a given time: and not limited to cases of accident, &c., but even against negligence, and voluntary acts. *Sanders v. Pope*, 12 Ves. 282.

2. Relief against forfeiture by breach of covenant by lessee, where compensation can be made. *Davis v. West*, 12 Ves. 475.

## 2. Re-entry for nonpayment of rent.

1. Relief against a forfeiture under a covenant for re-entry for nonpayment of rent: not, where the recovery in ejectment was also upon breach of other covenants. *Wadman v. Calcraft*, 10 Ves. 67.

2. Relief against forfeiture of a lease for breach of covenant not extended beyond the case of payment of money, as in the instance of rent, to the other covenants; as to repair. *Hill v. Barclay*, 18 Ves. jun. 56.

3. Relief against breach of covenant by nonpayment of rent: lessor therefore compelled to proceed on some other covenant, not admitting relief. 3 Ves. & Beam. 30.

4. Where there have been various dealings between landlord and tenant, so as to produce an account too complicated to be taken at law; and the landlord has brought ejectment for nonpayment of rent, the tenant may file a bill, before judgment at law, for an account on the foot of those dealings, and to have the balance applied to the rent claimed to be due, and for an injunction. *O'Connor v. Spaight*, 1 Sch. & Lef. 305. In such case the tenant need not bring in the rent, under stat. 4 Geo. 1. c. 5. *Ibid.*

5. Tenant having a claim against his landlord for unliquidated damages, occasioned by cutting timber on the demised premises, in pursuance of a power so to do, reserved by the lease, the landlord brought an ejectment for nonpayment of rent. On bill filed by tenant, stating his claim, and charging that, if ascertained and credit given for it, there would not be a year's rent in arrear, and on that fact being established upon an issue, tenant was restored to the possession (which the landlord had obtained in the meantime) on paying the balance due by him; and decreed entitled to an account of means profits, &c. *Beasley v. Darcy*, 2 Sch. & Lef. 403.

## 3. Re-entry for not insuring.

Courts of equity will not relieve against a forfeiture for breach of a covenant to insure, &c. *Rolfe v. Harris*, 2 Price, 206. n.

## 4. Re-entry for not repairing.

1. Relief to a tenant against the lapse of time for repairs, in the discretion of the court upon the circumstances. 12 Ves.

2. The court will not give relief in equity against a lessor's right of re-entry for a forfeiture by breach of a covenant to lay out a sum of money on the premises in repairs within a given time. And that, notwithstanding there have been no requisition made by the landlord for performance of the covenant, and although he have suffered the tenant to continue in possession of the premises for three years after the breach of covenant, but has not received rent from him in the meantime, or otherwise recognized the subsistence of the tenancy. The time within which the covenant was to have been performed having been limited by the lease, is equivalent to a specific requisition of performance by the lessor; and a neglect on the part of the tenant is tantamount to a refusal in law. The ground on which the court refuses to relieve in such a case is, that they have no effectual means of ascertaining, or of making compensation to the covenantee. Nor is it enough to show that no damage has been sustained by the delay, and that the premises may be put into as good or better condition than they would have been if the covenant had been punctually performed, or even that, by a mistake of the solicitor, who prepared the lease, the limitation of the period for performance of the covenant had been introduced, although not warranted by the

previous agreement, or so understood at that time by the parties themselves, denied by the answer. *Bracebridge v. Buckley*, 2 Price, 200.

5. Re-entry for assigning.

No relief against forfeiture by breach of covenant not to assign without licence. 18 Ves. jun. 63.

6. In relation to the statute 4 Geo. 2. c. 28.

Statute 4 Geo. 2. c. 28. regulating the relief of a tenant against a forfeiture for a breach of covenant by nonpayment of rent. 18 Ves. jun. 60.

XII. *Of the jurisdiction of courts of equity to set aside leases.*

On the ground of fraud.

Lease set aside with costs; as obtained by the contrived and habitual intoxication of the lessor immediately on coming of age, at a very inadequate rent; and acts of confirmation held not sufficient. *Say v. Barwick*, 1 Ves. & Beam. 195.

XIII. *Of terms attendant.*

1. Distinction between terms in gross and terms attendant.

Distinction between a term in gross and a term to attend the inheritance. 10 Ves. 259.

2. They belong, when satisfied, to the owner of the inheritance.

When the purposes of the trust of a term are satisfied, the term belongs in equity to the owners of the inheritance; whether declared by the original conveyance to attend the inheritance or not. 10 Ves. 270.

XIV. *Of the landlord's rights.*

1. To a decree to prevent a breach of covenant.

Decree against a lessee of alum works, to prevent a breach of a covenant to leave stock of a certain amount at the expiration of the lease. *Ward v. Duke of Buckingham*, 10 Ves. 161.

2. The possession of the tenant is that of the landlord.

1. The possession of a tenant, even when abusing his right, or exercising to an extent not authorized by his tenure, is still the landlord's possession; and the allowance of the abuse for any length of time shall not give the tenant a right to continue it. 1 Sch. & Lef. 8.

2. Tenant entering under a lease, his possession shall be held as continuing to be under the lease, though he do not pay rent for many years. *Secus semble*, if he attorn to a third person, with the knowledge of his lessor. 2 Sch. & Lef. 626.

3. On the tenant embarrassing the tenure.

Tenants by agreement among themselves doing any thing to embarrass the tenure; landlord has a right to assistance of equity. *Saunders v. Lord Annesley*, 2 Sch. & Lef. 108.

4. On disclaimer by tenant.

The act of a tenant, disclaiming his landlord's title and admitting title in a third person, shall not affect his landlord's knowledge of, or does not acquiesce, in such act. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 624.

5. After a recovery against him in ejectment, through his own negligence.

Vide 10 Ves. 544.

6. An

6. An action for use and occupation will not lie where there is a deed.

Where there is a demise, lessor cannot bring an action for use and occupation, as a stranger may; but it must be upon the deed for the rent. 2 Ves. 307.

## XV. Of the tenant's rights.

1. To a discovery of the landlord's title.

Dubious where a man takes a house under an agreement in writing, that the lessor shall grant him a long lease, and lays out money in the substantial repairs and improvement of it, and afterwards discovers that the lessor has only a life-interest in it, whether he is entitled to a discovery of the lessor's title? Waring v. Mackreth and another, Forrest, 129.

2. To defeat the landlord's title.

A person holding a chattel interest under another, cannot lawfully do any act to defeat the title of his lessor, during the continuance of his lease. 2 Sch. & Lef. 96. Possession must be held according to its original nature. Ibid. 98.

3. To set up a title adverse to his landlord.

1. Tenant cannot set up a title against his landlord. 2 Ves. 696.
2. Lessee cannot dispute the title of his landlord. 11 Ves. 344.

4. To compel the landlord to interplead.

The rule, that a tenant cannot compel his landlord to interplead, does not prevail, where the claim of a third person arises by the act of the landlord, subsequent to the commencement of the relation of landlord and tenant. Clarke v. Byne, 13 Ves. 383.

5. To assign.

Power of assignment incident to the estate of a lessee, without the word "assigns," unless expressly restrained. 15 Ves. 264.

6. To set-off for repairs.

Where a landlord is bound in law or equity, to repair in certain cases, and the tenant is obliged, by a sudden accident to make those repairs, to prevent further damage, he may set it off as money paid to the use of the landlord against an action for rent; and therefore equity will not interfere. Waters v. Weigal, 2 Anst. 575.

7. To relief upon expenditure permitted.

1. No relief upon general equity from expenditure under the observation of the landlord by a tenant, but not under any specific engagement or arrangement. Pilling v. Armitage, 12 Ves. 78.

2. As to expenditure by a tenant with the knowledge of the landlord, aware also that the lease is bad, *quære*. 12 Ves. 85.

3. Where a tenant, under a void lease, makes expensive improvements with the knowledge and approbation of the landlord, he is entitled in equity to a valid lease, *comme semble*. Hardcastle v. Shafto, 1 Anst. 184.

4. Dubious where a man takes a house under an agreement in writing, that the lessor shall grant him a long lease, and lays out money in the substantial repairs and improvement of it, and afterwards discovers that the lessor has only a life-interest in it, whether he is entitled to keep possession of the house without paying rent, till he is reimbursed the money he has laid out? Waring v. Mackreth and another, Forrest, 129.



XVI. *Of the tenant's obligations.*

## 1. To preserve his landlord's rights.

Obligation of tenant to take care of the rights of his landlord. 17 Ves. jun. 225.

## 2. Distinction between the original lessee and his assignee.

1. Lessee remains liable to the determination of the term : assignee only during his possession. 8 Ves. 95.

2. Lessee under express covenant to pay the rent and perform the covenants, liable during the whole term, notwithstanding assignments. 1 Ves. & Beam. 11.

3. Distinction as to assignee; though liable during his own possession. Ibid.

XVII. *Of the rights of the tenant's assignee.*

To set up an adverse title.

1. A., gaining possession under assignment of a lease for years and paying rent under it, shall not be allowed to change the nature of such possession and to set up a title to the fee, by accepting a conveyance of the fee from persons claiming adversely to those under whom the lease is held, although the right be in such persons. *Saunders v. Lord Annesley*, 2 Sch. & Lef. 73.

2. Nor will the acts of A., and those under whom he derives, treating such interest as freehold for several years, conveying and settling it as such, give a title different from that under which the possession was originally gained. 2 Sch. & Lef. 73.

XVIII. *With reference to the Irish tenantry act.*

## 1. General observations.

See observations on the tenantry act, and on the cases which have been decided under it. *Lennon v. Napper*, 2 Sch. & Lef. 682.

## 2. The six months to redeem are calendar months.

The six months given to tenants, evicted under the ejectment statutes for nonpayment of rent, to redeem, are calendar months. *Dowling v. Foxall*, 1 Ball & Beatty, 193.

## 3. The right to renew may be lost by laches.

Where a tenant neglected for three years after a demand, made under the tenantry act, 19 & 20 Geo. 3. c. 30., to renew, his right of renewal decreed to be gone; though but one of the three lives in the lease had dropped. *Keating v. Sparrow*, 1 Ball & Beatty, 367.

## 4. As to what shall be deemed reasonable time after demand for paying renewal fines.

1. Under the tenantry act, 19 & 20 Geo. 3. c. 20., what shall be deemed reasonable time after demand for paying renewal fines, must in all cases depend on the circumstances; and circumstances previous as well as subsequent to the demand, are to be taken into the consideration. Therefore, where the demand was on the 6th of October, a tender on the 20th of March following was not within reasonable time; the tenant having had intimation for two years before that payment of the fine was expected, and have neglected to pay it. *Jackson v. Saunders*, 1 Sch. & Lef. 443.

2. Reasonable time, within the Irish tenantry act, 19 & 20 Geo. 3., is no more than what is necessary to give the tenant full opportunity for ascertaining when the *cestui que vies* died, for computing the amount of the fine due, and for preparing leases, and tendering them for execution. *Freeman v. Lord Waterford*, Ibid. 454.

5. Under the circumstances, a tender was held to be in time.

After a notice by the landlord on the 16th of December to renew ; where the tenant had not his lease, but was just of age and embarrassed ; where an erroneous account was furnished by the landlord's agent, after an application by the tenant in January ; where a draft of a renewal in the February following was tendered ; and the landlord prevented the tenant from selling timber to pay the rent and fines. A tender in the October following was under these circumstances held to be in time, under the provisions of the tenantry act ; and a renewal decreed upon payment of costs. *Jessop v. King*, 2 B. & B. 81.

6. Form of the demand.

The demand required by the tenantry act, 19 & 20 Geo. 3., need not be in writing ; nor is any precise form prescribed. *Jackson v. Saunders*, 1 Sch. & Lef. 443.

7. Of a bill to perpetuate the evidence of a demand.

A landlord may file a bill to perpetuate the evidence of a demand, made under the tenantry act, to renew. 1 Ball & Beatty, 372.

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LAND TAX.

I. Of the amount of the assessment.

Upon an annuity or rent-charge out of the profits of the new river company.

II. Of the redemption of the tax.

1. Construction of the acts, with reference to the nature of the biddings, and contract.
2. Of the mode of enforcing the duty of the commissioners.
3. Misapplication of an infant tenant in tail's personal estate charged upon the remainder-man.

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I. Of the amount of the assessment.

Upon an annuity or rent-charge out of the profits of the new river company.

Whether an annuity or rent-charge out of the profits of the new river company is to bear the full assessment to the land-tax, or is to have the benefit, according to the proportion, of a reduction, in consequence of an assessment upon the profits of the company at an under-value, *quære*. The bill by the annuitant was dismissed : the court refusing to raise an equity as to the profit arising from disobedience to the act. *Adair v. the New River Company*, 11 Ves. 429.

II. Of the redemption of the tax.

1. Construction of the acts, with reference to the nature of the biddings, and contract.

Construction of the acts for redemption and sale of the land tax with reference to the nature of the biddings intended to be made, and contract to be entered into, under the provisions of st. 42 Geo. 3. c. 116. s. 154. *Williams v. Steward*, 3 Mer. 472. Commissioners under the act merely ministerial ; no remedy therefore against them in equity ; but only either by *mandamus*

*mandamus* in K. B., (which is doubtful unless to compel them to grant certificates to persons proposing to purchase), or suit in exchequer, in such cases as are not specially provided for by the act. *Williams v. Steward*, 3 Mer. 472.

2. Of the mode of enforcing the duty of the commissioners.

*Ibid.*

3. Misapplication of an infant tenant in tail's personal estate charged upon the remainder-man.

Application of the personal estate of infant tenant in tail to the redemption of the land-tax by persons, not having authority within the act. Equity, by analogy to the option, to be reserved by guardians, &c. under the act, for the personal representative of the infant to charge the estate in the possession of the remainder-man. *Ware v. Polhill*, 11 Ves. 257.

## LIEN.

### I. Of the nature of the right.

It is a right to possess or to retain.

### II. Of legal and equitable liens.

Some liens exist only in equity.

### III. Of liens upon realty.

1. Distinction between lien by judgment and by contract.
2. Of the lien of a specialty creditor.
3. Of the lien conferred by a covenant to convey.
4. Of the lien conferred by a covenant for a specific application of rents and profits.
5. Of the lien of one tenant upon the other's moiety for a fine paid for renewal.
6. In the case of a rent-charge assigned to secure an annuity.
7. Lien upon a West India estate for supplies furnished.
8. Continuation of a lien, notwithstanding the determination of the possession of the particular tenant.

### IV. Of liens upon personalty.

1. Whether affected by special contract.
2. Of lien for a general balance.
3. Of the lien conferred by an order for payment out of a particular fund.
4. Lien upon securities, effected with plaintiff's money, obtained by embezzlement.
5. Lien of bankers upon securities deposited for a given sum, afterwards increased.
6. Lien of a creditor upon a bond deposited.
7. Of a distrainer's lien upon goods replevied.
8. Of a publisher's lien upon copyright.
9. Of liens in miscellaneous cases.
10. Determination of the right.

### I. Of the nature of the right.

It is a right to possess or to retain.

A lien is a right to possess or to retain. *Ex parte Heywood*, 2 Rose, 355.

II. Of

**II. Of legal and equitable liens.**

Some liens exist only in equity.

There are liens which exist only in equity, and of which equity alone can take cognizance; but the lien for freight is not one of them. *Gladstone v. Birley*, 2 Mer. 403.

**III. Of liens upon realty.****1. Distinction between lien by judgment and by contract.**

Distinction between a judgment, as attaching upon the land, and a special agreement for a security upon the land. 15 Ves. 354.

**2. Of a lien of the specialty creditor.**

Specialty creditors have no lien on the estate, and therefore the alienee of a devisee shall hold the land discharged. *Mathews v. Jones*, 2 Anst. 506.

**3. Of the lien conferred, by a covenant to convey.**

A party entitled as equitable tenant in tail under a settlement in which is a covenant to convey lands to the uses of such settlement; afterwards, and upon his own marriage, covenants also to convey lands of less value; though he obtains a decree for the execution of the first-mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed. *Gardner v. the Marquis of Townshend*, Cooper, 301.

**4. Of the lien conferred by a covenant for a specific application of rents and profits.**

A covenant to apply a certain portion of rents and profits to a particular use, gives a specific lien upon the estate. *Legard v. Hodges*, 3 B. C. C. 421.; 1 Ves. 477.

**5. Of the lien of one tenant upon the other's moiety for a fine paid for renewal.**

A fine paid for the renewal of a lease, by one of two tenants jointly holding lands. A lien on the other moiety, though under settlement. *Hamilton v. Denny*, 1 Ball & Beatty, 199.

**6. In the case of a rent-charge assigned to secure an annuity.**

On bill of interpleader by the owner of an estate against the grantee of a rent-charge out of it, assigned to secure an annuity and the annuitant, the annuity being void, the arrears of the rent-charge in court were paid to the original grantee; and the annuitant was held not entitled to have the consideration repaid out of that fund, there being only a general debt at law and no lien. *Duke of Bolton v. Williams*, 2 Ves. 138.

**7. Lien upon a West India estate for supplies furnished.**

Lien upon a West India estate for supplies furnished by tenant for life, tenant in common, &c. 14 Ves. 444.

**8. Continuation of a lien, notwithstanding the determination of the possession of the particular tenant.**

Lien after possession determined; as after the death of tenant for life of a West India estate for supplies, provided by him. 14 Ves. 442.

**IV. Of liens upon personalty.****1. Whether affected by special contract.**

Factor's lien, both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So in various trades. 16 Ves. 280.

**2. Of**

## 2. Of liens for a general balance.

1. Bankers having securities deposited as a pledge for 1000*l.*, though the depositor at his death is indebted in a larger sum, have no lien, farther than the 1000*l.* *Vanderzee v. Willis*, 3 B. C. C. 21.

2. The question, whether a tradesman has a lien on goods in his hands for the general balance, or only for so much as relates to the particular goods, is decided on the same grounds at law and in equity. To extend it, the party must show an agreement, or something from which to infer an agreement. 2 Mer. 404.

## 3. Of the lien conferred by an order for payment out of a particular fund.

1. An order to pay money out of a particular fund, gives the party a specific lien thereon. *Smith v. Everett*, 3 B. C. C. 64.

2. A. consigns a cargo to B., with a direction to pay to C. out of the proceeds a sum of money, and writes C. to that effect; C. has no lien on the proceeds. *Ex parte Heywood*, 2 Rose, 355.

## 4. Lien upon securities, effected with plaintiff's money, obtained by embezzlement.

Bill, following life-insurances, effected by the plaintiff's clerk with the plaintiff's money, procured by embezzlement, and transferred to the defendants for valuable consideration, but with notice. Demurrer allowed; the transaction amounting to felony, by the statute 39 Geo. 3. c. 85., and therefore not raising a civil contract. Secondly, the policies not being the plaintiff's property. *Cox v. Paxton*, 17 Ves. jun. 329.

## 5. Lien of bankers upon securities deposited for a given sum, afterwards increased.

Vide 3 B. C. C. 21.

## 6. Lien of a creditor upon a bond deposited.

A bond given for a general purpose of raising money, and deposited by the obligee with another as a security, shall be liable to the obligee's debt; not so, if given for a special purpose. *Caton v. Burke*, 1 B. C. C. 434.

## 7. Of a distrainer's lien upon goods replevied.

The distrainer has no lien upon goods taken in distress for rent, and replevied, but is left to his remedy on the replevin bond. *Bradyll v. Ball*, 1 B. C. C. 427.

## 8. Of a publisher's lien upon copyright.

Where an author agrees with a bookseller to publish his work, and to allow him interest for the money he shall advance, and also a share of the profits, the bookseller has a lien on the copyright, for his disbursements, *comme semble*. *Brook v. Wentworth*, 3 Anst. 881.

## 9. Of liens in miscellaneous cases.

1. Bond by infant for a just debt; his mother and infant sister being entitled, on death of A. without issue, to 4000*l.* stock for the mother for life; after, to her children according to her appointment; if no children, to the mother, after death of the son, covenanted to pay that debt, when either should become entitled to that stock. Upon marriage of the daughter, the mother made an appointment of the stock in her favour; but next day the husband having notice of, and approving the covenants to pay the son's debt, and reciting his and his wife's intention to secure it "as after-mentioned," released all their right to that stock to the mother, and covenanted, that when the wife should be twenty-one, all their interest should be vested in her; and a trust was declared, that if the obligee should have a right to recover that debt,

debt, it should be paid out of that stock. Afterwards, a bill being filed to set aside the settlement as an appointment by the mother for her own benefit without consideration, the parties were by agreement mutually released from the covenants in it; and the husband covenanted, that if the obligee should have a right, in life of the mother, to recover the debt, it should be paid out of that stock. The mother died intestate before A. Determined, that a fair assignee of the debt had no specific lien on the fund; which could be liable only by being brought back into the mother's assets, as taken out in fraud of her creditors; for which it must be said, either that there was no pretence for the compromise, or that no pretence for its providing for the debt only, if suable in the mother's life; but the marriage brokerage in the settlement was sufficient ground for the compromise, and the bill did not go on the other ground; therefore the common decree for account of assets, debts, and funeral expences, without reference to that fund, was made against the husband and wife as administrators. The debt of the son was a sufficient consideration for the covenants; and if the mother had survived A. there would have been a specific lien. *Johnson v. Boyfield*, 1 Ves. 314.

2. No lien under the circumstances. *Adams v. Claxton*, 6 Ves. 226.

#### 10. Determination of the right.

A consignee parting with the goods consigned, parts with his lien on them. *Cruger v. Wilcox*, Dick. 269.

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### LIFE, TENANT FOR.

#### I. Of the requisite ceremonial in a lease for life.

It must be by deed.

#### II. Of leases for three lives.

They are considered on a footing with leases for twenty-one years.

#### III. Of the rights of a tenant for life.

1. Conditions upon which he will be let into possession of premises charged.
2. Having forfeited by leasing, he cannot join with remainderman for an injunction.

#### IV. In relation to the remainderman.

1. How far the acts of a tenant for life are obligatory upon him.
2. Of compelling the production of the tenant for life's person.

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#### I. Of the requisite ceremonial in a lease for life.

It must be by deed.

Lease for life must be by deed. 14 Ves. 158.

#### II. Of leases for three lives.

They are considered on a footing with leases for twenty-one years.

A lease for three lives considered both by the legislature in framing, enabling, and disabling statutes, and by many founders of charities as on a footing with leases for twenty-one years. *Attorney-general v. Cross*, 3 Mer. 539.

#### III. Of

**III. Of the rights of a tenant for life.**

1. Conditions upon which he will be let into possession of premises charged.

Tenant for life let into possession on consent, and giving security to pay charges payable out of rents and profits, and to keep down interest of the fund to answer contingent charges. *Blake v. Bunbury*, 1 Ves. 514.

2. Having forfeited by leasing, he cannot join with remainder-man for an injunction.

Tenant for life having made a lease of coal mines amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction. *Wentworth v. Turner*, 3 Ves. 3.

**IV. In relation to the remainder-man.**

1. How far the acts of a tenant for life are obligatory upon him.

There are many cases in which the acts of tenant for life bind the remainder-man, as evidence. *Saunders v. Lord Annesley*, 2 Sch. & Lef. 101.

2. Of compelling the production of the tenant for life's person.

1. Tenant for 99 years, if she shall so long live; remainder to trustees to preserve contingent remainders; remainder to the heirs of her body; remainder over to the same trustees upon trust for other persons. Upon the application of those persons and the trustees under the stat. 6 Ann. c. 18. the husband of the tenant for life was ordered to produce her. *Ex parte Grant*, 6 Ves. 512.

2. Proceeding under the act of 6 Ann. c. 18. to compel production of *cestui que vie*. *Ex parte St. Aubyn*, 2 Cox, 373.

**LIMITATION, STATUTE OF.****I. Construction of the statute.**

1. As applied to debts.
2. As applied to titles to land.
3. The Irish statute, 11 Anne, c. 2.
4. The Irish statute, 7 Geo. 2. sess. 2. c. 14. s. 8.

**II. What matters or transactions are directly or by analogy within the statute.**

1. Equitable rights.
2. Legal rights asserted in courts of equity.
3. Where the legal and equitable title correspond.
4. A trust by implication, as affected by an equity.
5. A trust founded on fraud or the like.
6. Rents of estate in trust.

**III. What transactions are within the exception touching merchant's accounts.**

1. Whether transactions between principal and agent are.
2. Some transaction must have passed within six years.

**IV. What matters or transactions are neither directly nor by analogy within the statute.**

1. A bill of revivor after a decree to account.
2. A trust, as between trustee and *cestui que trust*.

3. Non-

3. Non application by trustee of purchase money in discharge of incumbrances.

#### V. *Of the period of limitation.*

1. In the case of rents and profits.
2. In the case of a rent-charge.
3. To the redemption of a mortgage.

#### VI. *From what period its operation commences.*

1. In cases of fraud.
2. The Irish statute 8 Geo. 1. c. 4.
3. Notwithstanding the courts are closed.

#### VII. *Of abridging its operation.*

1. By a demand.
2. By acknowledgment.
3. By acknowledgment in an answer.
4. By a devise for debts.
5. By bankruptcy.
6. By payment of dividend under a bankruptcy.
7. By fraud.

#### VIII. *Of the Jamaica statute of limitations.*

Its effect, and construction.

### I. *Construction of the statute.*

1. As applied to debts.

Lord Redesdale's opinion, that debts upon which the time limited by the statute of limitations has run, are presumed to be paid. 2 Ves. & Beam. 288.

2. As applied to titles to land.

The true meaning of the statute of limitations, as applied to titles to land, is, that the party shall have twenty years, during which it should be open to him to proceed to assert his title. *Bond v. Hopkins*, 1 Sch. & Lef. 413.

3. The Irish statute, 11 Anne, c. 2.

Whether the proviso in statute 11 Anne, c. 2. in favour of infants, extends to infants having only a title in remainder at the time when the *habere* is executed? *Semble* not. *O'Connor v. Lord Bandon*, 2 Sch. & Lef. 679.

4. The Irish statute, 7 Geo. 2. sess. 2. c. 14. s. 8.

The saving for infants, &c. in the statute 7 Geo. 2. c. 14. sect. 8., is a provision for the benefit of plaintiffs: to conclude such persons if they do not come in within the time specified. 2 Sch. & Lef. 304.

### II. *What matters or transactions are directly or by analogy within the statute.*

1. Equitable rights.

1. Though the statute of limitations does not apply to any equitable demand, equity takes the same limitation in cases analogous to those at law. 10 Ves. 466.

2. Effect of time in equity by analogy to the statute of limitations. 15 Ves. 496.

3. Length



3. Length of time adopted in equity by analogy to the statute of limitations. 1 Ves. & Beam. 539.

4. Though the statute of limitations does not apply in terms to proceedings in equity, yet such proceedings are affected by analogy to the statute; so that, in general, if a party be guilty of such laches in pursuing his equitable title as would bar him at law, he shall be barred in equity. But equity will remove the legal bar proceeding from lapse of time, as it would any other legal advantage, if sought to be used unconscientiously. 1 Sch. & Lef. 413. 428. 431.

5. Courts of equity act, not by analogy, but in obedience to the statute of limitations. 2 Sch. & Lef. 630.

6. Courts of equity, though not within the words of the statute of limitations, (which apply to particular legal remedies,) are within the spirit and meaning of them. *Hovenden v. Annesley*, 2 Sch. & Lef. 630.

7. Where the legislature has limited a period for law proceedings, equity will in analogous cases consider itself bound by the same limitation. 2 Sch. & Lef. 632.

8. Every new right of action in equity, must be acted upon within twenty years after it accrues. 2 Sch. & Lef. 636.

9. Although courts of equity are not bound by the statute of limitations, yet in cases of trust and constructive fraud, it will regulate its decisions by analogy to it. 1 Ball & Beatty, 119.

## 2. Legal rights asserted in courts of equity.

Upon all legal titles and legal demands, courts of equity are bound by the statute of limitations. 2 Sch. & Lef. 631.

## 3. Where the legal and equitable title correspond.

The statute of limitations is founded upon the soundest principles, and courts of equity are bound to adopt it, where the legal and equitable title correspond; differing only in the court, where it is to be enforced. 1 Ball & Beatty, 166.

## 4. A trust by implication, as affected by an equity.

Vide 1 B. C. C. 651.; 1 Cox, 28.

## 5. A trust founded on fraud or the like.

With respect to the operation of the statute of limitations upon cases of trust in equity, the distinction is, if the trust be constituted by the act of the parties, the possession of the trustee is the possession of the *cestui que* trust, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud or the like, his possession is adverse; and the statute of limitations will run from the time that the circumstances of the fraud were discovered. 2 Sch. & Lef. 633.

## 6. Rents of estate in trust.

Vide 4 B. C. C. 468.

# III. What transactions are within the exception touching merchant's accounts.

## 1. Whether transactions between principal and agent are.

Whether transactions between principal and agent are within the exception in the statute of limitations as to merchants' accounts, *quære*. *Jones v. Pengree*, 6 Ves. 580.

## 2. Some

## 2. Some transaction must have passed within six years.

1. Merchants' accounts, after six years total discontinuance, within the statute of limitations. *Martin v. Heathcote*, 2 Eden, 169.

2. Statute of limitations a bar to merchants' accounts, all accounts having ceased above six years. *Barber v. Barber*, 18 Ves. jun. 286.

3. Whether, in order to have the benefit of the exception in the statute of limitations as to merchants' accounts, some transaction must have passed within six years, *quære*. *Jones v. Pengree*, 6 Ves. 580.

IV. *What matters or transactions are neither directly nor by analogy within the statute.*

## 1. A bill of revivor after a decree to account.

To a bill of revivor after a decree to account, the statute of limitations cannot be pleaded in bar. 1 Ball & Beatty, 531.

2. A trust, as between trustee and *cestui que* trust.

The rule that trusts are not within the statute of limitations applies only as between trustee and *cestui que* trust, and will not hold where a claim is made after a great length of time against a trustee by implication of law, more especially where such implication is to be raised upon a doubtful equity. *Townsend v. Townsend*, 1 Cox, 28.; 1 B. C. C. 651.

## 3. Nonapplication by trustee of purchase money in discharge of incumbrances.

The statute of limitations cannot be pleaded by trustees in answer to a charge of breach of trust to defend them from the consequences of neglecting their duty in having sold an estate charged with the payment of a sum of money, without satisfying that demand. *Milnes v. Cowley*, 4 Price, 103.

V. *Of the period of limitation.*

## 1. In the case of rents and profits.

1. Account of rent not directed farther back than six years. *Hercy v. Ballard*, 4 B. C. C. 468.

2. Account of rents and profits limited to six years by analogy to legal limitation. 10 Ves. 469.

## 2. In the case of a rent-charge.

No limitation to a rent-charge in law or equity. But the demand may be excluded by presumption from length of time, and acquiescence. 10 Ves. 467.

## 3. To the redemption of a mortgage.

Redemption barred by twenty years possession without impediment to the mortgagor, or ten years after impediment removed. 17 Ves. jun. 99.

VI. *From what period its operation commences.*

## 1. In cases of fraud.

In cases of fraud, time in order to bar the remedy, will not begin to run till the party acquires a knowledge of the facts constituting the fraud. *Blennerhasset v. Day*, 2 B. & B. 129.

## 2. The Irish statute, 8 Geo. 1. c. 4.

The statute of limitations, 8 Geo. 1. c. 4. is meant to apply to cases where no payment of interest is made, although there exists a person entitled to demand interest: until there be such a person, the statute does not begin to run. 2 Sch. & Lef. 30.

## 3. Notwithstanding the courts are closed.

Though the courts of justice were shut up in time of war, so that no original could be sued out, the statute of limitation continues to run. 17 Ves. jun. 93.

## VII. Of avoiding its operation.

## 1. By a demand.

Mere demand, without process or acknowledgment, not sufficient against the statute of limitations. 1 Ves. & Beam. 540.

## 2. By acknowledgment.

Plea of the statute of limitations to a bill of discovery over-ruled; upon letters assigning reasons for declining to pay; and recommending the plaintiff to bring an action; as amounting to an acknowledgment of the debt, sufficient to take it out of the statute upon the authorities; though against principle. Baillie v. Sibbald, 15 Ves. 185.

## 3. By acknowledgment in an answer.

A debt within the statute of limitations taken out of the statute by words in an answer. Galway v. Lord Barrymore, Dick. 163.

## 4. By a devise for debts.

1. A will directing debts to be paid, takes the case out of the statute of limitations. Blakeway v. Lord Strafford, Dick. 48.

2. Whether a charge by will for payment of debts revives a debt barred by the statute of limitations, *quære*. Stackhouse v. Barnston, 10 Ves. 453.

3. As to reviving a debt, within the statute of limitations, under a trust for debts, *quære*. 15 Ves. 488.

4. As to a reviving debt, within the statute of limitations, under a devise for debts, *quære*. 15 Ves. 497.

5. Devise in trust for payment of debts, does not revive a debt, upon which the statute of limitations has taken effect by the effluxion of time before the testator's death. Burke v. Jones, 2 Ves. & Beam. 275.

6. Where lands are devised in trust for payment of debts, the statute of limitations runs not, in equity, after the death of testator, against debts not barred thereby at his death. Executors of Fergus v. Gore, 1 Sch. & Lef. 107. But if the statute had run before the death of testator, it may be set up; for the debts are presumed to be paid. Ibid.

## 5. By bankruptcy.

The effect of the statute of limitations not discontinued by bankruptcy. 15 Ves. 496.

## 6. By payment of dividend under a bankruptcy.

Payment of dividend under a commission of bankruptcy against one partner raises a new *assumpsit* by the other, depriving him of the benefit of the statute of limitations. 15 Ves. 499.

## 7. By fraud.

A woman at the time of her marriage, was indebted on two promissory notes. After the marriage, the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit, the husband pleaded his infancy at the time of giving the bond. On a bill filed in this court for relief, the court ordered the notes to be returned to the plaintiff, with directions that the defendant should not plead the statute of limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given. But it would not order the immediate payment of the money. Clarke v. Copley, 2 Cox, 173.

## VIII. Of the Jamaica statute of limitation.

Its effect, and construction.

1. Effect of the statute of limitations or possessory law, of Jamaica, (beyond the statute of limitations in this country;) barring not merely the legal remedy, but any suit, claim, or demand: converting seven years' possession into a positive absolute title. No exception in favour of absentees; not being within the exception expressed; as there was no such exception out of the statutes of limitation in this country, until expressly given by statute 4 Ann. c. 16. s. 19. *Beckford v. Wade*, 17 Ves. jun. 87.

2. The exception in the law of Jamaica relating to trustees, means actual, not constructive, trusts. *Ibid.*

3. The exception as to tenants for life, not applicable, where they would convey the fee under a power of sale. *Ibid.*

## LOAN.

## Essentials requisite to loan of money.

The repayment must not depend upon a contingency.

In order to constitute a loan, it is essential that the money, with interest, is at all events secured to the lender. 2 Sch. & Lef. 470.

## LUNACY.

## I. General rules and observations.

1. General observations on insanity.
2. The term "*non compos mentis*" defined.

## II. Of the jurisdiction in lunacy, original and delegated.

1. Nature of the jurisdiction exercised by the great seal.
2. Distinction between the jurisdiction in chancery and in lunacy.
3. The care of lunatics is not of necessity delegated to the chancellor.
4. An appeal lies from the great seal to the king in council.
5. Commitment for a contempt of the jurisdiction.
6. The application to remove from gaol to a proper asylum, an indictée acquitted on the ground of lunacy, must be made to the king in council.

## III. Of a commission of lunacy.

1. It is discretionary, not of right.
2. It may issue in any case of mental imbecility; thus, where it arises from habitual intoxication.
3. Or from old age.
4. Mere incapacity to manage his affairs, will not alone support a commission.

5. An inquest, that the party is so far debilitated in his mind, as to be incapable of the general management of his affairs, was quashed.
6. Verdict of unsound mind, is equivalent to idiotcy or lunacy.
7. The inquest cannot make a special return.
8. Nor can a *melius inquirendum* issue on an insufficient return.
9. It may be granted on the application of a stranger, in a proper case.
10. Purpose of the inquiry from what period the lunacy commenced.
11. Purpose of the clause directing the inquiry who is next heir.
12. The inquest need not state whether the lunatic has or has not lucid intervals.
13. The lunatic has a right to be present at its execution.
14. Of notice to the lunatic of executing the commission.
15. The residence is the proper place of execution.
16. The residence prior to lunacy, not the place to which he was since conveyed, was appointed for the place of execution.
17. Commissioners may summon witnesses.
18. Traverse of the inquisition is of right.
19. Whether a mere stranger can traverse the inquisition.
20. The chancellor has a discretion to permit any one grieved to traverse the inquisition.
21. One interested under the lunatic's contract, permitted to traverse the inquisition.
22. Leave to traverse the inquisition, refused to the husband under suspicion of the marriage being invalid.
23. Of the costs of an application for leave to traverse, which fails.
24. The inquest as to the party entitled as next heir, is not conclusive.
25. Upon a traverse of the inquisition, the jury, *inter alia*, returning, not now a lunatic, the commission was superseded.
26. Inquest in England under an English commission, not sufficient to found a grant of lands in Ireland.
27. Reference for maintenance, though no commission had issued.
28. Order that a trustee of unsound mind shall transfer stock, though no commission had issued.
29. A person found lunatic by a competent jurisdiction abroad, may be considered a lunatic here.
30. Order, without a reference, for maintenance, in a case where no commission had issued.
31. Of the degree of restoration of the mental faculties, sufficient to warrant a *supersedeas*.

#### IV. Of the committee of a lunatic.

1. His office is ministerial only.
2. The person may be committed to one, the estate to another's care.

3. Who

3. Who are eligible, as — the next of kin.
4. Who are eligible, as — relations are preferred to strangers.
5. Who are not eligible, as — a master in chancery.
6. Who are not eligible, as — one who has agreed to give part of the profits to another.
7. Form of appointment — with or without a reference.
8. The course on the committee becoming lunatic.
9. A committee will be removed upon his bankruptcy.
10. The course, on a vacancy in the office.
11. The course, where no one can be procured to act.
12. The lunatic's death does not determine the control over his committee.
13. The person of the lunatic may be delivered to the committee by order, without *habeas corpus*.
14. Miscellaneous matters.
15. See *infra*, 5.

#### V. Of the administration of the lunatic's estate.

1. In lunacy, the crown is merely a trustee.
2. The estate can be granted only during pleasure.
3. The rule is to attend to the owner's interest, without any regard to the succession.
4. Management of timber.
5. Of the authority of the court to fell decayed timber.
6. Investment of property in securities.
7. Land-tax redeemed out of the produce of decayed timber.
8. Timber cut on estate *ex parte paternâ*, applied to discharge encumbrance on estate *ex parte maternâ*.
9. Creditors cannot require an order, the effect of which would reduce the lunatic to want.
10. Order on petition, that part of the lunatic's real estate be sold for payment of debts to prevent a bill by the creditors, refused.
11. Of ordering, upon petition, payment of debts out of funds, not within the creditor's reach.
12. An absolute title to the lunatic's leasehold estate, cannot be made by an order in lunacy.
13. A tenant will be restrained from waste, by petition, without bill.
14. Order, after lunatic's death, for payment of a debt.
15. Of conveyance by lunatic trustee, under 4 Geo. 2. c. 10.
16. The 36 Geo. 3. c. 90. s. 3. does not extend to stock standing in the name of another, to which the lunatic is entitled as administrator.
17. A transfer of stock under 36 Geo. 3. c. 90. will not be ordered, where the lunatic is abroad, under a judicial proceeding, in nature of a commission of lunacy.
18. Alteration of property is as far as possible to be avoided.
19. Of the conversion of property, in relation to the equities of the different representatives.
20. Whether the produce of decayed timber felled, shall be considered real or personal estate.

21. The produce of timber felled, is personal estate.
22. Purchase, by the committee, of real estate, with the savings, to be considered personal estate still.
23. When a charge falling in, shall sink for the heir.
24. Mode of a committee's passing his accounts.
25. Expenditure by the committee, without a previous order, not to be allowed.
26. Allowance for necessary repairs, made without order, refused.
27. Agreement by the committee, for working coal, established under the circumstances.
28. Allowance to husband, accounting for wife's separate estate, for extra expence incurred by her lunacy.
29. Quantum of allowance for maintenance.
30. Of allowance to a lunatic's relations.
31. The committee, on the lunatic's death, will be ordered to give up possession to the heir.
32. Bill lies by the attorney-general against the committee for an account of, and to secure, the property.

#### VI. Construction of the statute 17 Edw. 2. c. 9.

The term "waste" defined.

#### VII. Of the interposition of a court of equity to invalidate transactions overreached by an inquisition in lunacy.

1. Where a contract is fair and without notice.
2. Preliminary issue.

#### VIII. Of the right of an interested person to access to a lunatic to ascertain his state.

Refused in a case where the interest was in default of appointment by lunatic.

#### IX. Of appointing a guardian ad litem.

1. The committee was appointed guardian to defend a suit.
2. Where lunatic is defendant in committee's suit, a guardian will be appointed.
3. Defendant becoming insane after decree, a guardian was appointed to produce books, &c.

#### X. Of a state of lunacy with lucid intervals.

Acts by a lunatic, done during a lucid interval, are valid.

#### XI. Of presumptions in a case of lunacy.

1. Lunacy being established, the proof of recovery is thrown upon the party.
2. In relation to lucid intervals.

#### I. General rules and observations.

1. General observations on insanity.

General observations on. Attorney-general v. Parnter, 3 B. C. C. 441.

2. The

2. The term "*non compos mentis*" defined.

Explanation of "*non compos mentis*." 12 Ves. 450.

## II. Of the jurisdiction in lunacy, original and delegated.

## 1. Nature of the jurisdiction exercised by the great seal.

1. The great seal hath the care of lunatics under a special appointment, and acts as a commissioner. *Wigg v. Tyler*, Dick. 552.

2. Under the statute, the crown commits the care of lunatics to some great officer, not of necessity the chancellor. The warrant confers no jurisdiction, but only a power of administration. The appeal is to the king in council. 2 Ves. 71.

3. The care of the person and property of a lunatic, is a trust reposed in the king, who discharges it by bailiff: which bailiff is appointed by the person holding the great seal, by virtue of a warrant from the crown. But the superintendence of the conduct of the committee, originates in the authority of the court itself; as being the court from which the commission issues, into which the inquisition is returned, and which makes the grant founded thereon. *In re Fitzgerald*, 2 Sch. & Lef. 432.

4. In this case, A. was found next heir by the inquisition. B. (who would have been next heir, if A. had been out of the way,) had got into possession of the estates as committee of the deceased lunatic, and refused to deliver it to A. whom he alleged to be illegitimate. B. was restrained from interfering with the rents under colour of the authority vested in him as committee; and each party left at liberty to assert their claims as they should be advised. *Ibid*.

5. And the title deeds being brought in by B. pursuant to order, the court refused to make an order for liberty to inspect them, on behalf of A. claiming as heir, until a bill should be filed, and the deeds transferred to the credit of that cause. *Ibid*.

## 2. Distinction between the jurisdiction in chancery and in lunacy.

Distinction between the jurisdiction of the court of chancery, and that in lunacy, under a special warrant from the crown, usually intrusted to the keeper of the great seal. *Sherwood v. Sanderson*, 19 Ves. 280.

3. The care of lunatics is not of necessity delegated to the chancellor. *Vide supra*, div. 1.

4. An appeal lies from the great seal to the king in council.

*Vide* 2 Ves. 71.

## 5. Commitment for a contempt of the jurisdiction.

Commitment in the jurisdiction of lunacy for a contempt, by the publication of a pamphlet. Ignorance of the contents will not excuse the printer. *Ex parte Jones*, 13 Ves. 237.

6. The application to remove from gaol to a proper asylum, an indictée acquitted on the ground of lunacy, must be made to the king in council.

Where a lunatic had been tried for murder, and acquitted on account of his lunacy, but ordered by the judge to be detained; the lord chancellor declined ordering him to be removed out of gaol, to a proper receptacle for lunatics, the proper application being to the king in council. *Ex parte Hill*, Cooper, 54.

## III. Of a commission of lunacy.

## 1. It is discretionary, not of right.

Commission of lunacy the subject of discretion; regulated solely for the benefit



benefit of the lunatic, with reference to the care of his person and property: not of course, therefore, upon the mere fact of lunacy. *Ex parte Tomlinson*, 1 Ves. & Beam. 57.

2. It may issue in any case of mental imbecility; thus, where it arises from habitual intoxication.

The commission of lunacy is not confined to strict insanity; but is applied to cases of imbecility of mind, to the extent of incapacity, from any cause; as disease, age, or habitual intoxication. *Ridgeway v. Darwin*, 8 Ves. 65.

3. Or from old age.

The commission of lunacy applicable to incapacity from causes distinct from lunacy; as old age: but the return, if not in the words of the commission, must have equivalent words; and in such a case the proper return is, that the party is of unsound mind; so that he is not sufficient for the government of himself, &c. *Ex parte Cranmer*, 12 Ves. 445.

4. Mere incapacity to manage his affairs, will not alone support a commission.

Verdict of unsound mind equivalent to idiocy or lunacy; but mere incapacity to manage his affairs, will not alone support the commission. *Sherwood v. Sanderson*, 19 Ves. 285.

5. An inquest, that the party is so far debilitated in his mind, as to be incapable of the general management of his affairs, was quashed.

Return to a commission of lunacy, that the party is so far debilitated in his mind as to be incapable of the general management of his affairs, quashed: and a new commission issued: a "*melius inquirendum*" not issuing in lunacy. *Ex parte Cranmer*, 12 Ves. 445.

6. Verdict of unsound mind, is equivalent to idiocy or lunacy.

Vide 19 Ves. 285.

7. The inquest cannot make a special return.

No special verdict upon a commission of lunacy. 12 Ves. 450.

8. Nor can a *melius inquirendum* issue on an insufficient return.

Vide 12 Ves. 445.

9. It may be granted on the application of a stranger, in a proper case.

Commission of lunacy, in a proper case, granted upon the application of a stranger; and without regard to his motive; the lunatic being a natural child; and his mother opposing it. *Ex parte Ogle*, 15 Ves. 112.

10. Purpose of the inquiry from what period the lunacy commenced.

Reason of the enquiry from what period the lunacy commenced. When the lunacy is of some duration, and the lunatic has performed acts, the principle on which the crown extends its protection requires an examination into the circumstances of competence and incompetence. *Ex parte Smith*, Swanst. 6.

11. Purpose of the cause directing the inquiry who is next heir.

The commission directing the jury to enquire who is the next heir of the lunatic, is to enable the crown to know to whom the property ought to be delivered on the death of the lunatic. The person so found is *primæ facie*, entitled as heir; but the inquisition is not conclusive to that fact. 2 Sch. & Lef. 440.

12. The inquest need not state whether the lunatic has or has not lucid intervals.

Upon the return of the traverse to the inquisition of lunacy, finding, that

the party was a lunatic at the time of her marriage and at the time of taking the inquisition, but at that time (the verdict) was not a lunatic, the commission was superseded; but the lord chancellor doubted the propriety of such a double issue. *Ex parte Ferne*, 5 Ves. 832.

13. The lunatic has a right to be present at its execution.

Privilege of the party, who is the subject of a commission of lunacy, to be present at the execution. *Ex parte Cranmer*, 12 Ves. 445.

14. Of notice to the lunatic of executing the commission.

The lord chancellor inclined to quash the inquisition: the commission not having been executed near the place of abode; and an order that the lunatic should have due notice, having been disobeyed. *Ex parte Hall*, 7 Ves. 261.

15. The residence is the proper place of execution.

The residence is the proper place at which to execute a commission of lunacy. *Ex parte Baker*, Cooper, 205.

16. The residence prior to lunacy, not the place to which he was since conveyed, was appointed for the place of execution.

Commission of lunacy directed to be executed in the neighbourhood in which the lunatic resided prior to his lunacy, not in that to which he had been since conveyed; although evidence was given of his inability to bear removal. *Ex parte Smith*, Swanst. 4.

17. Commissioners may summon witnesses.

Commissioners of lunatics have a power of summoning witnesses as incident to their office. 6 Ves. 784.

18. Traverse of the inquisition is of right.

1. A traverse to the return to an inquisition finding a person lunatic is a right by law; though the lord chancellor is not dissatisfied with the return upon the evidence. The order was therefore suspended for the purpose of taking the traverse. *Ex parte Wragg*, *ex parte Ferne*, 5 Ves. 450.

2. Traverse to an inquisition, finding a person lunatic, is *de jure*, not matter of favour. 5 Ves. 833.

3. Right to traverse an inquisition of lunacy under the statute 2 Edw. 6. c. 8. s. 6. 6 Ves. 580.

19. Whether a mere stranger can traverse the inquisition.

Whether a mere stranger having no interest would be permitted to traverse an inquisition of lunacy, *quære*. *Ex parte Ward*, 6 Ves. 579.

20. The chancellor has a discretion to permit any one grieved to traverse the inquisition.

It is in the discretion of the lord chancellor to grant leave to any person grieved, &c. to traverse an inquisition of lunacy. Refused to the husband of the lunatic, under circumstances which made the validity of the marriage doubtful. *In re Fust*, 1 Cox, 418.

21. One interested under the lunatic's contract, permitted to traverse the inquisition.

A person, having an interest under a contract with the lunatic, permitted to traverse. *Ex parte Hall*, 7 Ves. 261.

22. Leave to traverse the inquisition, refused to the husband under suspicion of marriage being invalid.

Vide 1 Cox, 418.

23. Of the costs of an application for leave to traverse, which fails.

Any fair and reasonably provident application as to the execution of a commission of lunacy is not discouraged: but in this instance the petition being wholly groundless was dismissed with costs. *Ex parte Ward*, 6 Ves. 579.

24. The inquest as to the party entitled as next heir, is not conclusive.  
Vide 2 S. & L. 440.

25. Upon a traverse of the inquisition, the jury, *inter alia*, returning, not now a lunatic, the commission was superseded.

Vide 5 Ves. 832.

26. Inquest in England under an English commission, not sufficient to found a grant of lands in Ireland.

An inquisition taken in England under a commission of lunacy issued there, is not sufficient to found a grant of lands in Ireland. There must be an inquisition and finding under the authority of the great seal of Ireland. *In re Duchess of Chandos*, 1 Sch. & Lef. 301.

27. Reference for maintenance, though no commission had issued.

Reference to a master, to see what was proper to be allowed for the maintenance of a person of insane mind, no commission of lunacy having issued; ordered after consideration. *Machin v. Salkeld*, Dick. 634.

28. Order that a trustee of unsound mind shall transfer stock, though no commission had issued.

Stock ordered to be transferred under the statute 36 Geo. 3. c. 90. the trustee being of unsound mind, though no commission had issued; and having actually refused to transfer; the refusal proceeding from mere weakness of mind. *Simms v. Naylor*, 4 Ves. 360.

29. A person found lunatic by a competent jurisdiction abroad, may be considered a lunatic here.

A person found a lunatic by a competent jurisdiction abroad, may be considered a lunatic here. 2 Ves. 588.

30. Order, without a reference, for maintenance, in a case where no commission had issued.

Upon petition, praying a reference to the master as to the state of the plaintiff and her fortune, and directions for her maintenance, the property being too small to bear a commission of lunacy, an order was made upon affidavit, without a reference, for payment of the dividends for the two ensuing quarters. *Eyre v. Wake*, 4 Ves. 795.

31. Of the degree of restoration of the mental faculties, sufficient to warrant a *supersedeas*.

Issue directed upon a lunacy, established by two verdicts. To supersede a commission, it is not necessary that the mind should be restored to its original state: competence to common purposes, as to make a will of personal estate, is sufficient. But the absence of the disorder, especially if of a dangerous tendency, must be satisfactorily proved by the evidence of persons having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence. *Ex parte Holyland*, 11 Ves. 10.

## IV. Of the committee of a lunatic.

## 1. His office is ministerial only.

The committee of a lunatic is as a receiver or bailiff; merely official. 2 Sch. & Lef. 439.

## 2. The person may be committed to one, the estate to another's care.

Bankruptcy of the committee of the person of a lunatic is a sufficient cause for removing him on account of the fund for maintenance: but the custody of the person will not be changed, if the master finds it proper, with regard to the comfort of the lunatic, that it should continue. *Ex parte Mildmay*, 3 Ves. 2.

## 3. Who are eligible, as — the next of kin.

The old rule, that the next of kin of a lunatic, if entitled to his estate upon his death, was not to be committee of the person, is not now adhered to. *Ex parte Cockayne*, 7 Ves. 591.

## 4. Who are eligible, as — relations are preferred to strangers.

In the appointment of committee of a lunatic, relations, unless some specific objection, preferred to strangers. The wife appointed committee of the person, not alone, but jointly with a relation. *Ex parte Le Heup*, 18 Ves. jun. 221.

## 5. Who are eligible, as — a master in chancery.

The court will not appoint a master in chancery to an office, in respect of which he will be liable to account; as, committee of a lunatic's estate. The court refused to appoint a person committee of a lunatic, upon the circumstances; particularly, that he had agreed to give part of the profits to another. *Ex parte Fletcher*, 6 Ves. 427.

## 6. Who are eligible, as — one who has agreed to give part of the profits to another.

*Ibid.*

## 7. Form of appointment — with or without a reference.

Appointment of committee of a lunatic without a reference; and the balances to be paid in on affidavit, without annual account before the master, the property being very small. *Ex parte Pickard*, 3 Ves. & Beam. 127.

## 8. The course on the committee becoming lunatic.

One of the defendants being a lunatic, and the committee of his estate being also a lunatic, application should be made to the great seal, to appoint a new committee of the estate. *Lloyd v. —*, Dick. 460.

## 9. A committee will be removed upon his bankruptcy.

*Vide* 3 Ves. 2.

## 10. The course, on a vacancy in the office.

Where a party has been found a lunatic under a commission of inquiry, this court will not interfere. *Murray v. Frank*, Dick. 555.

## 11. The course, where no one can be procured to act.

Where no one could be procured to act as committee of a lunatic, a receiver was appointed, with a salary: but to be considered, and give security, as committee. *Ex parte Warren*, 10 Ves. 622.

## 12. The lunatic's death does not determine the control over his committee.

The control of the court on the committee of a lunatic, is not determined by the death of the lunatic. 2 Sch. & Lef. 441.

## 13. The

13. The person of the lunatic may be delivered to the committee by order, without *habeas corpus*.

Order, that a person, against whom a commission of lunacy was established, should be delivered up to the committee. *Habeas corpus* not necessary. *Ex parte Cranmer*, 12 Ves. 445.

14. Miscellaneous matter.

Upon bill by son, committee of father, a lunatic, to set aside a voluntary settlement by him; motion for defendant to let the house, sell the furniture, &c. and bring the whole into court, refused; plaintiff not consenting. *Colman v. Croker*, 1 Ves. 160.

## V. Of the administration of the lunatic's estate.

### 1. In lunacy, the crown is merely a trustee.

1. For lunatics the crown is merely a trustee; but in the case of an idiot, the crown is absolutely entitled to the profits, subject to the maintenance of the idiot. 2 Sch. & Lef. 153. *In re Fitzgerald*, 436.

2. Whether the warrant which gives to the chancellor the right of providing for the care of the persons and estates of idiots and lunatics, authorises him to pass letters patent granting to any person, for his own benefit, the surplus profits of the idiot's estate, *quære*. *Lysaght v. Royse*, 2 Sch. & Lef. 153.

### 2. The estate can be granted only during pleasure.

No grant of a lunatic's estate can be made otherwise than during pleasure. 2 Sch. & Lef. 438.

### 3. The rule is to attend to the owner's interest, without any regard to the succession.

In managing the estate of a lunatic, the general principle is, to attend solely to the interest of the owner, without any regard to the succession. 2 Ves. 72.

### 4. Management of timber.

Where timber makes part of the general rental of an estate, in case of lunacy it would be a breach of duty not to manage it in the usual manner. 2 Ves. 71.

### 5. Of the authority of the court to fell decayed timber.

Lord chancellor thought that, notwithstanding the words of the statute, the court has authority to order timber decaying on the estate of a lunatic, to be cut: but did not absolutely decide that point; or whether the produce should be considered as real or personal estate. *Ex parte Bromfield*, 3 B. C. C. 510.

### 6. Investment of property in securities.

1. The court will never permit any part of the lunatic's estate to be laid out on private security. *Ex parte Calthorpe*, 1 Cox, 182.

2. Residue of a lunatic's property beyond his debts invested in a government annuity for his maintenance upon the master's report that it was for his benefit. *Ex parte Stonnard*, 18 Ves. jun. 285.

### 7. Land-tax redeemed out of the produce of decayed timber.

Land-tax on a lunatic's estate redeemed by order out of the produce of decaying timber, ordered to be cut for payment of debts under the master's report, that it was for his benefit. No equity for a charge in favour of the next of kin. *Ex parte Phillips*, 19 Ves. 118.

### 8. Timber

8. Timber cut on estate *ex parte paternā*, applied to discharge incumbrance on estate *ex parte maternā*.

Timber on a lunatic's estate *ex parte paternā*, cut; and applied in discharge of a mortgage on his estate *ex parte maternā*; no equity between the heirs. *Ex parte Phillips*, 19 Ves. 123.

9. Creditors cannot require an order, the effect of which would reduce the lunatic to want.

The lord chancellor will not even for creditors make an order in lunacy, the effect of which must be to put the lunatic in a state of absolute want. *Ex parte Dikes*, 8 Ves. 79.

10. Order on petition, that part of the lunatic's real estate be sold for payment of debts to prevent a bill by the creditors, refused.

The lord chancellor cannot upon a petition in lunacy order part of the lunatic's real estate to be sold for payment of his debts, to prevent a bill by the creditors. *Ex parte Smith*, 5 Ves. 556.

11. Of ordering, upon petition, payment of debts out of funds, not within the creditor's reach.

No order upon petition in lunacy for payment of the lunatic's debts out of funds, not within the reach of his creditors, except for his accommodation, and it clearly appears, that he will have a sufficient maintenance. *Ex parte Hastings*, 14 Ves. 182.

12. An absolute title to the lunatic's leasehold estate, cannot be made by an order in lunacy.

The lord chancellor cannot by an order in lunacy make an absolute title to the lunatic's leasehold estate. *Ex parte Dikes*, 8 Ves. 79.

13. A tenant will be restrained from waste, by petition, without bill.

The tenant of a lunatic's estate was restrained, on petition, from committing waste, there being no bill filed. *In re Creagh*, 1 Ball & Beatty, 108.

14. Order, after lunatic's death, for payment of a debt.

Order, after the death of a lunatic, for payment of a debt; viz. an attorney's bill upon a retainer, overreached by the lunacy; and no report of debts: if the petition is presented in the life of the lunatic. But the debt must be established at law. *Ex parte M'Dougal*, 12 Ves. 384.

15. Of conveyance by lunatic trustee, under 4 Geo. 2. c. 10.

1. A trustee found a lunatic by the master's report, cannot be ordered to convey under the statute 4 Geo. 2. c. 10. unless a commission of lunacy has issued. *Ex parte Gillam*, 2 Ves. 587.

2. A lunatic trustee within the statute 4 Geo. 2. c. 10. must be without interest or duty. Therefore having an interest as a creditor, the trust being to sell for payment of debts, he is not within the act. *Ex parte Tutin*, 3 Ves. & Beam. 150.

16. The 36 Geo. 3. c. 90. s. 3. does not extend to stock standing in the name of another, to which the lunatic is entitled as administrator.

Construction of the act 36 Geo. 3. c. 90. s. 3., directing the transfer in certain cases, of stock standing in the name of a lunatic or of his committee; not to extend to stock standing in the name of another, to which the lunatic is entitled as administrator. *Ex parte Adams*, 2 Mer. 112.

17. A transfer of stock under 36 Geo. 3. c. 90. will not be ordered, where the lunatic is abroad, under a judicial proceeding, in nature of a commission of lunacy.

A lunatic abroad, under a judicial proceeding in nature of a commission of lunacy, is not within the statute 36 Geo. 3. c. 90. *Sylva v. Da Costa*, 8 Ves. 316.

18. Alteration of property is as far as possible to be avoided.

In managing the estate of a lunatic, this court may apply personal in payment of debts to any extent, and is to take every advantage that tends fairly towards ordinary improvement, considering only the immediate interest of the proprietor; but consistently with that, alteration of property is as far as possible to be avoided; and great care must be taken, that nothing extraordinary is attempted; as purchasing estates, disposing of interests, engaging in adventures, &c. 2 Ves. 73.

19. Of the conversion of property, in relation to the equities of the different representatives.

1. No equity between heir at law of a lunatic and his personal representatives. *Oxendon v. Oxendon*, 4 B. C. C. 397.

2. There is no equity between the real and the personal representatives after the death of a lunatic, to have property, which was altered by the court, restored; therefore the produce of timber on the estate of a lunatic, cut and sold by order on report that it would be for his benefit, is personal assets. *Oxenden v. Lord Compton*, 2 Ves. 69.

20. Whether the produce of decayed timber felled, shall be considered real or personal estate.

Vide 3 B. C. C. 510.

21. The produce of timber felled, is personal estate.

Timber being felled on a lunatic's estate by a committee, by order of the court, the produce is personal estate of the lunatic. *Oxendon v. Compton*, 4 B. C. C. 391.

22. Purchase, by the committee, of real estate, with the savings, to be considered personal estate still.

The committee of a lunatic's estate hath not power by purchasing real estate with the savings, to alter the nature of the property, and lands so purchased will be considered as personal estate. *Audley v. Audley*, Dick. 16.

23. When a charge falling in, shall sink for the heir.

Charge upon a lunatic's estate falling into him as representative of his sister, shall sink for his heir at law. *Compton v. Oxenden*, 4 B. C. C. 397.

24. Mode of a committee's passing his accounts.

Committee of lunatic's estate not permitted to pass his accounts without inquiry, what money in his hands from time to time. Master to state particular circumstances. *Ex parte Cotton*, 1 Ves. 156.

25. Expenditure by the committee, without a previous order, not to be allowed.

Expenditure by the committee of a lunatic's estate, without a previous application, not to be allowed. *Ex parte Marton*, *ex parte Hilbert*, 11 Ves. 397.

26. Allowance for necessary repairs, made without order, refused.

Repairs, made without a previous order, though reported necessary, not allowed to the committee of a lunatic's estate. *Anon.* 10 Ves. 104.

27. Agree-

**27. Agreement by the committee, for working coal, established under the circumstances.**

Agreement by the committee of a lunatic, that coal, under the lunatic's estate, should be worked by the owner of the adjoining land, established under the circumstances. *Ex parte* Tabbert, 6 Ves. 428.

**28. Allowance to husband, accounting for wife's separate estate, for extra expence incurred by her lunacy.**

In an account against the husband's estate of dividends of the wife's separate assets received by him, consideration to be had of his extra expence of maintaining her, in consequence of her being a lunatic. *Attorney-general v. Parnter*. 4 B. C. C. 409.

**29. Quantum of allowance for maintenance.**

A liberal application of the property of a lunatic is to be made, to secure every comfort his situation will admit. *Ex parte* Baker, 6 Ves. 8.

**30. Of allowance to a lunatic's relations.**

Practice of making an allowance to the immediate relations of a lunatic, other than those whom the lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and founded not on any supposed interest in the property, which cannot exist during the lunatic's lifetime, but upon the principle, that the court will act with reference to the lunatic, and for his benefit, as it is probable the lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are therefore entirely in the discretion of the court. *Ex parte* Whitbread, 2 Mer. 99.

**31. The committee, on the lunatic's death, will be ordered to give up possession to the heir.**

On application of the heir, after the death of the lunatic, the court will order the committee to give up the possession, and not put the heir to his ejectment; supposing his title as heir, admitted. 2 Sch. & Lef. 439.

**32. Bill lies by the attorney-general against the committee for an account of, and to secure the property.**

Bill will lie by the attorney-general on behalf of a lunatic against her committee for an account of, and to secure, the lunatic's property. *Attorney-general v. Parnter*, Dick. 748.

**VI. Construction of the statute 17 Edw. 2. c. 9.**

The term "waste" defined.

1. *Waste* in the statute providing for lunatics, means destruction, not that from which tenant for life impeachable is restrained. 1 Ves. 461.

2. The statute of lunatics does not introduce any new right in the crown; the words, *waste and destruction*, in it, are to be construed in the ordinary, not the technical, sense. 2 Ves. 71.

**VII. Of the interposition of a court of equity to invalidate transactions overreached by an inquisition in lunacy.****1. Where a contract is fair and without notice.**

A court of equity will not interfere to set aside a contract, overreached by an inquisition in lunacy, if fair and without notice; especially where the parties cannot be reinstated. *Niell v. Morley*, 9 Ves. 478.

**2. Preliminary issue.**

Upon a bill for specific performance of a contract, overreached by a commission



mission of lunacy, the plaintiff not having traversed the inquisition, an issue was directed, whether the defendant was a lunatic at the execution: if so, whether he had lucid intervals; and whether the contract was executed during a lucid interval; the difficulties in executing the contract, which was for the sale of an estate vested in the lunatic, viz. that the price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous enquiry, with a view to performance: the plaintiff being willing to take the title. *Hall v. Warren*, 9 Ves. 605.

### VIII. Of the right of an interested person to access to a lunatic, to ascertain his state.

Refused in a case where the interest was in default of appointment by lunatic.

Access to a lunatic by a person entitled upon the death of the lunatic in default of appointment by her, to see, whether she was in a state to exercise the power, refused. *Ex parte Lyttleton*, 6 Ves. 7.

### IX. Of appointing a guardian *ad litem*.

1. The committee was appointed guardian to defend a suit.

The committee of the estate of a lunatic appointed his guardian, to answer and defend the suit. *Westcomb v. Westcomb*, Dick. 233.

2. Where lunatic is defendant in committee's suit, a guardian will be appointed.

Defendant, a lunatic, stating that his committee was a plaintiff, reference to the master to appoint defendant a guardian *ad litem*. *Snell v. Hyat*, Dick. 287.

3. Defendant becoming insane after decree, a guardian was appointed to produce books, &c.

The defendant becoming impaired in his mind, after the decree, had a guardian appointed him, by whom he might produce books, &c. *Gason v. Garnier*, Dick. 286.

### X. Of a state of lunacy with lucid intervals.

Acts by a lunatic, during lucid interval, are valid.

Acts by a lunatic, done during a lucid interval, valid. 9 Ves. 610.

### XI. Of presumptions in a case of lunacy.

1. Lunacy being established, the proof of recovery is thrown upon the party.

Insanity having been once established, proof of recovery is upon the party: otherwise the insanity must be established, by proof applying to the particular date. 13 Ves. 88.

2. In relation to lucid intervals.

General lunacy being established the proof is thrown upon the party alleging a lucid interval; and must establish, beyond a mere cessation of the violent symptoms, a restoration of mind, sufficient to enable the party soundly to judge of the act. 9 Ves. 611.

## MAINTENANCE (OF SUITS).

### I. What is maintenance.

In the case of suit instituted.

II. What

**II. What is not maintenance.**

The sale of an equitable interest under a contract of purchase.

**III. When maintenance is justifiable.**

In respect of privity in estate, or connection.

**I. What is maintenance.**

In the case of suit instituted.

Vide 3 Ves. 494.

**II. What is not maintenance.**

The sale of an equitable interest under a contract of purchase.

Vide Swanst. 56.

**III. When maintenance is justifiable.**

In respect of privity in estate, or connection.

Vide 3 Ves. 503.

**MAINTENANCE (SUSTENANCE).****I. Of the parent's right to an allowance for maintenance out of his child's fortune.**

1. General rule upon the subject.
2. Distinction as to maintenance between an infant and a married woman with a separate income.
3. Where the will, bequeathing the fortune, directed it to be applied to maintenance.
4. Where the children's fortune, on a second marriage, was settled to the use of the mother for life, with a provision for maintenance.
5. In the case of the children of his wife by a former marriage.
6. Where the father was abroad in very embarrassed circumstances.
7. Maintenance given under the circumstances.

**II. Of the guardian's right to maintenance for his ward.**

1. Payment under circumstances, directed to the testamentary, instead of the appointed, guardian.
2. Vide in tit. GUARDIAN.

**III. Of the husband's right to an allowance for maintenance out of his wife's separate estate.**

1. General rule upon the subject.
2. Under the peculiar circumstances of her insanity and otherwise.

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Allowance to a residuary legatee pending the account.

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1. Where one of two funds is sought to be charged.

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2. A large allowance ordered under circumstances.
3. A larger allowance than that prescribed by the will, ordered under circumstances.

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1. Pendency of suit, not essential to.
2. Form of the reference to the master.

**X. Of the mode of opposing the allowance.**

By setting up an adverse title.

**I. Of the parent's right to an allowance for maintenance out of his child's fortune.**

1. General rule upon the subject.

1. If the parent be of ability to maintain his children, he shall not have an allowance for that purpose out of the interest of a fortune coming *aliunde*, although it was ordered by the will to be applied to maintenance. *Hughes v. Hughes*, 1 B. C. C. 387.

2. No maintenance shall be allowed where the parent is of ability to maintain his children. *Pulsford v. Hunter*, 3 B. C. C. 416.; *Salter ex parte*, 3 B. C. C. 500.

3. In

3. In order to entitle the father of an infant legatee to maintenance, it is not necessary that he should be absolutely insolvent; but that he should not be in sufficient circumstances to maintain his child suitably to his expectation. *Buckworth v. Buckworth*, 1 Cox, 80.

4. Distinction as to maintenance between an infant and a married woman with a separate income: the father of ability, not exonerated from maintenance by the infant's property: the husband maintaining his wife and receiving her separate income, not liable to account for more than one year, upon a presumed agreement to subject that fund to maintenance. *Brodie v. Barry*, 2 Ves. & Beam. 36.

2. Distinction as to maintenance between an infant and a married woman with a separate income.

Vide 2 V. & B. 36.

3. Where the will, bequeathing the fortune, directed it to be applied to maintenance.

1. Although where fortunes are given to children (living the father) with provision for maintenance, that shall not be raised, but accumulate when the father is of ability to maintain them; yet, when the children's fortune, on a second marriage, were settled to the use of the mother for life, with a provision for maintenance out of the interest of the fund, the court ordered an allowance. *Mundy v. Earl Howe*, 4 B. C. C. 223.

2. Maintenance decreed to grandchildren out of the fortune bequeathed to them by their grandfather, though no direction for it in the will. *Collins v. Blackburn*, 9 Ves. 470.

4. Where the children's fortune, on a second marriage, was settled to the use of the mother for life, with a provision for maintenance.

Vide 4 B. C. C. 223.

5. In the case of the children of his wife by a former marriage.

The mother having married again, her second husband is not bound to maintain the children by the former marriage, but shall have an allowance out of their fortunes. *Billingsley v. Critchet*, 1 B. C. C. 268.

6. Where the father was abroad in very embarrassed circumstances.

The interest of small legacies ordered to be paid to the mother, for maintenance, upon her affidavit, that the father was abroad in very embarrassed circumstances. *Walker v. Shore*, 15 Ves. 122.

7. Maintenance given under the circumstances.

Maintenance under the circumstances given to a father, who had 6000*l.* a year of his own, and although no report of debts had been made. *Jervoise v. Silk*, Cooper, 52.

## II. Of the guardian's right to maintenance for his ward.

Payment under circumstances, directed to the testamentary, instead of the appointed, guardian.

A part of the maintenance allowed for the infant, was under particular circumstances directed to be paid to the mother and testamentary guardian, although another person was appointed guardian. *Heysham v. Heysham*, 1 Cox, 179.

## III. Of the husband's right to an allowance for maintenance out of his wife's separate estate.

1. General rule upon the subject.

Under peculiar circumstance, the insanity of the wife, but no commission issued,

issued, maintained in Scotland by the husband, an only child, an infant entitled to the capital in the event of surviving his mother, upon the husband's application for an allowance, inquiries were directed as to the just maintenance, and the husband's ability, with due regard to her comfort, &c. *Brodie v. Barry*, 2 Ves. & Beam. 36.

2. Under the peculiar circumstances of her insanity, and otherwise. *Ibid.*

#### IV. Of maintenance in other cases.

Allowance to a residuary legatee pending the account.

Where the court can be satisfied, that the fund is clear, an allowance for maintenance will be allowed, pending the account, to the residuary legatees; not, if an accounting party. *Warter v. ———*, 13 Ves. 92.

#### V. Measure of the allowance.

1. Where one of two funds is sought to be charged.

A direction by will, to apply so much interest as might be necessary towards the maintenance and education of the testator's grandchildren upon the decease of their respective mothers, the residue to accumulate for them all, was confined to so much as should be actually necessary, regard being had to their situation at the death of their mother; their father having by his will left them a considerable property, with a provision for maintenance. *Rowlings v. Goldfrap*, 5 Ves. 440.

2. A large allowance ordered under circumstances.

A large allowance for maintenance and education ordered under circumstances: but with reluctance. *Ex parte Petre*, 7 Ves. 403.

3. A larger allowance than that prescribed by the will, ordered under circumstances.

Increase of maintenance, beyond that prescribed by the will, ordered under circumstances; the infants being entitled to the fund absolutely among them: viz. a daughter to a portion at twenty-one; and the sons to the residue with survivorship. *Aynsworth v. Pratchett*, 13 Ves. 321.

#### VI. Of increasing the allowance.

1. Beyond the sum prescribed by the will.

Vide 13 Ves. 321.

2. Form of the reference by the master, to ascertain the propriety of an increase.

Application for an increase of maintenance, regard being had to two children unprovided, denied; and reference to see whether it was proper to make any and what increase to the allowance for the maintenance of the infants. *Burnet v. Burnet*, Dick. 602.

#### VII. The fund out of which maintenance may be dettred.

1. General rule as to allowing maintenance against a direction for accumulation.

Maintenance allowed, against a direction for accumulation, only where it is for the benefit of the infants; the chance by surviving being equal; and no other interest to take effect upon any contingency will be defeated. *Errat v. Barlow*, 14 Ves. 202.

2. Where principal and interest of legacy is vested, though directed to accumulate till twenty-one.

Maintenance allowed where principal and interest of a legacy to a child

is vested, although the interest is directed to accumulate until legatee attains twenty-one. *Stretch v. Watkins*, 1 Mad. 253.

3. A fund directed to accumulate till twenty-one, and on dying before twenty-one, limited over.

1. Maintenance allowed an infant out of the produce of the residue of personal estate, bequeathed to him by his father, where the will directed the interest to accumulate till he attained twenty-one, and if he died before, the whole given over, and the will was silent as to maintenance. *Mole v. Mole*, Dick. 310.

2. Residuary bequest in favour of infant grandchildren, payable at twenty-one or marriage, or to the issue of those dead, with survivorship, and accumulation till the time of payment, and a limitation over absolutely in case of the death of all without issue before that time. The father in consequence of bankruptcy being wholly unable to maintain his children, maintenance was directed by the court, taking the consent of the persons to whom the property was given over. *Fendall v. Nash*, 5 Ves.

3. Devise to an infant grandson at twenty-one, with accumulation in the mean time; with similar limitations in case of his death under twenty-one to his sisters. Their father being dead, having left all his property, which was considerable, to his wife, who married a person in low circumstances, maintenance was decreed, without an inquiry, whether it was for the benefit of the infants; the court judging of that. *Greenwell v. Greenwell*, 5 Ves. 194.

4. Residuary bequest to a very large amount in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship; the interest to accumulate, and be paid with the capital: and in case of the death of all before the time of payment over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed; and there being several children, the court directed maintenance, taking the consent of the mother. *Cavendish v. Mercer*, 5 Ves. 195. n.

5. Maintenance allowed in the case of children and grandchildren, though the interests were contingent, with reference to the case of survivorship; accumulation directed; and no express authority for any application during minority, except for the younger children, surviving the eldest, in the event of his death under twenty-one, without issue. The court refused to make the order on petition; and directed a bill to be filed. *Fairman v. Green*, 10 Ves. 45.

4. Legacy given over on a dying under twenty-one.

Maintenance not allowed out of legacies to children, given over in case of their deaths under twenty-one, without consent of the legatee over. 10 Ves. 48.

5. Legacies to grandchildren at twenty-one, with a limitation over, on a dying under twenty-one.

Maintenance not allowed upon legacies by a grandfather to his grandchildren, at twenty-one, with interest; though the father was not of ability to maintain them: the legacies with the interest being given over in the event of death under twenty-one. *Errington v. Chapman*, 12 Ves. 20.

6. Legacy to children when and as they attain twenty-one; with survivorship; and cessation, on all dying under twenty-one.

Maintenance ordered, upon the fair inference of intention, where legacy was given to children "when" and "as" they attain twenty-one, with survivorship in case of any dying under that age; and if all die the legacy to cease. *Lambert v. Parker, Cooper*, 143.

7. Legacy to grandchildren, when the younger shall attain twenty-one.

Maintenance out of interest of a legacy to grandchildren, when the youngest should attain twenty-one, refused. *Lomax v. Lomax*, 11 Ves. 48.

8. Legacy payable at a future day, and no direction as to interest.

Legacy to a child, payable at a future day. Maintenance allowed; though no direction as to interest. 11 Ves. 2.

9. Legacy payable at twenty-one, with a general provision for maintenance of children.

Testator directed maintenance for his sons during minority, and for his daughter till twenty-one or marriage; and gave her a legacy, in case she should attain twenty-one, payable at, and to carry interest from, that time. Having married at eighteen, she was allowed maintenance for the interval, until twenty-one. *Chambers v. Goldwin*, 11 Ves. 1.

10. A fund not vested.

The court will not allow maintenance to a grandchild legatee, out of a fund not vested. *Buckworth v. Buckworth*, 1 Cox, 80.

11. Out of capital.

1. The court very rarely has broken in upon the capital for the mere purpose of maintenance, though frequently for advancement. 6 Ves. 474.

2. Maintenance for a child can be charged only out of the interest of its fortune. *Beasley v. Magrath*, 2 Sch. & Lef. 35.

3. Maintenance out of the principal of minor's fortune, composed chiefly of accumulated interest, refused. *Ex parte M'Key*, 1 Ball & Beatty, 405.

12. Residue to infants, with survivorship on deaths under twenty-one, and a limitation over on all dying under twenty-one.

Residue bequeathed to infants, with sums to them in the event of death under the age of twenty-one. Maintenance, not being directed by the will, was not ordered by the court; there being a limitation over upon the death of all under twenty-one, to their sister; having no other interest in that fund; though a distinct legatee by the same will. The case, in which the court has given maintenance, has been, where the fund, being given to the children with survivorship among them, their interest, and the chance of taking the whole, as survivor, was equal; and no other person interested. *Ex parte Kebble*, 11 Ves. 604.

### VIII. Of the period from which the allowance shall commence.

Whether antecedent to the master's report.

1. When the parent is reported out of ability, the sum allowed shall be only from the time of the report, not of the decree. 1 B. C. C. 387.

2. No allowance can be made to a parent for the maintenance of his child for the time past. *Hill v. Chapman*, 2 B. C. C. 231.

3. The court will not give a maintenance for the time previous to the master's report, but on very particular circumstances. *Andrews v. Partington*, 2 B. C. C. 60.; 2 Cox, 223.

4. Maintenance allowed for the time past. *Reeves v. Brymer*, 6 Ves. 425.

5. Maintenance allowed for the time past as well as the time to come. *Sherwood v. Smith*, 6 Ves. 454.; *Maberly v. Turton*, 14 Ves. 499.; *Sisson v. Shaw*, 9 Ves. 285.

6. Under particular circumstances, a power to the trustees to apply dividends for maintenance with the approbation of the parents or the survivor, and by the death of the trustees, or their not acting, their discretion not having been exercised; an inquiry was directed whether it would have been reasonable and proper in the trustees to apply any and what part of the dividends; having regard to the situation, circumstances, and ability of the father and the fortunes of the children. *Maberly v. Turton*, 14 Ves. 499.

**IX. Of the mode of obtaining the allowance.**

1. Pendency of suit, not essential to.

The court will grant a maintenance though there is no cause in court. *Kent ex parte*, 3 B. C. C. 88.

2. Form of the reference to the master.

A special direction to the master, in settling an allowance to an eldest son, to consider the birth of a posthumous child, refused. 1 B. C. C. 179.

**X. Of the mode of opposing the allowance.**

By setting up an adverse title.

A title set up against an infant cannot be taken notice of on exceptions to a master's report of maintenance, but must be established elsewhere. *Nicholls ex parte*, 1 B. C. C. 577.

**MANAGER.****Of the obligations of the manager of a West India estate.**

To give security.

Manager of estate in West Indies, is not to give security faithfully to manage. Ordered to account for produce, and to consign, so far as the management requires it; but must have a discretion as to what to be applied there. *Morris v. Elme*, 1 Ves. 139.

**MANDAMUS.****When a mandamus does not lie.**

To admit to a copyhold.

Mandamus to the lord to admit to a copyhold does not lie. 3 Ves. 754.

**MANOR.****I. Of the validity of a custom.**

That one in whose name a grant of reversion is obtained, is entitled beneficially, unless a trust is declared.

**II. Rights of the lord.**

In relation to common.

**III. Obligations of the lord.**

In relation to alienation in freehold manors.

**I. Of the validity of a custom.**

That one in whose name a grant of reversion is obtained, is entitled beneficially, unless a trust is declared.

The custom of a manor was, that if a tenant for life of a copyhold obtains a grant in reversion in the name of a third person, such person is entitled



beneficially, unless a trust is mentioned on the rolls of the manor. Held, that the custom was reasonable, and that the persons who were named in the reversionary grants of the copyholds, were not trustees, but beneficially entitled. *Edwards v. Fidel*, 3 Mad. 237.

## II. Rights of the lord.

In relation to common.

A lord of a manor hath no right to a common; he hath a right to the soil, to dig, to plant upon, and to do every thing authorised by the statute of Merton. *Bolton v. Lowther*, Dick. 677.

## III. Obligations of the lord.

In relation to alienation in freehold manors.

In freehold manors, the lord is considered as much bound as if he were a party to the deed of alienation, because the power which the tenant has is equivalent to his consent. *Burgess v. Wheate*, 1 Eden, 232.

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## MARKET.

### Essentials necessary to the exercise of the exclusive privileges.

That the market is competent to the accommodation of the public.

Essential to the complaint of an old market against a new one set up near it, that the old is competent to the accommodation of the public: so here the old proprietors must be able to keep it up properly; the accommodation of the public being the principal thing. 1 Ves. 114.

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## MARLBOROUGH, DUKE OF.

### Of the Marlborough estate.

The pension granted by statute 5 Anne, c. 4. is not alienable.

The estates which by stat. 5 Anne, c. 3. for perpetuating the memory of the great actions performed by the duke of Marlborough, are limited to the then duke for life, remainder to S. his duchess for life, remainder to the heirs male of the body of the duke, remainder to all and every his daughters; in such manner as the titles are therein-before limited, in order that they may always "go along and be enjoyed with the titles and dignities," with a proviso restraining alienation to the prejudice of the persons in remainder, are not alienable, and the rents and profits may be effectually aliened by the person in possession, as against himself. The pension granted by stat. 5 Anne, c. 4. "for the more honourable support of the dignities" of the duke of M., and his posterity, payable out of the revenues of the post-office, to such person severally and successively to whom the same should come by virtue of that act, with a proviso that the acquittance of every such person should be a sufficient discharge, is unalienable. A motion for a receiver, therefore, by an annuitant, to secure whose annuity the duke had executed an indenture for conveying the estates and the pension to a trustee, was granted as to the estates, and refused as to the pension. *Davis v. Duke of Marlborough*, Swanst. 74.

## MARRIAGE.

## MARRIAGE.

**I. In relation to the civil law.**

Ground of the favour to marriage by the civil law.

**II. Influence of collateral circumstances.**

Marriage cannot be affected by contract between the parties.

**III. Of the ceremonial necessary or proper in the celebration of marriage.**

1. Residence within the parish.
2. Banns.

**IV. Of the ceremonial necessary to the nullity of a marriage.**

The sentence of the spiritual court is requisite, though the marriage is void.

**V. Of marriages in Scotland.**

1. Validity of a marriage in Scotland without banns or licence.
2. Validity of a marriage in Scotland of a ward of court.

**VI. In relation to contracts connected with marriage.**

1. Money obtained by sale of influence in marriage brocage, will be decreed to be refunded.
2. Validity, under the circumstances, of a bond to marry or pay money.

**VII. Force of representations inducing to marriage.**

They will be made good even at the instance of persons concerned in fraudulently defeating such representation.

**VIII. Of rights conditioned upon marrying with consent.**

1. Validity of such condition.
2. The condition in this case was held precedent.
3. The condition in this case was held subsequent.
4. Where the condition is subsequent, and no devise over, it will not be enforced.
5. Of construing the condition as limited to a marrying under age.
6. A consent fairly obtained, cannot be retracted.
7. A consent may be retracted upon good reason.
8. The condition is gone where the consent is unduly withheld.
9. To dispense with consent from its having been unduly withheld; the onus of proof is thrown upon the party insisting that it was unduly withheld.
10. The course, where the consenting party refuses, or is incapable, from absence or otherwise, to consent or object.
11. Whether satisfied by a previous general permission, and subsequent approbation.
12. Under the circumstances, a marriage was held to have been with consent.

13. Under

13. Under the circumstances, a marriage was held to have been without consent.
14. In this case, the condition was held to have been satisfied by having married once with consent.
15. Conditional consent on the offer of a settlement, satisfied by a settlement after marriage.
16. The condition not applicable where the party married in testator's lifetime, with his consent or subsequent approbation.
17. The condition not applicable where the party married after the date of the will, and was a widow at the death.

#### IX. In relation to judicial proceedings.

Effect of a *feme sole* marrying pending suit.

#### I. In relation to the civil law.

Ground of the favour to marriage by the civil law.

Ground of the favour to marriage by the civil law. 8 Ves. 96.

#### II. Influence of collateral circumstances.

Marriage cannot be affected by contract between the parties.

Marriage not to be affected by contract between the parties. 11 Ves. 532.

#### III. Of the ceremonial necessary or proper in the celebration of marriage.

##### 1. Residence within the parish.

1. Clergyman, celebrating marriage by banns without making the inquiry directed by the marriage act, liable to ecclesiastical censure, at least; perhaps to other consequences. The marriage, however, good; though neither party was resident in the parish. *Nicholson v. Squire*, 16 Ves. 259.

2. Marriage by banns legal, though only one of the parties resided in the parish. *Robinson v. Grant*, 18 Ves. jun. 289.

##### 2. Banns.

By the canon law, which is binding on the clergy, it is highly criminal to celebrate marriage without a due publication of banns; which must suppose information as to the residence. Penalties by that law and the statute law upon the clergyman. 6 Ves. 423.

#### IV. Of the ceremonial necessary to the nullity of a marriage.

The sentence of the spiritual court is requisite, though the marriage is void.

Sentence of the ecclesiastical court necessary; though the marriage void; as in the case of lunacy. *Ex parte Turing*, 1 Ves. & Beam. 140.

#### V. Of marriages in Scotland.

##### 1. Validity of a marriage in Scotland without banns or licence.

A marriage celebrated in Scotland without banns or licence, is good. And a bond given by a father by way of settlement previous to a re-solemnization of

of such marriage here, not sustained against creditors, under his commission. *Ex parte* Hall, 1 Rose, 30.

2. Validity of a marriage in Scotland of a ward of court.

Marriage of a ward of court in Scotland; validity doubted. *Grierson v. Grierson*, Dick. 588.

VI. *In relation to contracts connected with marriage.*

1. Money obtained by sale of influence in marriage brokerage, will be decreed to be refunded.

Decree to refund money obtained by sale of influence in marriage brokerage. 18 Ves. jun. 382.

2. Validity, under the circumstances, of a bond to marry or pay money.

Bond, to marry a woman, or pay a sum of money, established at law. Injunction, till the hearing, on grounds of public policy: being an engagement, founded upon expectations under the will of a third person, (though not a relation,) from whom it was kept secret, to marry at his death; and no mutual obligation. *Cock v. Richards*, 10 Ves. 429.

VII. *Force of representations inducing to marriage.*

They will be made good even at the instance of persons concerned in fraudulently defeating such representation.

Material representation in the circumstances of a person contracting marriage, made good even at the instance of persons concerned in fraudulently defeating such representation. 1 Ves. & Beam. 355.

VIII. *Of rights conditioned upon marrying with consent.*

1. Validity of such condition.

A condition of marriage with consent of the legatee's mother, is a valid condition precedent, and not *in terrorem* only. *Scott v. Tyler*, 2 B. C. C. 431.; Dick. 712.

2. The condition in this case was held precedent.

1. The testator, among other provisions, gave to a putative daughter 10,000*l.* in several events; one moiety at twenty-one, in case she should be then unmarried; the other moiety at twenty-five, if then unmarried; but if she married before twenty-one, with consent of her mother, then the whole to be paid to her, or settled to her use; but if she should die before twenty-five, the 10,000*l.* was given to the mother, to whom there was also a gift of the residue generally. The daughter married under twenty-one without consent. She does not come within the description to which the gift attached; it is therefore void, and the 10,000*l.* sinks into the residue given generally to the mother. *Scott v. Tyler*, 2 B. C. C. 431. And it seems that such restrictions are not merely *in terrorem*, but if reasonable, and precedent to the vesting of the property, are valid. *Ibid.*

2. Condition in restraint of marriage under twenty-one, without consent of trustees, established both as to a rent-charge out of real estate and a personal legacy. *Stackpole v. Beaumont*, 3 Ves. 89.

3. Testator gives 24,000*l.* upon trust, as to 6000*l.* to pay the interest to S. B. (his niece), during her life, and, after her decease, the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of 6000*l.* (residue of the 24,000*l.*.) for his three other nieces and their children. Proviso, that in case any of his said nieces should marry without such consent as therein prescribed, each, &c. so marrying should forfeit the interest of her 6000*l.*, and all other sums to which she may be entitled under his will; and the respective sums of 6000*l.*, and all such

such other sums, &c. should fall into his residue. And he gives the residue in trust for his two nephews and their children; in case of the death of either without issue, his moiety to go over to and be divided among his said nieces. Afterwards by codicil he gives to each of his nieces 2000*l.* in addition, "subject to the same powers, provisoes, directions, and limitations, as are contained in the will respecting the sums of 6000*l.*" S. B., who was of age at the date of the will, marries without the consent required. Held a forfeiture extending not only to the future interest of her 6000*l.*, but to the capital, and also to the 2000*l.*, given by the codicil, and to a fund set apart to answer an annuity, to which S. B. would otherwise have been entitled on the draft of the annuitant. *Lloyd v. Branton*, 3 Mer. 108. Whether the forfeiture would also extend to her share of the residue, in the event of the contingency upon which it is given over to the testator's nieces, *quære*. Ibid. It is too late to raise a doubt on the *legality* of the condition on which the right of S. B. to the bequests under the will is made to cease. Ibid.

3. The condition in this case was held subsequent.

Testator devises the residue to his children; but if any of the daughters shall marry without the consent of the mother or guardians, her share to go to those unmarried. This is a condition subsequent, and a daughter who married without consent is notwithstanding entitled. *Jones v. Earl of Suffolk*, 1 B. C. C. 528.

4. Where the condition is subsequent, and no devise over, it will not be enforced.

A subsequent condition of forfeiture on marriage without consent, where there is no devise over, will not be enforced. The reason of this rule is differently assigned, either because the bequest over affords a manifestation of intention that the condition is not merely *in terrorem*; or on account of the interest of the legatee over. *Lloyd v. Branton*, 3 Mer. 117.

5. Of construing the condition as limited to a marrying under age.

When a legacy is to vest or be paid at a particular age, and there is a clause of forfeiture on marriage without consent, the court will construe it as having relation to a marriage under the specified age. But where no age is specified, *quære* if the court can limit the condition to a marriage without consent under twenty-one. Clearly not; where the party so marrying was above twenty-one at the date of the will. *Lloyd v. Branton*, 3 Mer. 117.

6. A consent fairly obtained, cannot be retracted.

1. Marriage held to have been with consent, where A., whose consent was necessary, agreed to the marriage, provided a proper settlement could be made, and referred to B. to prepare one, which was accordingly done; and though there was afterwards some altercation between A. and the proposed husband, who signified his intention of relinquishing his addresses, yet the consent having been obtained without misrepresentation, could not be retracted: *secus* had it been obtained by deceit or fraud. *Merry v. Ryves*, 1 Eden, 1.

2. Consent to marriage once given shall not be withdrawn by adding terms, that do not go to the propriety of giving the consent. 10 Ves. 242.

7. A consent may be retracted upon good reason.

Consent to marriage may be withdrawn upon good reason. *Clarke v. Parker*, 19 Ves. 13.

8. The condition is gone where the consent is unduly withheld.

On questions whether a child by marriage broke the condition annexed to her legacy, and whether there were cross remainders as to real estate, determined in the negative on both. *Eastland v. Reynolds*, Dick. 317.

9. To

9. To dispense with consent from its having been unduly withheld; the *onus* of proof is thrown upon the party insisting that it was unduly withheld.

Trustee for consent to marriage not required to show his reason for dissent. It must be shown that he has unreasonably refused assent. *Clarke v. Parker*, 19 Ves. 22.

10. The course where the consenting party refuses, or is incapable, from absence or otherwise, to consent or object.

1. Application to approve of the marriage of an infant, under the statute 26 Geo. 2., the testamentary guardian being in parts beyond the seas. *Blake v. Blake*, Dick. 459.

2. Where a trustee refused to consent or object to a marriage, the court referred it to the master to consider of the propriety of the marriage. *Goldsmid v. Goldsmid*, Cooper, 225.

11. Whether satisfied by a previous general permission, and subsequent approbation.

Bequest of personal estate to A. provided she marry with the consent of B. (a trustee in the will); but if she marry without such consent, then to C. A general permission given by B., after A. attained twenty-one, to contract marriage as she might think fit, and subsequent approbation of a marriage contracted under such general permission without his knowledge, held a sufficient compliance with the requisition. *Pollock v. Croft*, 1 Mer. 181.

12. Under the circumstances, a marriage was held to have been with consent.

Marriage held to have been with consent of a trustee under a will, though expressed, not absolutely, but in general terms; that he would not stand in the way of any arrangement by the co-trustees, &c.; and advising a settlement; having previously encouraged the proposal; and though fraud was not imputed, having a prospect of benefit from the forfeiture. *D'Aguilar v. Drinkwater*, 2 Ves. & Beam. 225. Vide 1 Eden, 1.

13. Under the circumstances, a marriage was held to have been without consent.

1. Portion given over as to the greater part upon marriage without consent of executors. A conditional consent, upon the offer of a settlement, retracted on a subsequent refusal to settle, and the marriage taking place afterwards: no relief against the forfeiture. *Dashwood v. Lord Bulkeley*, 10 Ves. 230.

2. Real and personal estate given by will, on marriage, with consent and approbation, with a limitation over, in case the devisee should marry without the full consent, &c. of the trustees, &c., or refuse to execute such settlement as they should think proper. Previous consent and settlement not dispensed with, though under favourable circumstances; the treaty with consent of the two acting trustees, preparing the settlement avowedly on behalf of all without authority, but with slight knowledge, and no dissent of the third; who had not acted, except proving the will, and a few other instances; and execution deferred only from collateral circumstances: viz. a debt claimed by the two acting trustees. *Clarke v. Parker*, 19 Ves. 1.

14. In this case, the condition was held to have been satisfied, by having married once with consent.

Legacy given to a female infant: by the codicil, testatrix gave the father a power, in case she married during his lifetime, without his consent, to appoint; she marries once with his consent; the condition is satisfied, and the power gone. *Hutcheson v. Hammond*, 3 B. C. C. 128.

15. Conditional consent on the offer of a settlement, satisfied by a settlement after marriage.

Consent to marriage on the offer of a settlement after marriage, is sufficient. 10 Ves. 244.

16. The condition not applicable where the party married in testator's lifetime, with his consent or subsequent approbation.

Condition requiring the consent of executors to marriage, not applied to a daughter married in the testator's lifetime, with his consent or subsequent approbation. *Parnell v. Lyon*, 1 Ves. & Beam. 479.

17. The condition not applicable where the party married after the date of the will, and was a widow at the death.

Condition by will, requiring consent of trustees to marriage, not applicable to the second marriage of a daughter, who had married between the date of the will and the death of the testator, and was a widow at his death. *Crommelin v. Crommelin*. 3 Ves. 227.

### IX. In relation to judicial proceedings.

Effect of a *feme sole* marrying pending suit.

If a *feme* marry pending a suit and the cause proceed, and a decree be made, it is not a ground to reverse the decree. *Cranbourne v. Dalmahey*, Dick. 8.; 2 Freem. 169.

## MARRIAGE SETTLEMENT.

### I. Of what things a settlement may be made.

1. Term of years.
2. Personalty.

### II. Of parties to settlements.

1. They are purchasers to effectuate their intention.
2. Therefore for their issue.

### III. Of settlements.

1. Form and parts of.
2. Construction — general rule.
3. Construction — with reference to the parties who are the objects of the settlement.
4. Construction — with reference to the interests granted or reserved.
5. Construction — with reference to property subject to the trusts of.
6. Construction — with reference to the amount of the portions to be raised.
7. Construction — with reference to interest upon contingent portions.
8. Construction — with reference to the time of raising portions.
9. Construction — covenant to settle on wife and issue.
10. Construction — as barring wife of dower.
11. Construction — as operating to purchase the whole of the wife's property.

12. Con-

12. Construction — covenant to leave property to a married child.
13. Construction — operation of a freeman's settlement upon his children's customary share.
14. Construction — as satisfied by a distributive share.
15. Construction — miscellaneous.
16. Of reforming a settlement.
17. Of avoiding a settlement on the ground of fraud.
18. Of avoiding a settlement by a default in paying the consideration.
19. Of an infant's right to waive a settlement.
20. Of property liable to the trusts of the settlement.  
*Vide supra*, 5.

#### IV. Of agreements for settlements.

Letter previous to marriage.

#### V. Of carrying marriage articles into execution.

1. In strict settlement.
2. With reference to the nature of the interest or estate.
3. With reference to value.
4. By supplying the loss, destruction, or spoliation of.
5. How far governed by the nature of the relief sought.
6. By abatement of portions on failure of mother's estate.
7. By reforming a settlement contrary to the articles.
8. Notwithstanding adultery.
9. Where the wife dies pending an order for a settlement on herself and issue. *Vide infra*.
10. Miscellaneous.

#### VI. Of voluntary and fraudulent settlements.

1. Of marriage being a sufficient consideration.
2. To what and to whom the consideration of marriage extends.
3. Moveable effects. — *Vide supra*, 1. 2.
4. A settlement falsely reciting that the property was the wife's.
5. Jewels purchased after marriage, and given to wife.
6. A settlement reciting, and in pursuance of, a parol agreement before marriage.
7. Grant by a stranger who had promised to provide for the party.

#### VII. Of settlements by persons who afterwards become bankrupt.

1. Limitation of husband's property till his bankruptcy.
2. Limitation of wife's property till husband's bankruptcy.
3. Limitation of third person's property till husband's bankruptcy.
4. Children's right to their mother's settlement on their father's bankruptcy. *Vide infra*.
5. *Vide in tit. BANKRUPT.*

#### VIII. Of settlements in derogation of marital rights.

By *feme sole*, in her own favour, without notice.

#### IX. Of



**IX. Of the settlement which a wife is entitled to out of her separate estate.**

1. General rule.
2. Common practice.
3. Effect of an order for a proposal.
4. Notwithstanding the death of the other party after the order.
5. Of her right to waive it. Vide, *infra* 8, 9.
6. When a ward of court. — Vide *infra*, tit. WARD OF COURT.
7. Whether the right extends to children.
8. And their right, how far dependent upon their mother.
9. And whether destroyed by their mother's death before the report.

**X. Of contracts in control of marriage settlements.**

Between children and their parents, having power to distribute the property amongst them. — Vide in tit. CONTRACT, *sub fine*.

**I. Of what things a settlement may be made.**

1. Term of years.

Settlement of term for years. 12 Ves. 225.

2. Personalty.

Personal estate is so fluctuating in its nature, that it is impossible to make every specific article the subject of settlement. 5 Ves. 274.

**II. Of parties to settlements.**

1. They are purchasers to effectuate their intention.

Distinction between wills and marriage articles. All the parties to the latter are considered purchasers to effectuate their intention; none of the parties mentioned in the former are so, as the intention of the testator is alone to be considered. 1 Ball & Beatty, 25.

2. Therefore for their issue.

1. Husband and wife purchasers by the marriage for their children. 11 Ves. 228.

2. Parties to a marriage settlement are purchasers for their issue. Ibid. 235.

**III. Of settlements.**

1. Form and parts of.

1. Joint tenancy, as a provision for the children of a marriage, is an inconvenient mode of settlement. 1 Sch. & Lef. 88.

2. It is a common clause in marriage settlements, to entrust the husband with a power of appointing among the children, when the property is small. 1 Ball & Beatty, 91.

2. Construction — general rule.

1. The court will construe a settlement according to the intent of the parties, though the literal expressions be otherwise. Woodcock v. Duke of Dorset, 3 B. C. C. 569.

2. The court will, from the general frame of a settlement, collect the intent contrary to the express words of a particular clause. Hence, where an estate

estate in N., part of the general estate, was, in default of issue male of that marriage, limited to the first and other daughters, and terms were created of the whole estate, to raise portions for daughters, payable at certain times, and in certain events; and in case there was no issue male of that marriage, such portions were directed to be augmented; with a proviso, that in case any daughter should be entitled to the estate in N. before the portion appointed for her should be to be paid, then her portion should cease and not be paid. There being an only daughter, and the father having died without issue male, after her portion was vested; held, that she ought to be considered as an eldest son, and that she was not entitled to the augmented portion, though the estate vested *after* it became payable. *Earl of Northumberland v. Earl of Egremont*, 1 Eden, 435.

3. Construction — with reference to the parties who are the objects of the settlement.

1. Trust, under marriage settlement, for the next of kin of the wife, subject to her appointment by will, with two witnesses: appointment in favour of the husband by an unattested will being void, the children are entitled; not the husband; who is not of kin to his wife; and whose claim to her personal property is not in that character under the statute, but *jure mariti*; and in this case according to the plan of the settlement he was not intended. *Watt v. Watt*, 3 Ves. 244.

2. Under a limitation, in a marriage settlement, of the wife's property, in default of her appointment for her next of kin or personal representative, the husband not entitled. *Barley v. Wright*, 18 Ves. jun. 49.

3. Under a settlement, the son of a second marriage held to take as *heir male* of the body of father and mother, although a son by a former marriage was living, *by virtue of the contract*. *Seymour v. Boreman*, 2 Mer. 347.

4. Gift of real and personal estate to trustees, upon trust to apply the rents and dividends (or so much as they should think fit) to the maintenance, &c. of W. R. R. until twenty-five; then to permit him to receive the same during his life; and after his death, to apply the same (or so much, &c.) to the maintenance, &c. of all and every the children of W. R. R. until twenty-five respectively; then upon trust to assign and transfer to such children so attaining twenty-five; "and in case W. R. R. shall die without leaving issue living at the time of his death, or leaving such, and all die before twenty-five," upon trust to pay, &c. unto and among all and every the brothers and sisters of W. R. R., share and share alike, upon their attainment of twenty-five or marriage respectively; followed by a gift of residue, upon trust, as to one moiety, to permit the testator's daughter A., and her husband, to receive the rents, &c. during their lives, in succession, and after the death of the survivor to the children (except W. R. R.) in the same manner as with respect to the former gift. And as to the other moiety, upon like trusts for the testator's daughter B., her husband and family; with survivorship between the respective grandchildren; and in case of the death of either of the daughters, without leaving issue living at her decease, then to the children of the surviving daughter. 1. Held, that the limitation to the brothers and sisters of W. R. R. in default of issue living to attain twenty-five, was intended to include *all* his brothers and sisters living at his death, and was consequently void for remoteness. 2. Held, vested interests at twenty-five, in every instance, notwithstanding different expressions, there being no antecedent gift, of which it could have been the testator's intention merely to postpone the enjoyment, the gift being only the direction to pay at twenty-five. 3. A. having died, leaving issue, the moiety of the residue intended for her children, held undisposed of, as being void for remoteness. The other moiety held to vest in contingency during the life of B.; and if she should die without issue, to be all given over to the children of A. *Leake v. Robinson*, 2 Mer. 363.

5. Under a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband, taking a prior partial interest, is not entitled. *Bailey v. Wright*, Swanst. 39.

6. A settlement of personalty "to next of kin, in equal degrees," passes the property to a surviving sister, in exclusion of children by a deceased brother. *Anon.* 1 Mad. 36.

7. On a settlement of personalty "to the next of kin of the said A. P. of her own blood and family, as if she had died sole and unmarried," the next of kin take as under the statute of distributions. *Cotton v. Scarancke*, *Ibid.* 45.

4. Construction — with reference to the interests granted or reserved.

1. Settlement after marriage, of stock which had been the wife's property, in trust for the husband for life, then to the wife for life, and then to the heir male of the body of husband and wife, in default of such heir male, to the heirs female, &c.; with a clause, that if the husband should settle lands of equal value to the like uses, the stock should be re-assigned to him. A son being afterwards born, who died in the lifetime of the father, without issue, and under age; held, that the property vested in the father absolutely. *Le Rosseau v. Rede*, 2 Eden, 1.

2. On marriage, the husband executes a deed poll, whereby he purports to settle all his real and personal estate on the wife, and the heirs of her body, by him begotten, obliging her to give each of her children, by him begotten, 10,000*l.* a piece at twenty-one, and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children as tenants in common. These marriage articles so far tied up the property of the settlor, that a real estate purchased by him, in his lifetime, with part of his personal estate, shall be considered as personal estate, and be disposed of accordingly. *Lowther v. Earl of Westmoreland*, 1 Cox, 64.

3. Settlement, upon marriage, of the wife's property only, upon certain trusts, for the husband, wife, and children; in one event, for the husband absolutely; but making no provision for the event that happened: a resulting trust for the wife. *Langham v. Nenny*, 3 Ves. 467.

4. A deed is construed more strictly than a will, according to the legal import of the words. Therefore, in a marriage settlement, after life-estates to the husband and wife, a remainder to the heir male of her body by him to be begotten, and to his heirs, and, for want of such issue, to the daughters, and if there should be no issue of the marriage, to the right heirs of the husband, was held a contingent remainder in fee in such person as should be heir male of the wife at her death. *Bayley v. Morris*, 4 Ves. 788.

5. To such uses as the husband and wife shall jointly appoint, and in default of such appointment, to them for life; and after the decease of the survivor, to the use of all or any of the child or children of them, in such shares and proportions, and for such estate or estates, term or terms, and payable at such time or times, and in such manner and form, as the husband should by deed or will appoint; and in default thereof, to him and his heirs. The event, upon which the last limitation depends, is default of appointment, not of children. *Jenkins v. Quinchant*, 5 Ves. 596.

6. Settlement by a *feme sole*, in contemplation of marriage, of part of her fortune in trust to pay the dividends to herself for her separate use for life, and after her death for her intended husband; and after the death of the survivor to transfer the capital according to her appointment by will; and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors, &c. according to the statute of distributions. An interest for life only in the widow, with a power of disposition by will. *Anderson v. Dawson*, 15 Ves. 532.

7. Dis-

7. Distinction between a limitation to the executors and administrators, and to the next of kin; as between a limitation to the right heirs, and to heirs of a particular description as to real estate; giving the ancestor, having a particular estate, the whole property in the former case; not in the latter. 15 Ves. 536.

8. By articles previous to the marriage of W. T. with R. F., the father of W. T. "bound the fee of the farm of, &c. as a dowry or marriage portion to his son W. T. along with R. F., one half of said farm to be the right, title, and interest of the issue, whether son or daughter; if begotten on the body of R. F. by W. T." The issue take as tenants in common. Taggart v. Taggart, 1 Sch. & Lef. 84.

9. Limitation in a marriage article, to A. for life, subject to annuities for the lives of B. and C., and charge for a jointure for D. if she should survive A.; and after the death of said B. and C., A. and D., then to the use of the issue, &c.: the limitation to the issue is not to await the deaths of A., B., C., and D., but they are to take upon the death of A., subject to the charges for B., C., and D. Bushell v. Bushell, 1 Sch. & Lef. 90. 95.

10. By articles, relating to leases *pur autre vie* and for years, and to money, it was agreed that said leases for lives and for years should be conveyed to trustees, in trust (after successive life-estates to D. C. and I. C.) "after the decease of I. C., to the issue of I. and A. C., in such shares and proportions as the said I. should appoint; and for want of such appointment, to go to such children equally, share and share alike; and for default of such issue, to the heirs, executors, and administrators of said I. during said leases: the money, or the lands agreed to be purchased therewith, to go to the issue of said I. and A. in such shares and proportions" as there directed; and for want of such appointment, to be equally divided "among such children, share and share alike; and if no children of said marriage, or all should die before twenty-one," then a power to dispose of said money. Issue was construed children; and the issue of I. and A. took the absolute interest in the chattel property, and a *quasi fee* in the freehold property. Campbell v. Sandys, *Ibid.* 281.

11. Construction of an incorrect and ambiguous settlement, as vesting portions at the age of twenty-one, against words importing a condition of surviving the parents: an intention which, if clearly expressed, must prevail; but is not to be inferred, as not a rational construction of an ambiguous family settlement. Howgrave v. Cartier, 3 Ves. & Beam. 79.

5. Construction — with reference to property subject to the trusts of.

1. Execution of a contract on marriage by bond, with condition to settle all the personal estate that the husband should at any time during the coverture be possessed of. Lewis v. Madocks. 8 Ves. 150.

2. Settlement in consideration of the fortune of the wife, confined to her fortune at the time; unless expressed to comprehend future accessions. No claim can be maintained by the husband, or in his right, while the terms are not fulfilled on his part. Mitford v. Mitford, 9 Ves. 87.

3. A bond executed on the marriage of the obligor, conditioned to settle lands, "if he should become seised in possession," affects freehold only. Prebble v. Boghurst, Swanst. 319. 321.

4. A settlement of "all and singular the two-third parts of all and every the whole of my property, goods, &c. belonging to me in the empire of Great Britain and the East Indies, lately willed and devised unto me by Major John Missing;" held to pass only two-thirds of such property as then remained, and did not extend to such parts of the property as had been spent previous to the settlement. Cotteen v. Missing, 1 Mad. 176.

6. Construction — with reference to the amount of the portions to be raised.

Vide 3 Ves. 51.

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7. Construction — with reference to interest upon contingent portions.  
Vide 14 Ves. 558.

8. Construction — with reference to the time of raising portions.  
Vide 2 Eden, 26.

9. Construction — covenant to settle on wife and issue.

An obligation to make a settlement on the wife and issue, includes an obligation to make a settlement on the issue after the death of the wife. *Prebble v. Boghurst*, Swanst. 319.

10. Construction — as barring wife of dower.

A provision by marriage settlement in lieu, bar, and satisfaction of all dower, or thirds, which the wife might otherwise be entitled to out of all the real and personal estate, held to bar her interest in what was not disposed of by the will of her husband. *Druce v. Denison*, 6 Ves. 385.

11. Construction — as operating to purchase the whole of the wife's property.

1. Provisions by a marriage settlement not held a purchase of all the property of the wife; unless that purpose is expressed, or clearly imported. *Druce v. Denison*, 6 Ves. 385.

2. Settlement by husband in consideration of the portion of fortune, which he would have or receive upon his marriage, limited to the portion received upon the marriage; not extending to make him a purchaser of future accessions; unless that intention is clear. The wife, therefore, entitled to an additional provision out of a subsequent interest, arising to her, as next of kin; which equity was administered upon her bill against the assignees under the bankruptcy of her husband; and the administrator cannot set off a debt from the husband to the intestate's estate. *Carr v. Taylor*, 10 Ves. 574.

12. Construction — covenant to leave property to a married child.

Where a father on his daughter's marriage, covenants to leave her at his death an equal share of his personalty with his son, a gift of his property in the funds to his son, reserving the annual dividends for his own life, is not a breach of the articles. *Jones v. Martin*, 3 Anst. 832.

13. Construction — operation of a freeman's settlement upon his children's customary share.

Covenants in the marriage settlement of a freeman of the city of London, that the husband might dispose of the wife's share by will, and also that her executors would release and convey all her interest, &c. to the husband. Held, not to vary the general rule, that the children should be entitled to the benefit of a composition with the widow. *Knipe v. Thornton*, 2 Eden, 118.

14. Construction — as satisfied by a distributive share.

G. having by marriage articles covenanted that if he died in the life of his wife, his executors should within three months after his decease pay to her 3000*l.*, and having by his will given all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them shall appear right," on his death, during the life of his wife, the executors having died or renounced, his property is divisible according to the statute of distribution, and the widow's distributive share exceeding 3000*l.* is a performance of the covenant in the marriage articles. *Ex parte Goldsmid*, Swanst. 211.

15. Construction — miscellaneous.

1. Settlement on marriage, of stock belonging to the wife, in trust, after the

the death of the wife, if the husband survived, for him for life; if no issue, the whole to revest in the wife, with power of appointment; if none, to her next of kin: the wife eloped and lived in adultery: on the bill of the husband to have the dividends paid to him during their joint lives, evidence of such intent, or that they should be to the separate use of the wife, refused; but held to belong to the husband for the mutual support of both: decreed, that the costs and also the expences of the husband in a groundless suit, instituted against him by the wife in the ecclesiastical court, should be paid out of the accumulation, and the only surviving trustee appearing not to be indifferent, that the future dividends should be paid into court. *Ball v. Montgomery*, 2 Ves. 191.

2. Estates are settled on a marriage in strict settlement, provided that if the wife should, when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void. The husband and wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant, as if it had been performed: this is no evidence of the settlement. *Mathews v. Jones*, 2 Anst. 506.

#### 16. Of reforming a settlement.

1. If any thing in the recital, by which to correct, it may be done. 1 Ves. 59.

2. Settlement reformed according to intention declared in recital. 1 Ves. 171.

3. Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words of the articles was reformed. 5 Ves. 275.

4. Settlement reformed in favour of the younger children against the heir of the mother, claiming the reversion, by a letter from her on the marriage of her daughter, stating the intention. *Barstow v. Kilvington*, 5 Ves. 593.

5. Settlement after marriage reformed in favour of the issue against the devisee of the husband, claiming under the reversion, by his letter of instructions for drawing the settlement: but this equity did not prevail against creditors. *Jenkins v. Quinchant*, 5 Ves. 596. n.

6. Where a marriage settlement of a trader does not provide for a bond, given by the husband to the trustees for the wife's fortune, being proveable in the event of his bankruptcy, it will be amended accordingly; when it is the intention of the parties so to do. *Ex parte Verner*, 1 Ball & Beatty, 260.

7. Marriage settlement not altered in favour of the intention; the recital being too general, and nothing *dehors* the words to do it by. *Doran v. Ross*, 1 Ves. 57.

#### 17. Of avoiding a settlement on the ground of fraud.

Vide *Dick*. 504.

18. Of avoiding a settlement by a default in paying the consideration. Vide 2 S. & L. 602.

#### 19. Of an infant's right to waive a settlement.

Vide 2 Eden, 39.

#### 20. Of property liable to the trusts of the settlement.

1. Covenant in marriage settlement, that the settler would surrender certain copyholds which were intermixed with his freeholds, to be settled upon the issue of the marriage, with limitations to collateral branches of the family; his eldest son, upon his marriage, covenants to suffer a recovery of the freehold, (which was done,) and to settle the copyhold, (to which he was admitted in fee,) upon a bill brought by a nephew of the first settler, on failure of issue of that marriage for a specific performance of the covenant, to

to surrender in favour of collaterals: held, that though the consideration of marriage extended to collaterals, yet, that the son, by the covenants on his marriage, and by his admission in fee, had taken the copyholds discharged of the specific limitations. *Hale v. Lamb*, 2 Eden, 292.

2. By marriage articles 30,000*l.* was to be raised to pay the debts of the lady's father, she having before joined him in raising 24,000*l.* (of which the parties to the settlement had no notice;) this sum shall be part of the 30,000*l.* *Shelbourne v. Inchiquin*, 1 B. C. C. 338.

3. Money was by settlement to be laid out in land, to be settled to the use of husband for life, remainder to raise portions for younger children: the money was afterwards vested by order of the husband in South-sea annuities; afterwards by will, he devised generally all his manors, &c. to certain uses: the money in the funds must be laid out in land. *Hickman v. Bacon*, 3 B. C. C. 338.

4. By a marriage settlement I. G. had a power of appointing portions for daughters to the amount of 16,000*l.*, under a term of years created for raising the same: he appointed 13,000*l.* part thereof among four of his daughters, on their respective marriages, and took assignments from them of their interests in the said term. On the marriage of the eldest son, I. G. and the eldest son covenant that the settled estate is free from all incumbrances. After this I. G. makes his will, and appoints the remaining 3000*l.* to his only unmarried daughter. Notwithstanding the clear intention of I. G. to keep the term alive for his benefit, yet his covenant in the son's marriage settlement will bar his claim of any benefit from it as against the parties interested under that settlement. *Gower v. Gower*, 1 Cox, 53, 54.

5. On marriage, the husband covenants to pay to trustees the sum of 2000*l.* at least, to be by them laid out in land in the county of D., and settled to the uses of the marriage: the husband never pays the money to the trustees, but soon after the marriage purchases land in the county of D., and takes the conveyance to himself in fee, and then dies intestate, without any settlement. These lands will be considered as purchased by the husband in pursuance of his covenant, and be liable to the trusts of the settlement. *Sowden v. Sowden*, Cox, 166.

6. Articles before marriage for settling real estates of the husband, and also all and singular his personal estate of what nature or kind soever: a proper execution would be by a covenant, that real estate, that should be purchased with the personal, should, with respect to the objects of the settlement, be considered personal: the settlement therefore made after marriage, containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence, in order to defeat the right of his wife, were decreed to be conveyed by his devisee according to the articles. A gift by him in his life, in consideration of service was not disputed; but under the particular circumstances attending the marriage, and in the case of an infant, the court appeared to question its validity. *Randall v. Willis*, 5 Ves. 262.

7. Portions, to be raised by a trust term in a marriage settlement; the real estate held the primary fund; and a covenant by the settler to pay them, auxiliary only. *Lechmere v. Carleton*, 15 Ves. 193.

8. Effect of a contract on marriage by bond to devise, convey, or assure all such goods, personal estate, and effects that the husband should at any time during the joint lives of him and his wife be possessed of, to the use of them and the survivor; attaching on capital, not on income, unless laid up as capital, admitting therefore expenditure and debts, in a fair application of income, not liable to a minute account. On that principle, an estate purchased by the husband with money partly his own, partly borrowed on his personal security, and some part affecting him, was, after his death, held to belong, not to the trust, but to the heir, charged for the benefit of the trust with the money, that was his own, the debts paid on account of that purchase,

purchase, and expenditure in repairs, improvements, &c. *Lewis v. Madocks*, 17 Ves. jun. 48.

9. Money charged on land, by articles on marriage to be laid out on government security or freehold estate in a particular situation, with consent of the wife, to be settled upon trust for her separate use for life; and after her death, to be conveyed or assigned to her husband, his heirs, or executors; if she survive, for the issue, if more than one, subject to her appointment by deed or will, equally, at twenty-one, their heirs, if land; their executors, if money: if issue, subject to her appointment, and in default to his, or her, next of kin, their heirs, or executors. After the husband's death, having disposed of his personal estate by will, this property held personal; to the interest of which his widow was entitled for life, with power of appointment by implication in the event of an only child dead under age and intestate, and liberty to apply. *Van v. Barnett*, 19 Ves. 102.

10. Voluntary settlement of personal property in trust for such one or more of his children as the settlor shall appoint. Appointment to one child exclusively upon a secret understanding that that child shall re-assign a part of the fund to or in favour of a stranger: this appointment is a fraud upon the settlement, and void not only to the extent of the sum assigned back, but in toto. Bill, by purchaser for valuable consideration, without notice under this appointment, dismissed as against the person entitled under the settlement in default of appointment, such person having also the legal estate in the fund, which was the subject of the appointment. *Daubeny v. Cockburn*, 1 Mer. 626.

11. Payment of a valuable consideration of a person not having the legal estate, and not being an object of the power, cannot set up an invalid appointment in favour of such purchaser. *Daubeny v. Cockburn*, 1 Mer. 638. *Secus* where the power is unlimited as to its objects, and the appointment is only impeachable on the ground of its being voluntary. *Daubeny v. Cockburn*, 1 Mer. 638.

12. By deed poll on the marriage of I. S. H., lady S. (his mother) covenants that 9,500*l.* then due to her on mortgage, shall become his absolute property at her decease. The mortgage being paid off, the produce is laid out in exchequer bills, which are sold by I. S. H., under a power of attorney from lady S., and the produce of those exchequer bills laid out by him, under the same authority in the purchase of stock in the name of lady S. Lady S. subsequently makes an assignment of 14,348*l.* three *per cents.* standing in her name, to the plaintiff, a banker at Vienna, without notice of the deed poll, as a security for advances. Upon proof that the produce of the exchequer bills constituted a part of the stock so assigned, held, that the plaintiff was not entitled to the benefit of that security, as against the personal representatives of I. S. H., or those claiming after him, under the settlement, to the extent of the stock proved to have been purchased with the the produce of the exchequer bills. *Liebman v. Harcourt*, 2 Mer. 521.

13. I. P., on his marriage with M. T., executed a bond in the penalty of 2000*l.* with condition to be void if, in the event of M. T. surviving I. P., his executors, &c. should within three months after his decease, pay to trustees 1000*l.* in trust for M. T.; and if, in the event of I. P. surviving M. T., and there being any child or children of the marriage living at the decease of I. P., his executors, &c. should, within three months after his decease, pay to trustees 1000*l.* in trust for such child or children; "and farther, if I. P. should, at any time during his natural life, become seised of any messuages, &c. in possession, and should settle the same upon M. T. and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for M. T. in case she should happen to survive I. P.:" after the death of M. T., I. P. having married again, and then, and not before, become seised of real estates,



and having at his death left issue by both marriages, all the real estates of which he became seised during his life, were subject to the obligation, and settled on the issue of the first marriage as tenants in common in fee. *Prebble v. Boghurst*, Swanst. 309.

#### IV. Of agreements for settlements.

##### Letter previous to marriage.

Settlement decreed according to a letter previous to the marriage, though no express assent: the marriage having taken place immediately, a distinct positive dissent would be necessary to prevent the effect of the letter; and that could be evidenced only by an actual settlement before marriage. *Luders v. Anstey*, 4 Ves. 501.

#### V. Of carrying marriage articles into execution.

##### 1. In strict settlement.

1. Settlement to husband for life, remainder to wife for life, remainder to the heirs of their bodies, is a strict settlement; not so if the power of barring the entail be given to both. *Highway v. Banner*, 1 B. C. C. 584.

2. The rule, that a limitation to the heirs of the body in articles shall be carried into execution by a strict settlement, does not prevail, where the concurrence of both parents would be necessary to bar the entail. 7 Ves. 380.

3. Where articles were entered into previous to marriage, for settling by the wife's father lands to the use of the husband and wife for their lives, and the life of the survivor, and after the death of the survivor, to the use of the heirs of the body of the husband or the wife, remainder over; and a settlement was made after the marriage, reciting the articles, and said to be made in pursuance of the marriage. Upon a bill brought by a son of the marriage, the court refused to decree the articles to be carried into execution by a strict settlement against a purchaser for value, with notice of them; on the ground of the articles not being produced, by which alone the court could alter the settlement. *Cordwell v. Mackrill*, 2 Eden, 344.; *Amb. 515*.

##### 2. With reference to the nature of the interest or estate.

1. Covenant in a marriage settlement to settle leasehold estates in trust for such persons, and such and the like estates, ends, intents, and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders: the court, in executing the covenant, declared, that no person should be entitled to the absolute property, unless he should attain twenty-one, or die under that age leaving issue male. *Duke of Newcastle v. the Countess of Lincoln*, 3 Ves. 387.

2. Marriage articles limiting "an estate to A. for life, remainder to her husband for life, remainder to the heirs of the body of A. by her husband to be begotten; with like limitations of another moiety to B., the sister of A.," with a power to the husband of A. to dispose of the premises amongst the issue of the marriage, carried into execution. By limiting estates in strict settlement to A. and B., with cross remainders amongst their issue; with power to the husband of A. to appoint both estates amongst the children of A. *Dillon v. Dillon*, 1 Ball & Beatty, 77.

##### 3. With reference to value.

Where lands of a specified annual value are settled in jointure pursuant to a power, the value is to be estimated at the death of the husband. *Lady Londonderry v. Wayne*, 2 Eden, 170.

##### 4. By supplying the loss, destruction, or spoliation of.

1. Spoliation of marriage articles made good. *Bates v. Heard*, Dick. 4.

2. Bond

2. Bond for performance of a promise to make a settlement having been cancelled by the obligor, he was ordered to settle lands agreeably to the bond. *Arnold v. Barrington*, Dick. 5.

5. How far governed by the nature of the relief sought.

Plaintiffs file a bill to compel the execution of a settlement which was prepared, but never executed, by reason of the death of one of the parties. On the hearing, it appeared that the settlement so prepared, differed materially from the articles on which it was founded, to the prejudice of the plaintiffs. The court will direct a settlement according to the articles, notwithstanding the plaintiffs do not pray relief so beneficial to themselves. *Ex parte Durant*, 1 Cox, 58.

6. By abatement of portions on failure of mother's estate.

Articles of marriage to settle estates of husband and wife of equal value in strict settlement, and providing portions; the wife's estate being withdrawn by decree on the ground of infancy, the younger children were confined, as against the eldest, to half the portion; the articles providing in the event of no issue male, in which case the estates were to separate, that each should bear a moiety; though they also contemplated the case of the wife's refusal to be bound; providing against it by the forfeiture of her interest. *Clough v. Clough*, 5 Ves. 710.

7. By reforming a settlement, contrary to the articles.

Settlement set aside, as being contrary to articles, and a new settlement to be executed agreeably to the articles. *Neal v. Cust*, Dick. 513.

8. Notwithstanding adultery.

Vide 13 Ves. 443.; 1 B. & B. 204.

9. Where the wife dies pending an order for a settlement on herself and issue.

Where there is an order for a husband to lay proposals for a settlement on his wife, and the issue of the marriage; and the wife dies leaving issue, the court will keep the husband to the order. *Rowe v. Jackson*, Dick. 604.

10. Miscellaneous.

1. Widow entitled to an annuity, charged on freehold and leasehold estates, by the marriage settlement; the husband covenanted to convey the same of value to answer it; the husband dying and the rents not being sufficient, the deficiency ordered to be made good. *Matthews v. Matthews*, Dick. 470.

2. Covenant by husband in consideration of 1. (the purchase money of an estate of the wife,) within two years to convey lands in the county of N. of the value of such purchase money, by way of settlement. The husband having died without performing the covenant, performance of the same decreed against his representatives, by laying out in the purchase of land so to be settled, a sum equal to the present value of estates in N., which (at the time when the covenant ought to have been performed) would have been worth the amount of the purchase money, with interest at four *per cent.* from the death of the covenantor. *Lady Suffield v. Lord Suffield*, 3 Mer. 699.

## VI. *Of voluntary and fraudulent settlements.*

### 1. Of marriage being a sufficient consideration.

The consideration of marriage will support a settlement even of moveable effects; and neither the joint possession of furniture nor the want of an inventory, nor the fact that the settlor was indebted at the time, and that his wife knew it, will affect the settlement. 17 Ves. jun. 271.

### 2. To

## 2. To what and to whom the consideration of marriage extends.

1. The consideration of marriage runs through the whole settlement; and especially supports every provision with regard to the husband and wife. She is interested in the provision for her husband, enabling him to provide for her and the children; and it is not affected by subsequent events, as the death of the wife without children. *Nairn v. Prowse*, 6 Ves. 752.

2. Consideration of marriage considered as extending to persons not directly within it; viz. to brothers, uncles, and other relations, upon the marriage of a son; as within the contract between him and his father. 18 Ves. jun. 92.

3. A grant of an annuity to A. on her marriage, by a stranger, who had promised to provide for her, declared to be valid; it being granted in consideration of marriage; and A. was not held to be a volunteer. *Power v. Bailey*, 1 Ball & Beatty, 49.

## 3. Moveable effects.

Vide 17 Ves. 271.

## 4. A settlement falsely reciting that the property was the wife's.

Settlement sustained by the consideration of marriage against creditors; notwithstanding false recitals, that the property was the wife's; protecting also voluntary expenditure by the husband after the marriage in improvement by building and enfranchising copyholds, but not jewels and furniture, purchased by him after the marriage, and given to her. *Campion v. Cotton*, 17 Ves. jun. 263.

## 5. Jewels purchased after marriage, and given to wife.

*Ibid.*

## 6. A settlement reciting, and in pursuance of, a parol agreement before marriage.

Settlement after marriage of the wife's property, reciting, and in pursuance of, a parol agreement before, in trust as to part of the produce to the separate use of the wife; as to the rest, for husband for life; then for wife for life; then among the children according to the appointment of the survivor, good against creditors of the husband. Their bill to set it aside was dismissed with costs, and defendants were held entitled to that judgment even against a plaintiff, who was made so without authority: but his whole expence, and also the whole expence above the costs taxed of all the defendants except the husband, were decreed to be paid by the solicitor for plaintiffs; the transaction being considered as a combination between the husband, the creditors who authorised the bill, and the solicitor, to defraud the children. *Dundas v. Dutens*, 1 Ves. 196.

## 7. Grant by a stranger who had promised to provide for the party.

Vide 1 B. & B. 49.

## VII. Of settlements by persons who afterwards became bankrupt.

## 1. Limitation of husband's property till his bankruptcy.

1. A trader cannot on marriage secure a provision out of his own property for his wife in the event of bankruptcy, in prejudice of his creditors. 1 Ball & Beatty, 255.

2. Marriage settlement of a trader, securing a provision in the event of his bankruptcy for his wife, is good to the extent of her property. 1 Ball & Beatty, 256.

3. Where by the marriage settlement of a trader, his bond and the rents of his house were given to trustees for his wife and children, in the event of

of his bankruptcy or death, it was declared to be void upon the former event. The proof of the bond was directed to stand, the dividends to be invested in government securities. The interest to go to the assignees during the life of the bankrupt, then to the wife and children. *Ex parte Oxley*, 1 Ball & Beatty, 257.

2. Limitation of wife's property till husband's bankruptcy.

1. Limitation of a wife's property until the bankruptcy of her husband, or a lease determinable on the bankruptcy of the lessee, good. *Higinbotham v. Holme*, 19 Ves. 92.

2. Settlement on marriage of the wife's fortune in case of bankruptcy of the husband, though in the form of a bond by him; but as his bond affecting his property, it is void as against the creditors. *Ex parte Hodgson*, 19 Ves. 306.

3. A trader by settlement on marriage, in consideration of 1000*l.*, the wife's fortune, conveyed his house to trustees, to his own use till death or bankruptcy; then, in either event, if the wife be alive, to raise 1000*l.* for her separate use. This is a fair and valid settlement, in the nature of a mortgage to secure the wife's fortune. *Higginson v. Kelly*, 1 Ball & Beatty, 252.

4. On the bankruptcy of the husband, the trustees will not be restrained by injunction on the application of the assignees, from proceeding to recover the possession. *Ball & Beatty*, 252.

3. Limitation of third person's property till husband's bankruptcy.

A bond from the father of the wife of a trader to trustees upon her marriage, for her separate use, in case of the bankruptcy of her husband, was declared valid. *Ex parte Oxley*, 1 Ball & Beatty, 257.

4. Children's right to their mother's settlement on their father's bankruptcy.

Vide 1 B. & B. 257.

VIII. *Of settlements in derogation of marital rights.*

*By feme sole*, in her own favour, without notice.

A woman, pending a treaty of marriage with A., settled all her property to her separate use with his approbation: a few days after B., by a stratagem, induced her to marry him the day after she first thought of it: B. had no notice of the settlement: the settlement was established; and a deed of revocation obtained by duress set aside. *Countess of Strathmore v. Bowes*, 1 Ves. 22.

IX. *Of the settlement which a wife is entitled to out of her separate estate.*

1. General rule.

No means of enforcing a settlement on marriage of an adult, unless the husband seeks to obtain her property in court: but if the marriage is contempt, the court vindicating its jurisdiction by imprisonment, compels a settlement. 1 Ves. & Beam. 300.

2. Common practice.

The equitable right of a married woman stands upon the peculiar doctrine of the court. When money is carried over to her account, the habit of the court is without any previous application by her to direct an inquiry, whether any settlement has been made; and the constant habit has been to direct a settlement, not upon her only, but upon the children also: her option to waive a settlement not enabling her to have it confined to herself, excluding her children. 13 Ves. 6.

3. Effect

## 3. Effect of an order for a proposal.

Notwithstanding an order for a proposal for a settlement, under the equity of a married woman, by the death of either, while resting in proposal, the right by survivorship as between the husband and wife, is not affected. 10 Ves. 91.

## 4. Notwithstanding the death of the other party after the order.

If a settlement of the wife's equitable interest had been approved and ordered by the court, it is binding, notwithstanding the death of either party, before it is carried into effect. 4 Ves. 19.

## 5. Of her right to waive it.

1. *Feme covert* may waive her equity for a settlement out of her own property, even after the order, at any time before its completion. 10 Ves. 88.

2. As to the right of a married woman, after a proposal by her husband for a settlement of her property, to waive it, so as to bind the interest of the children, *quære*. 13 Ves. 5.

## 6. When a ward of court.

Vide 5 Ves. 15.

## 7. Whether the right extends to children.

The equity of compelling the husband to make a settlement out of the wife's estate, does not survive to the children, but is personal to her. *Scriven v. Tapley*, 2 Eden, 337.; *Amb. 509*.

## 8. And their right, how far dependant upon their mother.

1. Whether children have a substantive, independent, right, to claim a settlement out of the property of their mother, after her death, if not directed during her life, *quære*. 13 Ves. 7.

2. The child of a *feme covert*, a legatee, has no equity to insist on a settlement after the death of the mother, unless there is a contract or a decree for a settlement in the lifetime of the mother. *Lloyd v. Williams*, 1 Mad. 450.

## 9. And whether destroyed by their mother's death before the report.

1. Right of children to a provision out of the property of their mother, under a decree, directing a settlement by the husband on her and her children; notwithstanding her death before the report. Demurrer to the bill of the children was overruled. *Murray v. Lord Elibank*, 10 Ves. 84.

2. Right of children to a provision out of the property of their mother, under a decree, directing a settlement on her and her children; notwithstanding her death before the report: no act being done by her to waive the equity. *Murray v. Lord Elibank*, 13 Ves. 1. Vide *ante*, pl. 107.

3. After a decree for a settlement upon a married woman and her children out of her share, as one of the next of kin of an intestate, the mother dying before any report, the children under a bill, filed by them, having obtained a decree for a settlement, were also held entitled, though not in point of form, to the benefit of the original decree upon the bill of their mother, to the same directions, by way of original decree under their bill, for taking the necessary accounts, &c. to ascertain and secure the fund. *Murray v. Lord Elibank*, 14 Ves. 196.

## X. Of contracts in control of marriage settlements.

Between children and their parents, having power to distribute the property amongst them.

1. Vide in tit. CONTRACT, *sub fine*.

2. An estate limited under marriage settlement to A. for life, with remainder to her children by her deceased husband, in such manner as she should appoint; remainder in default of appointment, to all the children as tenants in

in common; an agreement by the children, that on her joining in suffering a recovery, the first use to which the recovery should enure, should be to A. for life, without impeachment of waste, is, it seems, valid in equity; and the court therefore refused to continue an injunction to restrain her from cutting timber, unless security was given to her for the value of all which she might cut during her life. *Davis v. Uphill*, Swanst. 129.

## MORTGAGE.

### I. Nature of mortgages.

1. Mortgage and pledge distinguished.
2. Criterion for deciding whether a transaction is, or is not, a mortgage.
3. Conveyance, whether absolute or by way of mortgage.
4. Conveyance, whether a conditional purchase, or a mortgage.
5. Conveyance, whether a trust for the grantor, or by way of mortgage.
6. Covenant, whether an executory mortgage.
7. Bond by mortgagor for a further advance, whether an executory additional mortgage.
8. Mortgage of freehold and copyhold, whether conditional as to copyhold.
9. Lease for a loan, and contracts in nature thereof. — Vide in tit. *USURY*.
10. Equitable mortgage — not favoured by the courts.
11. Equitable mortgage — creation of, by deposit of title deeds.
12. Equitable mortgage — creation of, by deposit of title deeds as a pledge.
13. Equitable mortgage — creation of, by deposit of title deeds, with the promise of a mortgage.
14. Equitable mortgage — creation of, by deposit of title deeds, with intent to create a future security.
15. Equitable mortgage — creation of, by deposit of title deeds — possession, evidence of.
16. Equitable mortgage — creation of, by deposit of part of title deeds.
17. Equitable mortgage — creation of, by deposit of copies of court rolls.
18. Equitable mortgage — creation of, by advancing upon the security of title deeds deposited with another.
19. Equitable mortgage — creation of, by agreement to mortgage, with subsequent delivery of title deeds.
20. Equitable mortgage — creation of, by assignment of rents and profits.
21. Equitable mortgage. — Vide in tit. *BANKRUPT*.

### II. Nature and extent of the mortgagor's interest.

1. In regard to the title deeds.
2. His right to appropriate the rents and profits, when in possession.
3. His right to cut underwood, mortgaged.
4. After forfeiture.

5. His

5. His interest will be guarded, by the appointment of a receiver.
6. His interest will be guarded, by the mortgagee's executor being restrained from enforcing payment, where there is no heir to re-convey.
7. Of his right to relief under 7 Geo. 2. c. 20.
8. Is concluded by his own recitals.
9. Force of his contract to grant a lease.

### III. Nature and extent of the mortgagor's rights.

Upon the mortgagee's holding over after payment.

### IV. Nature and extent of the mortgagee's interest.

1. Mortgagee's interest held co-extensive with the mortgagor's, in spite of recitals.
2. The period ascertained at which his interest commenced.
3. Subsequent advances covered by the original equitable mortgage, upon the intention.
4. Advances after a change in a firm, covered by the original equitable mortgage, upon the intention.
5. His right to distrain.
6. Whether entitled to an account, from the mortgagor, of the rents and profits.
7. His right to foreclose and sue at law at the same time.
8. His right to sue at law after a foreclosure.
9. His right to charge for a receiver.
10. His rights against the heir of the mortgagor, a copyholder.

### V. Nature and extent of the mortgagee's rights.

1. Extent of his claim upon the mortgage fund.
2. In regard to the treatment and disposition of the premises.
3. His right to charge for expenditure in protection of the estate.
4. His right to charge interest upon money expended.
5. His right to charge for renewal fines.
6. His right to charge for a receiver.
7. In relation to an annual accounting.
8. In relation to the standard of value in accounting.
9. To account in the character of agent or trustee.
10. To bid for the premises.
11. His right to appropriate the rents and profits on purchasing the life-interest in the mortgaged premises.
12. Mortgagee under a trust, to raise money by sale or mortgage.
13. His right to show the mortgagor's title.
14. In case of a sequestration.
15. Under a given mortgage deed.

### VI. Equity of redemption.

1. How viewed in equity.
2. Nature and properties of.
3. Is alienable, devisable, and descendible.
4. Is entailable.
5. Is an estate whereof there may be a seisin.

6. Grounds of the doctrine of redemption.
7. May be barred by security.
8. Redemption after a release by way of security.
9. Twenty years' possession is a bar to redemption.
10. Twenty years' possession not a bar where the mortgage has been acknowledged.
11. Twenty years' possession not a bar where the mortgagor was a *feme covert*.
12. Twenty years' possession, when a bar in the case of Welch mortgages.
13. Conveyance by mortgagor in trust to sell, with conveyance to mortgagee, whether a bar to redemption.
14. Who may redeem — a creditor.
15. Who may redeem — creditors under a trust deed.
16. Bill for redemption dismissed from defect in proof.
17. Separate redemption under a mortgage of two distinct estates for two distinct debts.
18. Of enlarging the time of payment, on a bill to redeem.
19. Under the Irish statute 8 Geo. 1. c. 2. s. 4.

#### VII. Payment of mortgage money and interest.

1. By accepting the bond of the mortgagor's devisee.
2. Where the personalty is deficient, and the same person is heir and executor.
3. Equity of the representative of the mortgagor, a legatee of the mortgagee, to set off arrears of interest due upon the legacy, against those due upon the mortgage.
4. Presumption of payment from the lapse of time.

#### VIII. Order in which mortgages are to be paid ; and means of gaining a priority.

1. Mortgages paid according to their priority.
2. Legal incumbrances preferred to equitable ones.
3. Priority lost from want of registration, whether revived against purchase money, where premises are sold under a decree.
4. Priority of mortgagee of the assignee of trustees for payment of debts, over the *cestui que* trust.
5. Where possession of the title deeds gives priority.
6. How far an old incumbrance will protect.
7. Of tacking subsequent to prior incumbrances.
8. At what time a prior incumbrance may be got in.
9. Effect of obtaining a prior term for years.
10. Prior incumbrancer's right to turn principal into interest, by indorsement.
11. A mortgagee may tack a judgment.
12. Mortgage coming to one as executor cannot be tacked.
13. Bond cannot be tacked against creditors.
14. Vide in tit. TACKING.
15. Where a declaration of trust of a term is sufficient.
16. Of notice — effect of notice of unregistered incumbrances.
17. A recovery, though to the use of a mortgage, first enures to ancient uses.

#### IX. Forfeiture.



**IX. Foreclosure.**

1. Nature, properties, and consequences of.
2. Default of payment under a decree upon a redemption bill, whether equivalent to.
3. Dismission, for want of prosecution of a redemption bill, whether equivalent to.
4. Where the title deeds are lost.
5. Of copyhold premises.
6. By one of several interested in a mortgage.
7. Against infant heir of copyhold mortgaged by lease and release.
8. Against tenant for life, the tenant in tail being abroad.
9. Of making incumbrancers *pendente lite*, parties to the decree of.
10. Decree of foreclosure sometimes opened.
11. Operation of an action for the balance, to open.
12. Time for payment enlarged.
13. Disposition of the premises pending.
14. Irish practice to decree, not a foreclosure, but a sale.

**X. Nature and extent of the rights of the assignee of the mortgager.**

1. Whether co-extensive only with those of the mortgagee.
2. Notice of assignment, how far essential.
3. Whether affected by antecedent incumbrances of which the mortgagee had not notice.
4. Whether bound by subsequent payments to the mortgagee.
5. Rights of the devisee of a reversionary interest to have the money arising from a sale, secured.

**XI. Nature and extent of the interest and obligation of the heir of the mortgagor.**

1. His interest, being an infant, will be guarded, by inquiring whether a sale will be for his benefit.
2. By executing new securities, the debt becomes his own.
3. Is included in the saving of 7th Geo. 2. c. 14. Ir.

**XII. Merger.**

By union with the fee.

**I. Nature of Mortgages.**

1. Mortgage and pledge distinguished.

Mortgage and pledge distinguished. 2 Ves. 378.

2. Criterion for deciding whether a transaction is, or is not, a mortgage. Vide 2 B. & B. 279.

3. Conveyance, whether absolute or by way of mortgage.

1. Absolute conveyance, and a deed of defeasance, on payment of mortgage money during the joint lives of mortgagor and mortgagee. Held a restraint; and a redemption decreed, there being also fraudulent and oppressive conduct on the part of the mortgagee. *Spurgeon v. Collier*, 1 Eden, 55.

2. Conveyances, held upon the circumstances and answer of defendant, to

be mortgages, and not absolute conveyances; and defendant having insisted upon their being absolute conveyances, plaintiffs were allowed to redeem with costs. *England v. Codrington*, 1 Eden, 169.

3. A. having granted a mortgage of anticipation to B. of a West India estate, being found upon an account taken, to be greatly indebted to him, releases the equity of redemption to B. and his heirs. It not appearing however at the time to have been intended as an absolute sale, and B. having both by letter and in conversation, stated himself as being only mortgagee in possession, a redemption was decreed. *Vernon v. Bethell*, 2 Eden, 110.

4. Conveyance, whether a conditional purchase, or a mortgage.

Vide 2 B. & B. 274.

5. Conveyance, whether a trust for the grantor, or by way of mortgage.

A., a trader, being indebted to B., and having agreed for the purchase of a lot of ground, proposes to B. that the conveyance should be made to him as a security for the debt; and by a note to his attorney, directs the conveyance to be made to B. It is made accordingly; and at the same time a defeasance is prepared, reciting the agreement, but not executed: but A. directs his attorney not to deliver up the absolute conveyance to B. until the defeasance should be executed. A. becomes bankrupt. The conveyance to B. held to be an imperfect mortgage, giving B. a specific lien, in preference to the other creditors. *Card v. Jaffray*, 2 Sch. & Lef. 374.

6. Covenant, whether an executory mortgage.

A. having borrowed money of B. by way of security, made a lease of certain lands to C., and assigned the rent reserved on that lease to B.; but did not convey to him any further interest in the land. Under the bankruptcy of A. the premises were sold, and the value of the lease was ordered to be paid to B., as in the case of a mortgage. *Ex parte Wills*, 2 Cox, 233.

7. Bond by mortgagor for a further advance, whether an additional executory mortgage.

A mortgagee having advanced to the mortgagor a further sum upon his bond; held, that the bond, though obscurely worded, was evidence of an agreement for a further charge upon the mortgaged premises. *Ex parte Hearn*. *In re Hamlyn*, 1 Buck. 165.

8. Mortgage of freehold and copyhold, whether conditional as to copyhold.

Mortgage of freehold estate, with a covenant for better securing the payment, to procure admission, and to surrender a copyhold estate, and in the mean time to stand seised in trust for the mortgagee. A primary mortgage of both estates; and the freehold not first applicable. *Aldrich v. Cooper*, 8 Ves. 382.

9. Lease for a loan, and contracts in nature thereof.

1. A lease granted to a creditor by the debtor, on a further loan of money, at a stipulated rent, to be retained in the discharge of the debt, the lease to be void when the debt would be satisfied, is a security in the nature of a mortgage. *Morony v. O'Dea*, 1 Ball & Beatty, 109.

2. And if such rent be reserved at the fair value of the land, the lease will not be set aside. *Ibid*.

3. But a lease afterwards granted on a further loan of money, reserving the old rent, set aside, being on the face of it a fraud; and the creditor lessee directed to account for the full value of the lands, from the date of the lease. *Ibid*.

4. An agreement, that a mortgagee shall enter into possession of the lands of the mortgagor at a fair rent, in discharge of his debt, is an exception to the rule;

rule; that a mortgagee in possession must account for the full value of the lands; and such agreement will be supported in equity, not being against public policy, or working a private injury. 1 Ball & Beatty, 117.

10. Equitable mortgage — not favoured by the courts.

1. Mortgage by possession of title-deeds disapproved; and not to be extended; with reference to the statute of frauds. In this instance it failed: the deeds being delivered, not as a present security, but for the purpose of having a mortgage security created. *Norris v. Wilkinson*, 12 Ves. 192.

2. Equitable mortgage by deposit of deeds not favoured; especially when contradicting a written instrument. *Ex parte Combe*, 17 Ves. jun. 369.

3. The doctrine of equitable mortgage by deposit of deeds, is not to be extended. In this case, a man having advanced money upon the security of a lease, at the time deposited with another creditor, it was held, that there was no lien beyond the debt of the first depository. *Ex parte Whitbread and others*, 1 Rose, 299.

4. The doctrine of equitable mortgage productive of inconvenience, and not to be carried further. *Ex parte Hooper*, 2 Rose, 326.

11. Equitable mortgage — creation of, by deposit of title deeds.

1. Assignment of rents and profits, or of deeds, is an equitable lien; and assignee may in equity insist upon a mortgage. *Ex parte Wills*, 1 Ves. 162.

2. A deposit of title deeds as a security, is an equitable mortgage. *Hankey v. Vernon*, 2 Cox, 12.

3. Equitable mortgage by a deposit of deeds. *Ex parte Coming*, 9 Ves. 115.

4. Equitable mortgage by delivery of deeds. The possession of the deeds is, if no other purpose is shown, evidence of an agreement, that the estate itself shall be a security. Whether it is necessary to deliver all the deeds, *quære*. 11 Ves. 401.

5. Equitable mortgage by the deposit of a lease. *Ex parte Haig*, 11 Ves. 403.

6. Equitable mortgage by deposit of deeds. *Ex parte Mountfort*, 14 Ves. 606.

7. Equitable mortgage by a deposit of deeds, upon an advance of money without a word passing. 17 Ves. jun. 230.

8. Equitable mortgage by deposit of deeds. *Monkhouse v. Corporation of Bedford*, 17 Ves. jun. 380.

9. Equitable mortgage by mere deposit of deeds without a word passing. 2 Ves. & Beam. 83.

10. A deposit of title deeds, as a security for money, is an equitable mortgage, and shall prevail against a subsequent mortgagee with knowledge of the deposit. *Birch v. Ellames*, 2 Anst. 427.

11. But where a creditor takes a mortgage hastily, in fear of the insolvency of his debtor, and under promises of getting the title deeds, the legal estate shall prevail against a prior deposit. *Plumb v. Fluit*, *Ibid.* 432.

12. Equitable mortgage — creation of, by deposit of title deeds as a pledge.

1. Deeds deposited as a pledge, will entitle the holder to have a mortgage. *Russel v. Russel*, 1 B. C. C. 270.

2. Defendant having taken a deposit of a lease as a security, decreed to take an assignment. *Lucas v. Comerford*, 3 B. C. C. 166.

13. Equitable mortgage — creation of, by deposit of title deeds, with the promise of a mortgage.

A man borrows money, and pledges the title deeds of his estates; and promises

promises to execute a mortgage, but does not, and becomes a bankrupt. His assignees were ordered to pay what was due, and if they did not, to convey the estate to the plaintiff in fee. *Pye v. Daubuz*, Dick. 759.

14. Equitable mortgage — creation of, by deposit of title deeds, with intent to create a future security.

1. The delivery of title deeds to an attorney to prepare a mortgage deed, does not amount to an equitable mortgage; otherwise, if deposited expressly as a security for a debt. *Ex parte Bulteel*, 2 Cox, 243.

2. Equitable mortgage held to be created by delivery of deeds for the purpose of preparing a legal mortgage. *Ex parte Bruce*, 1 Rose, 374.

15. Equitable mortgage — creation of, by deposit of title deeds — possession, evidence of.

Equitable mortgage from a deposit of part of the title deeds; with evidence, not merely parol, but in writing, that the object was to create a security upon the whole. *Ex parte Wetherell*, 11 Ves. 398.

16. Equitable mortgage — creation of, by deposit of part of title deeds.

Vide 11 Ves. 398. 401.

17. Equitable mortgage — creation of, by deposit of copies of court rolls.

Lien upon copyhold premises created by deposit of the copies of the court rolls. *Ex parte Warner*, 1 Rose, 286.

18. Equitable mortgage — creation of, by advancing upon the security of title deeds deposited with another.

Vide 1 Rose, 299.

19. Equitable mortgage — creation of, by agreement to mortgage, with subsequent delivery of title deeds.

An agreement to mortgage, with a subsequent delivery of the title deeds will amount in equity to a mortgage, and will be effectual from the time of the agreement. *Edge v. Worthington*, 1 Cox, 211.

20. Equitable mortgage — creation of, by assignment of rents and profits.

Vide 1 Ves. 162.

21. Equitable mortgage. Vide in tit. BANKRUPT.

## II. *Nature and extent of the mortgagor's interest.*

1. In regard to the title deeds.

1. Mortgagee having got possession of a mortgagor's title deeds, lodged them with an attorney, who claimed a lien on them for business done for mortgagee. On the application of mortgagor, mortgagee was restrained from proceeding at law upon his collateral security. *Schoole v. Sall*, 1 Sch. & Lef. 176.

2. But it was referred to the master to take an account of what was due for principal, interest, and costs, and the costs of the proceedings at law, and the money to be paid into the bank, and remain until the title deeds should be secured, the mortgagor paying the costs at law and in equity. *Ibid.* 177.

2. His right to appropriate the rents and profits, when in possession.

1. Mortgagee cannot have an account of rents and profits received by the mortgagor; though the security being upon an estate for lives is become insufficient. *Colman v. the Duke of St. Albans*, 3 Ves. 25.

2. Mortgagee not entitled to an account of past rents from the mortgagor. *Ex parte Wilson*, 2 Ves. & Beam. 252.

3. His right to cut underwood, mortgaged.

Mortgage of wood and underwood. It is not waste by the mortgagor in possession to cut underwood at seasonable times, and of proper growth. But being a bankrupt, an injunction was granted on the right of the mortgagee to have the estate sold in the plight, in which it was at the bankruptcy, and to prove the rest of his debt. *Hampton v. Hodges*, 8 Ves. 105.

4. After forfeiture.

An equity of redemption is, after forfeiture, a merely equitable right, and the possession of the mortgagor is more precarious than that of any other *cestui que trust*. In point of possession, the mortgagor is a mere tenant at will, even in equity. *Cholmondeley v. Clinton*, 2 Mer. 360.

5. His interest will be guarded, by the appointment of a receiver.

Though a mortgagee shall not be deprived of possession while any thing remains due, where he refused to swear that any thing was due; a consignee, the estate being in the West Indies, was appointed. *Quarrell v. Beckford*, 13 Ves. 377.

6. His interest will be guarded, by the mortgagee's executor being restrained from enforcing payment, where there is no heir to re-convey.

An executor of a mortgagee restrained from enforcing payment; and the money ordered into court, where there was no heir of the mortgagee who could re-convey. 1 Sch. & Lef. 177.

7. Of his right to relief under 7 Geo. 2. c. 20.

1. No order under the statute 7 Geo. 2. c. 20. s. 2., the bill not being confined to a mere foreclosure; but including also another subject. *Bastard v. Clarke*, 7 Ves. 489.

2. No relief to a mortgagor under the statute 7 Geo. 2. c. 20., the mortgagee being entitled to execution. *Amis v. Lloyd*, 3 Ves. & Beam. 15.

8. Is concluded by his own recitals.

Mortgagor is concluded by recitals in his own deeds, showing the sum due; that the estate is redeemable; or the like. But such recitals must be taken altogether. 2 Sch. & Lef. 295.

9. Force of his contract to grant a lease.

1. A contract for a lease by mortgagor cannot be enforced against the tenant, without obtaining a re-conveyance of the mortgage, or procuring the mortgagee to confirm the same. *Costigan v. Hastler*, 2 Sch. & Lef. 160.

2. Tenant holding, under such contract, cannot compel his landlord to pay off the mortgage, to give effect to the contract. *Ibid*.

### III. Nature and extent of the mortgagor's right.

Upon the mortgagee's holding over after payment.

Mortgagee in possession holding over after payment of his principal and interest, charged with the balance and interest. *Quarrell v. Beckford*, 1 Mad. 269.

### IV. Nature and extent of the mortgagee's interest.

1. Mortgagee's interest held co-extensive with the mortgagor's, in spite of recitals.

Mortgagee held, notwithstanding a recital in the declaration of trust, to have

have obtained a security to the extent of the interest of mortgagor in the premises. *Sheldon v. Cox*, 2 Eden, 224.; *Amb.* 624.

2. The period ascertained at which his interest commenced.

Vide 1 Cox, 211.

3. Subsequent advances covered by the original equitable mortgage, upon the intention.

1. Equitable mortgage by a deposit of deeds; covering subsequent advances; upon evidence, that they were made upon that security. *Ex parte Langston*, 17 Ves. jun. 227.

2. Mortgage held no security for subsequent advances made on the strength of a parol engagement. *Ex parte Hooper*, 1 Mer. 7.

4. Advances after a change in a firm, covered by the original equitable mortgage, upon the intention.

Equitable mortgage by deposit of deeds extended, beyond the original purpose, to advances after an alteration of the firm by implication or parol. *Ex parte Kensington*, 2 Ves. & Beam. 79.

5. His right to distrain.

Mortgagee's rights to distrain after notice. 2 Ves. & Beam. 252.

6. Whether entitled to an account, from the mortgagor, of the rents and profits.

Vide 3 Ves. 25.; 2 Ves. & Beam. 252.

7. His right to foreclose and sue at law at the same time.

1. Mortgagee got possession of the estate, sued at law on the covenant for repayment, and brought this bill to foreclose: this is regular, and equity will not stop the proceedings at law, unless the defendant brings in the money. *Rees v. Parkinson*, 2 Anst. 497.

2. Mortgagee has a right to proceed on his mortgage and bond at the same time, (being an exception to the rule, that a party shall not sue at law and in equity at the same time;) but mortgagor shall not be obliged to pay upon his bond, unless secure of his title deeds being delivered up. 1 Sch. & Lef. 177.

8. His right to sue at law after a foreclosure.

1. A mortgagee may sue at law on the bond, after a decree of foreclosure. *Aylet v. Hill*, Dick. 551.; *sed vid.* id. 785.

2. After foreclosure and sale, the mortgagee may bring an action for the residue. *Tooke v. Hartley*, 2 B. C. C. 125.

3. After foreclosure and sale of the mortgaged estate, injunction granted to restrain the mortgagee from recovering the difference at law. *Ferry v. Barker*, 8 Ves. 527.

9. His right to charge for a receiver.

Vide 10 Ves. 405.

10. His rights against the heir of the mortgagor, a copyholder.

Copyhold lands mortgaged in fee by lease and release as freehold: the customary heir is bound by a covenant for farther assurance: but during his infancy the court refused to foreclose; and would go no farther than directing the account, and that in default of payment, the plaintiffs should be let into possession, and hold and enjoy till the heir should attain twenty-one, at which time he should surrender; and a day was given to show cause against the decree. *Spencer v. Boyes*, 4 Ves. 370.

### V. Nature and extent of the mortgagor's rights.

#### 1. Extent of his claim upon the mortgage fund.

Vide 2 Sch. & Lef. 218.

#### 2. In regard to the treatment and disposition of the premises.

A mortgagee is not bound to leave premises in as good repair as he found them; but only in as good repair as might be expected from the owner. *Russel v. Smithies*, 1 Anst. 96. Vide 12 Ves. 493.

#### 3. His right to charge for expenditure in protection of the estate.

1. Expenses incurred by a mortgagee in possession for the protection of the estate, acquiesced in by the mortgagor, allowed. *Lord Trimleston v. Hamil*, 1 Ball & Beatty, 377.

2. A mortgagee in possession will be allowed the expenses necessarily incurred for the protection of the estate. 1 Ball & Beatty, 385.

#### 4. His right to charge interest upon money expended.

Money disbursed by a mortgagee shall carry the same interest as the original sum. *Woolley v. Drag*, 2 Anst. 551.

#### 5. His right to charge for renewal fines.

Mortgagee of leasehold interest, paying renewal fines, reimbursed out of the estate. 1 Ball & Beatty, 202.

#### 6. His right to charge for a receiver.

1. Mortgagee is not entitled to charge receiver's fees for himself: he is entitled, if he pays a receiver. 2 Sch. & Lef. 301.

2. A creditor, going into possession as a *quasi* mortgagee, is not entitled to receiver's fees. 1 Ball & Beatty, 384.

#### 7. In relation to an annual accounting.

Annual accounts are never rendered by mortgagee in possession; but when mortgagor conceives the debt to be satisfied, he calls for a final adjustment. 1 B. & B. 383.

#### 8. In relation to the standard of value in accounting.

A mortgagee in possession, if he enter into the receipt of the rents of the mortgaged premises, will be charged at the rate of the rents reserved. 1 Ball & Beatty, 385.

#### 9. To account in the character of agent or trustee.

1. Under a conveyance of a West India estate, in effect a mortgage, though expressed as a trust, an assignee was held liable to account as a mortgagee, and not entitled to charge as trustee or agent. Therefore the accounts settled with the executors of the mortgagor since his death in 1791, were declared not to be considered settled; the prior accounts to stand; with liberty to surcharge and falsify; but not farther back than 1785. *Chambers v. Goldwin*, 5 Ves. 834.

2. Upon appeal the decree varied, 1st, by confining the liberty to surcharge and falsify to the accounts of the defendant himself, the assignee; without prejudice to any suit against the representatives of the assignor; 2dly, by confining the declaration against the right to commission to the period of residence in England; leaving open to investigation before the master the right to commission, while in the West Indies; which point was not made by the pleadings. As to opening the accounts, settled with the executors of the original owner of the estate since his death, the decree was affirmed. *Chambers v. Goldwin*, 9 Ves. 254.

#### 10. To bid for the premises.

A mortgagee, who was the sole assignee and principal creditor, there being only

only one other creditor, to a small amount, permitted to bid for the estate, subject to the approbation of the master, the mortgagee undertaking to make good the deficiency between the sum bid and the price to be fixed by the master, in case he should not approve of the bidding. *In re Salisbury*, 1 Buck, 245.

11. His right to appropriate the rents and profits on purchasing the life-interest in the mortgaged premises.

Mortgagee having permitted the tenant for life to run in arrear for the interest, purchases the estate for life, and takes possession under that purchase: he is bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear; and in the account under a bill of foreclosure, was charged accordingly. *Lord Penrhyn v. Hughes*, 5 Ves. 99.

12. Mortgage, under a trust, to raise money by sale or mortgage.

Mortgagee under a trust to raise money by sale or mortgage, has only the remedies of a mortgagee; and cannot call upon the trustees for execution of the trust. *Palk v. Lord Clinton*, 12 Ves. 48.

13. His right to show the mortgagor's title.

A mortgagee has no right to show the title of his mortgagor. *Lambert v. Rogers*, 2 Mer. 489.

14. In case of a sequestration.

Sequestrators took possession of certain mortgaged estates. The mortgagees, on petition, obtained an order to have the rents and profits of the mortgaged estates in the hands of the sequestrators, applied towards payment of their mortgage money, &c. and possession of the mortgaged estates delivered up to them. *Walker v. Bell*, 2 Mad. 21.

15. Under a given mortgage deed.

Deed of mortgage at *5l. per cent.* contained a proviso, that as often as the interest should be paid half yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest *3½ per cent.* By a separate agreement, mortgagee covenanted not to call in the money within five years, unless the interest should be in arrear. The *first* half year's interest not having been tendered till *after* the three months, but the *second* half year's interest *before*; held, first, that the mortgagee was only entitled to interest at *5l. per cent.* for the half year which had been tendered after the time; secondly, that in consequence of the default, he was entitled to call in his money. *Stanhope v. Manners*, 2 Eden, 197.

## VI. Equity of redemption.

### 1. How viewed in equity.

The equity of redemption, is, in the eye of chancery, the fee simple of the land; will descend, may be granted, devised, and entailed, and barred by a common recovery, which proves that, in consideration of equity, it is such an estate as there may be a seisin of. *Burgess v. Wheate*, 1 Eden, 225.

### 2. Nature and properties of.

*Ibid.*

### 3. Is alienable, devisable, and descendible.

*Ibid.*

### 4. Is entailable.

*Ibid.*

### 5. Is an estate whereof there may be a seisin.

*Ibid.*



## 6. Grounds of the doctrine of redemption.

1. Ground of redemption of a mortgage, and of relief against nonpayment of rent, that the object is a security. 12 Ves. 332.

2. Ground of redemption of a mortgage, that the object is a security for money. 12 Ves. 334.

## 7. May be barred by recovery.

Vide 1 Eden, 225.

## 8. Redemption after a release by way of recovery.

Vide 2 Eden, 110.

## 9. Twenty years' possession is a bar to redemption.

A mortgaged estate getting into different hands, redemption was refused as to part from length of time, and opened as to the other part; accounts having been kept, and there being a devise of it as a mortgage. 3 Ves. 22.

## 10. Twenty years' possession not a bar where the mortgage has been acknowledged.

1. If a mortgagee admits having no other title, it shall bind him, and the court will let in the mortgagor to redeem after twenty years; not so, if he claims by better title. *Perry v. Marston*, 2 B.C.C. 391.

2. Bill to redeem after twenty years, upon parol evidence of conversation with the mortgagee, dismissed. *Whiting v. White*, 2 Cox, 290; *Cooper* 1.

3. Bill for the redemption of a mortgage after twenty years, upon the evidence of a conversation proved by one witness only, dismissed: his honor the vice-chancellor, however, was of opinion, that parol evidence was admissible in such cases. *Reekes v. Postlethwaite*, *Cooper*, 161.

4. Redemption refused, though account delivered within twenty-one years, it being so delivered without any authority by a receiver and manager of the estate, and the employer being in a state which rendered him incapable of managing his affairs. *Barron v. Martin*, *Cooper*, 189.

5. May be redeemed after twenty years, if during that period the mortgagee has treated it as redeemable, as by keeping accounts upon it. 2 Ves. 84.

6. Bill against the devisee of mortgaged premises by the heir of mortgagor, for discovery and redemption; charging acknowledgments, that the estate was held in mortgage, and that accounts had been kept: plea of possession for fifty years, under conveyances from the mortgagee, ordered to stand for an answer. *Lake v. Thomas*, 3 Ves. 17.

7. Surrender by mortgagee of copyhold to the use of his will, is no proof that he considered it irredeemable. 4 Ves. 480.

8. Redemption decreed against the heir of mortgagee, and a purchaser with notice upon acknowledgment of the mortgage within twenty years before the bill in transaction with other persons, not with the heirs of the mortgagor. *Hansard v. Hardy*, 18 Ves. jun. 455.

9. Demurrer to a bill for redemption of a mortgage upon twenty years possession by the mortgagee; overruled, upon allegation of admission of the mortgage title within that period. *Hodley v. Healey*, 1 Ves. & Beam. 536.

11. Twenty years' possession not a bar where the mortgagor was a *feme covert*.

*Baron and feme* seized in fee in right of the *feme*, mortgage by fine, and afterwards convey the equity of redemption by lease and release to the mortgagee; the mortgagee remains in possession as complete owner for more than twenty years, during the life of the husband, tenant by the courtesy; upon the death of the husband, the heir of the wife may redeem, notwithstanding the lapse of time. *Corbett v. Barker*, 3 Anst. 755.

## 12. Twenty

12. Twenty years' possession, when a bar in the case of Welsh mortgages.

Time no bar to redemption in the case of a Welsh mortgage, unless twenty years after principal and interest paid by perception of rents and profits. *Fenwick v. Read*, 1 Mer. 114.

13. Conveyance by mortgagor in trust to sell, with conveyance to mortgagee, whether a bar to redemption.

Plea to a bill (to redeem a mortgage) of a conveyance by the mortgagor of the equity of redemption, in trust to sell and pay the mortgage, and a bond debt from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage-money, with interest and costs; ordered to stand for an answer, with liberty to accept. *Stabback v. Leatt, Cooper*, 46.

14. Who may redeem — a creditor.

When the estate is in mortgage prior to a judgment, or when the judgment is obtained, the legal estate is in any manner out of the debtor, so that the creditor could not recover under an *elegit*; equity, in order to protect a purchaser, will not permit the creditor to redeem. *Barret v. Blake*, 2 B. & B. 357.

15. Who may redeem — creditors under a trust deed.

Creditors under a deed of trust cannot have a decree for redemption against a mortgagee; unless a special case; as collusion; that the trustee refuses, &c. In this case the bill by the creditors prayed, not a redemption, but a sale; to which the mortgagee would not consent; but submitted to be redeemed; and the bill was dismissed. *Troughton v. Binkes*, 6 Ves. 573.

16. Bill for redemption dismissed from defect in proof.

Tenant in common of a moiety having obtained a decree for a redemption of his moiety, afterwards takes a conveyance of the equity of redemption of the other tenant in common; and then files a supplemental bill for a redemption as to that; stating that a prior conveyance of that equity of redemption, by the assignees of that tenant in common who had been a bankrupt, and in which conveyance the bankrupt had joined, was void as against the bankrupt, having been improperly made. Bill dismissed, being supported by the evidence of the bankrupt alone. *Waugh v. Land, Cooper*, 129.

17. Separate redemption under a mortgage of two distinct estates for two distinct debts.

1. The principle, that where two distinct estates are mortgaged for two distinct debts, a separate redemption cannot be decreed, operates as long as the equities of redemption remain united in the same person. *Willie v. Lugg*, 2 Eden, 78.

2. A purchaser of an equity of redemption filed his bill against the mortgagee to redeem. The original mortgagor having made a mortgage of other premises to the same mortgagee for a distinct debt, the purchaser cannot redeem the first, without redeeming the second mortgage. And the parties interested in the equity of redemption of the second mortgage, are necessary parties to the suit. *Ireson v. Denn*, 2 Cox, 425.

18. Of enlarging the time of payment, on a bill to redeem.

The time not enlarged upon a bill of redemption, as upon a bill of foreclosure. *Novosielski v. Wakefield*, 17 Ves. jun. 417.

19. Under

## 19. Under the Irish stat. 8 Geo. 1. c. 2. s. 4.

The nine months allowed by the stat. 8 Geo. 1. c. 2. s. 4. to a mortgagee of an evicted lease to redeem, are calendar months. *Biddulph v. St. John*, 2 Sch. & Lef. 521.

## VII. Payment of mortgage money and interest.

## 1. By accepting the bond of the mortgagor's devisee.

A mortgagee takes a bond from the assignee of the devisee for the arrears of the interest then due, and gives a receipt. The bond is unpaid. The interest is still secured by the mortgage. *Hardwick v. Mynd*, 1 Anst. 111.

## 2. Where the personalty is deficient, and the same person is heir and executor.

Where the personalty is deficient, and the same person is heir and executor, the mortgagee may pray a sale in the first instance. *Daniel v. Skipworth*, 2 B. C. C. 155.

## 3. Equity of the representative of the mortgagor, a legatee of the mortgagee, to set off arrears of interest due upon the legacy, against those due upon the mortgage.

Devisee of an equity of redemption not entitled to have an arrear of interest upon a legacy from the mortgagee to the mortgagor, set off against the interest due upon the mortgage. *Pettat v. Ellis*, 9 Ves. 563.

## 4. Presumption of payment from the lapse of time.

1. Although nonpayment of interest for twenty years, where clear and no demand, raises a presumption of payment; yet no doubtful circumstances, and the original mortgage admitted, referred to the master to enquire whether any interest had been paid. *Trash v. White*, 3 B. C. C. 289.

2. There is no general rule in equity for presuming a mortgage satisfied after twenty years, or any other period of time, without payment or demand of principal or interest. And if a jury should on this ground presume a bond satisfied, which is given as a collateral security to the mortgage, yet the mortgagee is not thereby prevented from showing the truth of the case in a court of equity, if in fact the money has not been paid. *Toplis v. Baker*, 2 Cox, 118.

3. Mortgage presumed satisfied: no interest having been received for twenty-five years. 12 Ves. 266.

## VIII. Order in which mortgages are to be paid; and means of gaining a priority.

## 1. Mortgages paid according to their priority.

1. Satisfaction among equitable securities, shall be according to the priorities of their dates. *Becket v. Cordley*, 1 B. C. C. 353.

2. Therefore where the legal estate is in a mortgagee, the subsequent securities, being nearly equitable, shall have priority according to their dates. *Becket v. Cordley*, *Ibid*.

## 2. Legal incumbrances preferred to equitable ones.

1. The question of priority between incumbrancers, if the legal estate has not been got in, depends upon the better right to call for it; and the prior incumbrancer, if he has that right, is in equity in the same state as if he had an assignment. 11 Ves. 618.

2. Preference of a mortgagee of the equity of redemption, getting in the legal estate. 12 Ves. 134.

## 3. Equitable

3. Equitable mortgage by deposit of title deeds, preferred to a purchase with notice. *Hiern v. Mill*. 13 Ves. 114.

3. Priority lost from want of registration ; whether revived against purchase money where premises are sold under a decree.

Where premises had been sold under a decree ; held, that the lien of an incumbrancer was not transferred to the purchase money, so as to be out of the registry act ; and he was therefore postponed to subsequent incumbrancers. *Hennand v. Moore*, 1 Eden, 327.

4. Priority of mortgagee of the assignee of trustees for payment of debts, over the *cestui que* trust.

Devise for payment of debts, the trustees convey to A. B. for the purposes of the trust. A. B. mortgages to several persons who have notice of the trust. These mortgages are good. *Hardwick v. Mynd*, 1 Anst. 109.

5. Where possession of the title deeds gives priority.

1. Mortgagee of a reversion (not having the title deeds) shall not be postponed to a subsequent mortgagee (whose mortgage was made after the mortgagor came into possession, who had the title deeds : there being neither fraud nor gross negligence. *Twirle v. Rand*. 2 B. C. C. 650.

2. Not a general rule in equity, that a second mortgagee, who has the title deeds, without notice of a prior incumbrance, shall be preferred : negligence alone will not postpone the first ; it must amount to fraud. 6 Ves. 183.

3. To postpone the first mortgagee on the ground of leaving the title deeds in the possession of the mortgagor, the case must amount to fraud. *Barnett v. Weston*, 12 Ves. 130.

4. Deeds not taken from a subsequent incumbrancer in favour of a prior one. 2 Ves. & Beam. 83.

6. How far an old incumbrance will protect.

1. Subsequent mortgagee, redeeming a prior mortgage, must redeem it entirely. 12 Ves. 59.

2. Whether a third mortgagee, taking in the first, can exclude the second, where the first, when conveying to the third, knew of the second. *Quare*. 15 Ves. 335.

3. Purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in, against subsequent incumbrances of which he had notice. *Toulmin v. Steere*, 3 Mer. 210.

7. Of tacking subsequent to prior incumbrances.

The third mortgagee buying in the first mortgage, even *pendente lite*, shall unite his securities, and postpone the second. *Robinson v. Davidson*, 1 B. C. C. 63.

8. At what time a prior incumbrance may be got in.

Third mortgagee having, *pendente lite*, and after the first mortgagee had by his answer, submitted (on payment of the money due to him) to assign to the plaintiff the second mortgagee, obtained an assignment of the first mortgage : decreed to be entitled to hold the estate against the second mortgagee till he should be paid what was due to him upon both, he having had no notice of the second mortgage, when he advanced his money. *Belchier v. Butler*, 1 Eden, 523. ; 5 Toml. P. C. 292.

9. Effect of obtaining a prior term for years.

1. Mortgagee may protect himself against a claim of dower by taking an assignment of an old mortgage term prior to the right of dower. *Wynn v. Williams*, 5 Ves. 130.

2. In equity, a second mortgagee without notice, getting in a satisfied term, may protect himself ; the conscience being equal. The lord chancellor of opinion,

opinion, that at law an assignment of such term is not to be presumed, without some dealing upon it. Consequences of the late doctrine of courts of law on this subject. 6 Ves. 184.

3. Rule between incumbrancers, that a subsequent incumbrancer, without notice, and having as good a right, getting in the legal estate, by assignment of a term, or possessing himself of the deed creating it, is protected. 10 Ves. 26.

4. Rule between incumbrancers, that a subsequent incumbrancer, without notice, getting in a term, may protect himself; unless there are circumstances, giving the prior incumbrancer a better right to call for an assignment. 10 Ves. 270.

5. Subsequent incumbrancer cannot protect himself by a satisfied term against a prior incumbrance, unless in some sense got in: either by an assignment, or making the trustee a party to the instrument, or taking possession of the deed, creating the term: nor, if he has notice, before he pays his money. Distinction upon that as to the dowress, upon no principle, but established by practice. 10 Ves. 271.

6. A subsequent incumbrancer without notice protected by getting possession of the deed, creating an outstanding term. As to the consequence to the trustee, assigning to him, though aware of a prior incumbrance, and whether the court would interfere by injunction, *quære*. 11 Ves. 613.

10. Prior incumbrancer's right to turn principal into interest, by indorsement.

A prior incumbrancer not allowed to turn interest into principal by indorsement, as against a subsequent incumbrancer of whom she had notice. *Digby v. Craggs*, 2 Eden, 200.; *Amb*. 612.

11. A mortgagee may tack a judgment.

First and second mortgagees: the mortgagor a bankrupt. The first mortgagee entitled to tack a subsequent judgment docketed, though no execution has issued, at the time of the bankruptcy. *Baker v. Harris*, 16 Ves. 397.

12. Mortgage coming to one as executor, cannot be tacked.

The right of the first mortgagee with the legal estate, to tack as against mesne mortgagees, does not cover a mortgage of the equity of redemption coming to him as executor. *Barnett v. Weston*, 12 Ves. 130.

13. Bond cannot be tacked against creditors.

Not to be tacked to a mortgage against creditors. *Hamerton v. Rogers*, 1 Ves. 513.

14. Vide in tit. TACKING.

15. Where a declaration of trust of a term is sufficient.

The custody of the deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer, without notice of the prior mortgage; held to give him an advantage over the first incumbrancer, which a court of equity would not deprive him of. *Stanhope v. Earl Verney*, 2 Eden, 81.

16. Of notice — effect of notice of unregistered incumbrances.

Notice of an unregistered mortgage, held to affect subsequent mortgagees, who had registered. *Sheldon v. Cox*, 2 Eden, 224.

17. A recovery, though to the use of a mortgage, first enures to ancient uses.

Where a father was tenant for life with remainder to his son in tail, who, on his marriage, by lease and release, conveys his estate to trustees in strict settlement:

settlement; and some time afterwards joins with his father in making a mortgage of the same estate, and suffers a recovery to the use of the mortgage. Held, that the recovery shall notwithstanding enure first to the uses of the marriage settlement. *Cheney v. Hall*, 2 Eden, 357.; Amb. 526.

### IX. Foreclosure.

#### 1. Nature, properties, and consequences of.

1. A mortgagee, after he hath foreclosed the mortgage, cannot bring an action on his bond or the covenant in the mortgage until the estate hath been fairly sold, and it is seen whether the purchase money is deficient; for until it is sold, the estate remains a pledge, and *non constat*, but it may be ample. *Took v. —*, Dick. 785.

2. Judgment confessed after a bill of foreclosure ineffectual against the plaintiff. 2 Ves. & Beam. 207.

2. Default of payment under a decree upon a redemption bill, whether equivalent to.

Default of payment under a decree upon a bill for redemption, operates as a foreclosure. 11 Ves. 199.

3. Dismission, for want of prosecution of a redemption bill, whether equivalent to.

Dismission of a bill for redemption, for want of prosecution, has not the effect of foreclosure: not preventing another bill. 18 Ves. jun. 460.

#### 4. Where the title deeds are lost.

The title deeds being stolen from a mortgagee; the account directed without an inquiry. *Stokoe v. Robson*, 3 Ves. & Beam. 51.

#### 5. Of copyhold premises.

For foreclosure of copyhold premises. See *Hill v. Price*, Dick. 344.

#### 6. By one of several interested in a mortgage.

A trustee laid out the money of different persons on a mortgage; foreclosure by one *cestui que* trust as to his share. *Montgomerie v. the Marquis of Bath*, 3 Ves. 560.

7. Against infant heir of copyhold mortgaged by lease and release. Vide 4 Ves. 370.

#### 8. Against tenant for life, the tenant in tail being abroad.

Decree of foreclosure against a tenant for life, the tenant in tail being abroad. *Fishwick v. Lowe*, 1 Cox, 411.

#### 9. Of making incumbrances *pendente lite*, parties to the decree of.

Effect of *lis pendens*: subsequent mortgagees of an equity of redemption bound by a decree of foreclosure; though not made parties. An exception by a purchaser on that ground was disallowed; and a specific performance decreed; with costs. *Bishop of Winchester v. Paine*, 11 Ves. 294.

#### 10. Decree of foreclosure sometimes opened.

A decree of foreclosure had on sequestration in 1777, in pursuance of st. 7 Geo. 2. c. 14., against an absent mortgagor, known by the plaintiff to be incompetent, from mental imbecility, to conduct his affairs: and advantage having been taken in the account of the state of the defendant, and of his absence, and of his having nobody to manage his defence: and a sale had in 1780 in pursuance of such decree, to the person conducting the suit; set aside as fraudulent, on original bill filed in 1785 by the heir of the mortgagor; and an inquiry directed into the circumstances, upon the ground of which the decree and former proceedings were impeached. *Carew v. Johnston*, 2 Sch. & Lef. 280.

11. Oper-

### 11. Operation of an action for the balance, to open.

After foreclosure and sale, action by the mortgagee for the balance opens the foreclosure. Therefore, the mortgagee should have time to get back the estate and tender a re-conveyance, and the mortgagor to redeem. But the mortgagee having taken possession a considerable time ago, and the balance being inconsiderable, a perpetual injunction was decreed. *Perry v. Barker*, 13 Ves. 198.

### 12. Time for payment enlarged.

A fourth order made for enlarging the time for payment of mortgage money, under the circumstances. *Edwards v. Cunliffe*, 1 Mad. 287.

### 13. Disposition of the premises pending.

After bill of foreclosure filed by mortgagee, and a receiver appointed, tenant for life of the mortgaged premises with leasing power, makes leases. A bill is filed by a judgment-creditor, who moves to set the premises, pending the cause. Ordered to be set, without prejudice to any right the tenants may have against their lessor; and they, as tenants from year to year to the receiver, being entitled to notice to quit. *Lord Mansfield v. Hamilton*; *Hobhouse v. Hamilton*, 2 Sch. & Lef. 28.

### 14. Irish practice to decree, not a foreclosure, but a sale.

The course in Ireland is a decree for sale, instead of foreclosure; the mortgagor having the surplus, if any: the mortgagee, his remedy in case of deficiency. 13 Ves. 205.

## X. Nature and extent of the rights of the assignee of the mortgagee.

### 1. Whether co-extensive only with those of the mortgagee.

1. Assignment of a mortgage without the privity of the mortgagor: the assignee takes subject to the account between the mortgagor and mortgagee. *Matthews v. Wallwyn*, 4 Ves. 118.

2. Assignment of a mortgage without the intervention of the mortgagor, is subject to the account between the mortgagor and the mortgagee. 9 Ves. 264.

3. As between mortgagee and persons claiming under him, without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal. 4 Ves. 128.

### 2. Notice of assignment, how far essential.

Notice to the mortgagor of the assignment not necessary to its validity. 9 Ves. 411.

### 3. Whether affected by antecedent incumbrances of which the mortgagee had not notice.

Derivative mortgagee not affected by a settlement's coming to his hands, if the mortgagee from whom he took his mortgage, had not notice. *Sweet v. Southcote*, Dick. 671.

### 4. Whether bound by subsequent payments to the mortgagee.

After an assignment of a mortgage, payments to the mortgagee without notice, must be allowed by the assignee. The registry, the premises being in Middlesex, is not notice for this purpose. Tender, after the bill filed, of the balance, deducting the payments to the mortgagee, with costs, deprived the assignee of subsequent costs. *Williams v. Sorrell*, 4 Ves. 389.

### 5. Rights

5. Rights of the devisee of a reversionary interest to have the money arising from a sale, secured.

Testator having a debt secured upon land, gives the mortgage money to the mortgagor, and desires that he will give a reversionary interest in the premises to A. The mortgagor selling the estate, shall bring the mortgage money into court, for the use of the devisee of the reversion, subject to the life-estate. *Lewis v. King*, 2 B. C. C. 630.

XI. Nature and extent of the interest and obligation of the heir of the mortgagor.

1. His interest, being an infant, will be guarded, by inquiring whether a sale will be for his benefit.

Inquiry directed, in case the mortgagee's consent to a sale whether it will be for the benefit of the infant heir of the mortgagor. *Monday v. Monday*, 1 Ves. & Beam. 222.

2. By executing new securities, the debt becomes his own.

1. Where heir inherits a mortgaged estate, if he executes a new covenant and bond, with a new equity of redemption, he makes the debt his own, and his personal estate shall be primarily liable. *Donisthorpe v. Porter*, 2 Eden, 162.

2. Mortgaged estate descends; the mortgagee pressing, the security is assigned; a mere covenant by the heir, upon that occasion, for payment, does not make it his personal debt. 3 Ves. 131.

3. Is included in the saving of 7th Geo. 2. c. 14. Ir.

The heir of mortgagor may take advantage of the saving in the statute 7 Geo. 2. c. 14. in favour of infants, persons of nonsane memory, and *feme covert*s. *Carew v. Johnstone*, 2 Sch. & Lef. 280.

XII. Merger.

By union with the fee.

Mortgage not merged by union with the fee; the actual intention, not established by acts of the party, presumed from the greater advantage against merger in favour of the personal representative. *Forbes v. Moffat*, 18 Ves. jun. 384.

MORTMAIN AND CHARITY.

I. In relation to the stat. 1 Edw. 4. c. 14.

What uses are within the statute.

II. In relation to the stat. 43 Eliz. c. 4.

Charitable uses within the statute — a bequest for preaching a sermon, keeping chimes in repair, and paying singers.

III. In relation to the stat. 9 Geo. 2. c. 36.

1. It was intended to have a local operation only.
2. It meant to prevent an addition, by will, to land already in mortmain.
3. Inrolment in the court of chancery, means the court of chancery in England.
4. Bequests within the statute — devise upon a secret trust for a charity.

5. Be-



5. Bequests within the statute — devise declared to be in trust for a charity, though no declaration of trust executed pursuant to the statute of frauds.
6. Bequests within the statute — a charity for general purposes.
7. Bequests within the statute — where the principal part of a charity fails the whole fails.
8. Bequests within the statute — bequest in favour of two persons by name, for officiating in a charity void by the statute.
9. Bequests within the statute — a charity bad in part, fails in all, if every part is connected.
10. Bequests within the statute — legacy secured by mortgage.
11. Bequests within the statute — bequest of a mortgage, though included in a residue.
12. Bequests within the statute — devise of real and personal estate in trust for debts and legacies, void as a charge of charity legacies upon the real and leasehold estates, and money on mortgage.
13. Bequests within the statute — legacy to be laid out in land, until which, at interest.
14. Bequests within the statute — devise of real estates to be sold, and the produce, with the personal estate, upon trust, to be laid out in lands or the funds, subject to the debts and legacies, for the maintenance of a charity in Scotland; void as to the produce of the real estate, valid as to the personal property, by the effect of the option.
15. Bequests within the statute — bequest of money secured by assignment of the poor and county rates.
16. Bequests within the statute — legacy to the trustees of a chapel for protestant dissenters, to be applied in discharge of the mortgage on the chapel.
17. Bequests within the statute — legacy to be laid out in land for the benefit of two preachers at a chapel.
18. Bequests within the statute — legacy to be laid out in land for the establishment of minister of a chapel.
19. Bequests within the statute — trust to build or purchase a chapel, support a gospel minister, and for such charitable uses as executors should think proper.
20. Bequests within the statute — devise of a house to keep books in, for the increase and improvement of christian knowledge.
21. Bequests within the statute — legacy to build and endow a hospital upon land, not already in mortmain.
22. Bequests within the statute — legacy towards "erecting an endowment of a hospital for the county of D.;" it being necessary to purchase land for that purpose.
23. Bequests within the statute — bequest to sell and buy land to erect an almshouse.
24. Bequests within the statute — devise of real and personal estate to be sold, and part of the money to be laid out in the purchase of land to erect and endow an almshouse.
25. Bequests within the statute — legacy to build almshouses, and purchase the ground; with secondary objects.

26. Be-

26. Bequests within the statute — legacy to build a school-house, and to endow it, the parish having land on which a school-house formerly stood.
27. Bequests within the statute — a legacy to erect a new school-house, there being no land upon which to erect.
28. Bequests within the statute — bequest to erect a school-house, and purchase land for that purpose.
29. Bequests within the statute — devise of freehold houses to eight poor persons of a parish.
30. Bequests within the statute — legacy to the governors of queen Anne's bounty.
31. Bequests within the statute — legacy "to the society for increasing clergymen's livings in England and Wales," (which means the trustees of queen Anne's bounty,) for the perpetual purpose of increasing their livings.
32. Bequests within the statute — trust for establishing a perpetual botanical garden; the testator adding, that he trusted it would be a public benefit.
33. Bequests within the statute — bequest of a navigation share for the improvement of the city of Bath.
34. Bequests within the statute — a citizen of London cannot, under the custom, give land out of London in mortmain.
35. Bequests within the exception in the statute — general rules.
36. Bequests within the exception in the statute — the exception only extends to colleges established at the time when the statute was enacted.
37. Bequests within the exception in the statute — devise to the "thirteen fellows of A. living at testator's death."
38. Bequests not within the statute — devise in mortmain by a will before the statute.
39. Bequests not within the statute — appointment in mortmain after the statute, under a power in a will executed before.
40. Bequests not within the statute — gift of personalty to establish a school.
41. Bequests not within the statute — devise of real and personal estate to trustees to take a house for a school, to educate children and grandchildren of particular persons.
42. Bequests not within the statute — legacy to erect a school and blind asylum, with a direction that lands should not be purchased, and the expression of an expectation that lands would be given for the charities.
43. Bequests not within the statute — bequest for building a house for reduced gentlewomen.
44. Bequests not within the statute — money to build a parsonage-house, where no land is to be purchased.
45. Bequests not within the statute — money to repair parsonage-houses.
46. Bequests not within the statute — legacy to be laid out in building upon land already in mortmain.
47. Bequests not within the statute — bequest for rebuilding, repairing, &c. almshouses, is valid to the extent of any application upon the land already in mortmain.

48. Bequests not within the statute — legacy towards “erecting an endowment of a hospital for the county of D.” may go in aid of an endowment of any hospital already existing.
49. Bequests not within the statute — legacy for the increase and improvement of christian knowledge.
50. Bequests not within the statute — bequest of money to be invested in the funds, until it could be laid out in land “to the satisfaction” of the trustees.
51. Bequests not within the statute — money to be laid out in the purchase of heritable securities in Scotland.
52. Bequests not within the statute — legacy to be laid out in land in Scotland.
53. Bequests not within the statute — devise of real estates to be sold, and the produce, with the personal estate, upon trust, to be laid out in lands or the funds, subject to debts and legacies, for the maintenance of a charity in Scotland; void as to the produce of the real estate; valid as to the personal property, by the effect of the option.
54. Bequests not within the statute — legacy to be laid out in land in Ireland.
55. Bequests not within the statute — *quare*, whether a bequest of money upon mortgage is.
56. Bequests of a doubtful class — devise upon a secret trust for a charity, not declared pursuant to the statute of frauds.
57. Bequests of a doubtful class — bequest of money upon mortgage.
58. Conveyances within the statute — mortgage of turnpike tolls.
59. Conveyances within the statute — influence of a will upon a deed executed within the year.
60. Conveyances not within the statute — reservation to the grantor of a power of regulating the charity.
61. Conveyances not within the statute — deed, when enrolled, need not be executed by grantees; sufficient, if by grantor.
62. Conveyances not within the statute — a case in which the grantor retained the deed, after enrolment, in his possession, and was himself rector of the benefice endowed.
63. Conveyances not within the exception in the statute — grant to a college, not beneficially, but in trust for other objects.

**IV. In relation to the question, what bequests are to charitable uses; what not.**

1. What are — bequest to poor relations.
2. What are — devise, with a discretion yearly to distribute so much amongst testator’s poor kinsfolk, and their issue, dwelling in B.
3. What are — bequest of residue “to the widows and children of seamen belonging to the town of Liverpool.”
4. What are not — bequest for such “benevolent” purposes as the trustees in their discretion may agree on.
5. What are not — bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve.

**V. In relation to the construction of devises to charitable uses.**

1. Rule of construing wills in charity cases, different from the cases of individuals.
2. Rule of construction, where the intention is obscure.
3. Bequest to "erect," imports that land is to be bought, unless a contrary intent is manifested.
4. Whether a bequest for repairing a chapel, authorizes the building a new one.
5. A legacy substituted for one void by the statute, without naming the fund, was held to be out of the same fund as the other.
6. Where testator "directs" the residue "to be divided for" certain charitable purposes named, "and other charitable purposes to be named hereafter," which he omits.
7. A surplus, with its increase, was held to result, after a term, to the charity, under the general trust; not to the heir.
8. A case in which the question was, whether the amount of the sum to be appointed was discretionary in the appointor.
9. A bequest in trust "for the worship and service of God."

**VI. In relation to the construction of deeds to charitable uses.**

In relation to religious worship.

**VII. Of the era of the jurisdiction of the court of chancery, upon informations for establishing charities.**

It arose since the reign of Elizabeth.

**VIII. Of the general jurisdiction exercised by the court of chancery over charities.**

1. Distinction between the internal management of a charity, and management of the revenue.
2. Where the charity is regulated by governors under a charter.
3. To enforce trusts on laches of visitor.
4. In the case of the visitor becoming lunatic.
5. To enforce trusts, on abuse by trustees, by decreeing an account for the time past.
6. To enforce trusts, on abuse by trustees, by vacating appointments to offices.
7. Breach of trust, by pulling down and selling the materials of a chapel, and converting to other uses the burial ground, relieved against.
8. To enforce trusts on laches of trustee, by directing an application for the sign manual to erect a charity.
9. To enforce trusts on laches of trustees, by appointing receiver, and decreeing account.
10. By correcting deviations from the will of the founder.
11. To administer in case of non-acceptance of bequest.
12. Obligation to administer trusts for the benefit of protestant dissenting congregations.

13. Of marshalling bequests by wills made before and after the mortmain act, so as to render all available.
14. Of marshalling assets in the case where realty and personalty are bequeathed, and the real bequest is void.
15. In relation to injunctions.
16. In the case of the foundling hospital.
17. Presumptions are in favour of a charity.
18. Presumption in favour of the regularity of proceedings.

**IX. In relation to commissions and commissioners of charitable uses.**

1. Commission — the mode of objecting to a commission issued in an unwarrantable case, may be by exceptions.
2. Commissioners — a contempt offered to them is punishable by the great seal.

**X. In relation to the question, whether a charitable bequest is such as a court of equity will execute.**

1. Where the property is devoted to charity in general.
2. Where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object.
3. The most general gifts for charity will be executed.
4. It has never executed a charity unless described by the will, or the property has been devoted to charity in general.
5. A power to trustees to continue testator's charities, or to give any others they should think fit.
6. Bequest of residue "to the widows and children of seamen belonging to the town of Liverpool."
7. Where no executor has been named to carry the purpose into effect.
8. Where the trustee died in testator's lifetime, and the bequest was to such charitable purposes as he should appoint.
9. Where the executor who was to name the hospital to which, &c. was struck out of the will.
10. A conveyance defective from limitation to certain officers, instead of the corporate body, aided under 43 Eliz. c. 4.
11. Bequest to a charity in Scotland.

**XI. In relation to preliminaries to carrying charitable uses into execution.**

Acceptance of the bequest by the beneficiary.

**XII. In relation to the mode in which charitable uses shall be carried into execution.**

1. Where the property is devoted to charity in general.
2. Where the purpose is indefinite, the disposition is in the sign manual; where a trustee is to be interposed, with an object defined, the court will administer.
3. Where the will interposes a trust, the disposition must be by a scheme before the master; where no trust, by sign manual.

4. Where

4. Where the intention is obscurely expressed.
5. Where the mode prescribed is left uncertain.
6. Where testator "directs" the residue "to be divided for" certain charitable purposes named, "and other charitable purposes to be named hereafter," which he omits.
7. Where the trustee died in testator's lifetime, and the bequest was to such charitable purposes as he should appoint.
8. Where a charity is so given that there can be no objects.
9. Where the objects of a charity may, though they do not at present, exist.
10. Where a gift to a charity was not void, but such as the court could not tolerate.
11. Where a charity cannot be executed as directed, but may substantially in another mode, it shall be executed *cy pres*.
12. In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres*.
13. On failure of the particular mode prescribed.
14. The court will not execute a trust differently from that intended, unless it cannot be executed literally.
15. Authority of the great seal, having summary powers to regulate a charity, to vary the foundation of the trust.
16. A case in which the direction of the founder was varied.
17. The doctrine of *cy pres* is now much narrower than formerly.
18. Where two parties differ as to the mode of execution, the leaning is in favor of the original system.
19. Administrators of charities becoming subject to a foreign power, a new scheme must be laid before the court.
20. A trust for the advancement of christianity, wanting objects, must be appointed *de novo*.
21. In the case of an increase of revenue.
22. In the case of a surplus.
23. Where the beneficiary refuses to accept.
24. A devise of lands to build and endow a college, may be executed on a grant of a charter from the crown.
25. In the case of a bequest for the increase and improvement of christian knowledge.
26. Legacy to repair parsonage houses; the election of the objects is in the court.
27. Where adyowsons are devised to a college already having its number.
28. In the case of a bequest of residue "to the widows and children of seamen belonging to the town of Liverpool."
29. By building a new chapel where the trust was for repairs.
30. Where a devise to a corporation was in trust "from time to time" to expend upon a road "at their discretion."
31. The case of Harrow school.

### XIII. In the relation to leases of charity lands.

1. The power of trustees to lease, will be controlled for the benefit of the charity.
2. A charity lease will be set aside for undervalue.

3. Cases in which leases have been set aside for undervalue.
4. Cases in which long leases have been set aside.
5. Cases in which leases with covenant for perpetual renewal have been set aside.
6. Cases in which leases impeached for inadequacy of value, have been upheld.
7. Cases in which long leases have been upheld.

**XIV. In relation to the funds of eleemosynary corporations.**

Stock cannot be appropriated to support a permanent charity ; but must be sold.

**XV. In relation to offices in eleemosynary corporations.**

1. Of elections.
2. Course of proceedings to remove an officer.
3. Course of proceeding to remove an officer *de facto*, where, from failure of heirs, the crown becomes visitor.

**XVI. In relation to judicial proceedings.**

1. What institutions are the subjects of a bill, what of an information.
2. The prayer of relief in a charity suit, how far important or conclusive.
3. In relation to the statute 52 Geo. 3. c. 101. giving the relief by petition — general rules as to the cases to which the act applies.
4. In relation to the statute 52 Geo. 3. c. 101. giving the relief by petition — cases not within the act.
5. Of referring a charity cause — to a particular person by name, not as arbitrator.
6. Proceedings under an award in a charity cause — consent of the attorney-general, or inquiry as to its beneficial tendency, requisite.
7. The only decree, where relator in a charity cause appears to have no title, can be to dismiss.
8. The course of correcting the omission, in a decree in a charity case, to declare the nature of the charity, may be upon farther directions, without a re-hearing.
9. Of perpetuating an information, by executing under it from time to time.
10. The strict rules of practice, whether applicable to injunctions in charity causes.
11. Mode of proceeding to remove a governor fraudulently elected.
12. Course of proceeding to remove an officer *de facto*, where, from failure of heirs, the crown becomes visitor.

**XVII. In relation to the rights of third persons.**

1. A void bequest to a charity is as none, under a settlement with limitations over on default of appointment.
2. A void charge in favour of a charity, sinks for the devisee.
3. Right of the devisee, subject to a charitable charge, to accumulations previous to the charity taking effect.

4. Right

4. Right of the next of kin to the surplus of a bequest to a charity.
5. Right of the next of kin to the surplus of a residue left to a charity.
6. Right of the next of kin on a void bequest, to promote popery.
7. Right of the heir to accumulations, previous to devise executed.
8. Right of the heir to the surplus of rents bequeathed to a charity.
9. Right of the heir to the surplus, where the rents of an estate bequeathed to a charity, are increased.
10. Bequest of a doubtful class — legacy for clothing such poor children as should be educated in the school of the nunnery of Waterford.

### I. *In relation to the stat. 1 Edw. 4. c. 14.*

What uses are within the statute.

1. Legacy to such purposes as the superior of a convent or her successor may judge most expedient, void as a superstitious use. 6 Ves. 567.
2. The statute 1 Edw. 6. c. 14. relates only to superstitious uses of a particular description then existing. 7 Ves. 495.

### II. *In relation to the stat. 43 Eliz. c. 4.*

Charitable uses within the statute — a bequest for preaching a sermon, keeping chimes in repair, and paying singers.

A bequest for preaching a sermon on ascension-day, for keeping the chimes of the church in repair, and for a payment to be made to the singers in the gallery of the church, are all bequests to charitable uses, within 43 Eliz. *Turner v. Ogden, Cox*, 316.

### III. *In relation to the stat. 9 Geo. 2. c. 36.*

1. It was intended to have a local operation only.

The statute of mortmain does not extend to the island of Grenada, in the West Indies; the object of the statute being wholly political, it having grown out of local circumstances, and being intended to have only a local operation. *Attorney-general v. Stewart*, 2 Mer. 143.

2. It meant to prevent an addition, by will, to land already in mortmain.

The statute of mortmain meant to prevent a person from adding to land already in mortmain by will. 2 Ves. 241.

3. Inrolment in the court of chancery, means the court of chancery in England.

Donations *inter vivos* in mortmain, are not prohibited by the statute, but regulated; the statute requiring enrolment in the court of chancery; by which is meant the court of chancery in England, where there is an ancient office for the enrolment of deeds; and there being no enrolment offices annexed to the courts of chancery in the colonies. *Attorney-general v. Stewart*, 2 Mer. 143.

4. Bequests within the statute — devise upon a secret trust for a charity.

1. Devise held to be void, being proved to be upon a secret trust for a charity:



charity: conveyances having been made by the devisees, and the trust declared, though they denied, by their answer, having made any promise. *Edwards v. Pike*, 1 Eden, 267.

2. Devise by will, attested by three witnesses, to A., B., and C., and the heirs of the survivor. The bill stated that it was upon a secret trust for a charity declared by an instrument executed at the same time as the will, and attested by two witnesses only, which was admitted by the answer. Held, that the devise was void under the statute of mortmain. *Boson v. Statham*, 1 Eden, 508.; 1 Cox, 17.

5. Bequests within the statute — devise declared to be in trust for a charity, though no declaration of trust executed pursuant to the statute of frauds.

Devise to A., B., and C., and the heirs of the survivor, declared to be in trust for a charity, and therefore void, although no declaration of trust executed according to the statute of frauds. *Boson v. Statham*, 1 Cox, 16.

6. Bequests within the statute — a charity for general purposes.

1. A general charity is void under the statute of mortmain. *Blandford v. Fackerell*, 4 B. C. C. 394.

2. Testator gave real and personal in trust, that a commodious and proper house should be taken on lease, at such yearly rent as should be agreed on, or otherwise as the trustees should think fit, as a school, and that the children and grandchildren of some relations should be placed there from the age of seven to fourteen, then to be put out apprentices; also, that such other children, as the trustees should think fit, should be placed at the same school; and he gave directions as to an inscription, visitation, &c.: this trust is void under the mortmain act, as to the general purpose of a permanent charity, but good as to the dispositions for the relations, to the extent of children and grandchildren of such of the stocks specified as were in being at the testator's death; and while the school is kept open for them, other children may be educated there. *Blandford v. Thackerell*, 1 Ves. 238.

7. Bequests within the statute — where the principal part of a charity fails, the whole fails.

Where the principal part of a charity fails, the whole fails; though part would have been good if unconnected; as a bequest to an infirmary, or a school, connected with a purpose of building it. 10 Ves. 538.

8. Bequests within the statute — bequest in favour of two persons by name, for officiating in a charity, void by the statute.

A conveyance of land to a charitable use, enrolled within the time limited by the stat. of 9 Geo. 2. c. 36. is not void by reason of any reservation to the grantor of a power of regulating the charity. It is sufficient that the deed is executed by the grantor at the time of the enrolment, and it need not be executed by the grantees. A bequest of money to be laid out in land, and applied to a charitable use, but until an eligible purchase can be made, to be laid out at interest, and the interest applied in the same manner, does not give any alternative to the trustees, but is void by the statute. And so is a bequest made in favour of two persons by name, if given to them for officiating in a charity, void by the statute. *Greives v. Case*, Cox, 301.

9. Bequests within the statute — a charity bad in part, fails in all, if every part is connected.

A charity, bad in part, must fail as to the whole, if every part is connected: as a bequest to educate children, the first part of the plan being to build a school. 10 Ves. 534.

10. Bequests

## 10. Bequests within the statute — legacy secured by mortgage.

Charitable legacy secured by mortgage, is void by the statute 9 Geo. 2. c. 36. *White v. Evans*, 4 Ves. 21.

## 11. Bequests within the statute — bequest of a mortgage, though included in a residue.

Mortgages cannot pass to a charity, though included in a residue. *Attorney-general v. Earl of Winchelsea*, 3 B. C. C. 373.

## 12. Bequests within the statute — devise of real and personal estate in trust for debts and legacies, void as a charge of charity legacies upon the real and leasehold estates, and money on mortgage.

Devise of real and personal estate in trust for debts and legacies, void under the statute 9 Geo. 2. c. 36., as a charge of charity legacies upon the real and leasehold estates, and money on mortgage; but on a deficiency of assets, the other legatees preferred to the heir. *Currie v. Pye*, 17 Ves. jun. 462.

## 13. Bequests within the statute — legacy to be laid out in land, until which, at interest.

Vide 1 Cox, 301.

## 14. Bequests within the statute — devise of real estates to be sold, and the produce, with the personal estate, upon trust, to be laid out in lands or the funds, subject to the debts and legacies, for the maintenance of a charity in Scotland; void as to the produce of the real estate, valid as to the personal property, by the effect of the option.

Devise of real estate to be sold; and the produce with the personal estate upon trust to be laid out in lands, or the funds, subject to the debts and legacies, for the maintenance of a charity in Scotland: void as to the produce of the real estate; valid as to the personal property by the effect of the option. The debts and other charges upon the fund apportioned according to the *Attorney-general v. the Earl of Winchelsea*, (3 Bro. C. C. 373.) *Curtis v. Hutton*, 14 Ves. 537.

## 15. Bequests within the statute — bequest of money secured by assignment of the poor and county rates.

Money secured by assignment of the poor rates and county rates, is within the stat. 9 Geo. 2. c. 36.; and therefore cannot pass under a bequest to a charity. *Finch v. Squire*, 10 Ves. 41.

## 16. Bequests within the statute — legacy to the trustees of a chapel for protestant dissenters, to be applied in discharge of the mortgage on the chapel.

Legacy to the trustees of a chapel for protestant dissenters, to be applied by them towards the discharge of the mortgage on the said chapel, is void under the statute 9 Geo. 2. c. 36. The mortgage having been paid off by other funds in the testator's life, the court would not say the legacy might not have been applied in repairing or sustaining the chapel; but was of opinion it could not be applied to any other charitable purpose. *Corbyn v. French*, 4 Ves. 418.

## 17. Bequests within the statute — legacy to be laid out in land for the benefit of two preachers at a chapel.

A bequest of money to be laid out in land for the benefit of two preachers at a chapel, is void by the statute. *Grievs v. Case*, 4 B. C. C. 67. So, though

though to be invested till an eligible purchase can be had. *Ibid.* And gift of part of the fund to A. and B., the then preachers, void. *Ibid.*

18. Bequests within the statute — legacy to be laid out in land for the establishment of minister of a chapel.

Bequest of money to be laid out in land for establishment of minister of a chapel, void under the 9 Geo. 2. c. 36.; and not supported by supposing a discretion in the trustees not to lay it out in land, the directions being imperative. *Grieves v. Case*, 1 Ves. 548.

19. Bequests within the statute — trust to build or purchase a chapel, support a gospel minister, and for such charitable uses as executors should think proper.

Trust by will, for building or purchasing a chapel, where it may appear to the executors to be most wanted: if any overplus, to go towards the support of a faithful gospel minister, not exceeding 20*l.* a year; and if any further surplus, for such charitable uses as the executors should think proper. The whole trust void, not only as to the real estate and a mortgage, but also as to the personal estate; and the real estate went to the heir at law; and the personal to the next of kin. *Chapman v. Brown*, 6 Ves. 404.

20. Bequests within the statute — devise of a house to keep books in, for the increase and improvement of christian knowledge.

Bequest of the residue of personal estate for the use of the Welch circulating charity schools, as long as they should continue, and the increase and improvement of christian knowledge, and promoting religion, and to purchase bibles and other religious books, pamphlets, and tracts, as the trustees should think fit, to go to the same uses with those already bought, and to be kept in a house, devised for that purpose. The devise of the house void: the personal bequest sustained, as a general charitable purpose for promoting christian knowledge; to be executed, regard being had, as far as reasonably may be, to the particular charity pointed out; viz. as to unlicensed schools, itinerant preachers, &c. *Attorney-general v. Stepney*, 10 Ves. 22.

21. Bequests within the statute — legacy to build and endow a hospital upon land, not already in mortmain.

Bequest of money to build and endow an hospital upon land, not already in mortmain, held to be void under st. 9 Geo. 2. *Pelham v. Anderson*, 2 Eden, 296.

22. Bequests within the statute — legacy towards “erecting an endowment of a hospital in the county of D.,” it being necessary to purchase land for that purpose.

A legacy towards “the erecting an endowment of a hospital for the county of D.” is void, if it be necessary to purchase land for the purpose; but it may go in aid of an endowment of any hospital already existing. *Ex parte Foy, Cox*, 163.

23. Bequests within the statute — bequest to sell and buy land to erect an alms-house.

Where testatrix devised her freehold and leasehold estates to trustees, which she directed them to sell, and buy ground and erect an alms-house, and lay out the residue in land, and also gave the residue of her personal estate to the like uses; the devise of the freehold and leasehold being void under the statute of mortmain, part of a decree at the rolls, which declared that if the trustees could obtain the gift of a piece of ground, they might erect

erect an alms-house, (giving them two years to procure such gift,) and also that they were entitled to have the assets marshalled so as to throw the debts, &c. on the leasehold, reversed, on appeal, by the lord chancellor. *Attorney-general v. Tyndall*, 2 Eden, 207.; *Amb.* 614.

24. Bequests within the statute — devise of real and personal estate to be sold, and part of the money to be laid out in the purchase of land to erect and endow an alms-house.

Devise of real and personal estate to be sold, and part of the money to be laid out in the purchase of land to erect and endow an alms-house, is void. *Attorney-general v. Tyndall*, 1 B. C. C. 444. n.

25. Bequests within the statute — legacy to build alms-houses and purchase the ground with secondary objects.

Legacy to build alms-houses and purchase the ground; with a residuary bequest to a charitable society, provided they will furnish a piece of ground to build the houses; taking the management; and, if not, substituting trustees, with a direction to procure a piece of ground, &c. The whole void as to the primary object under the statute 9 Geo. 2. c. 36.; being to purchase land to build the alms-houses; or at least, land already in mortmain not being distinctly pointed out; and the secondary object, though alone it might have been good, failing with the principal, with which it was connected. *Attorney-general v. Davies*, 9 Ves. 535.

26. Bequests within the statute — legacy to build a school-house and to endow it, the parish having land on which a school-house formerly stood.

A legacy to build a school-house, and to endow it, the parish having land on which a school-house formerly stood, held to come within the statute of mortmain. *Attorney-general v. Hutchinson*, Dick. 518.

27. Bequests within the statute — a legacy to erect a new school-house, there being no land upon which to erect.

Money given to erect a new school-house, there being no land upon which to erect, is within the statute of mortmain. *Attorney-general v. Hutchinson*, 1 B. C. C. 144. n.; *Felham v. Anderson*, *Ibid.*

28. Bequests within the statute — bequest to erect a school-house and purchase land for that purpose.

Testatrix gave the residue of her personal estate to trustees "to cause to be erected and built a dwelling-house to be appropriated to the use of a school-house, and directed her trustees to purchase land for that purpose." The trustees purchased land with their own money, which they were ready to give to the charity. To a bill praying that the charity might be carried into effect; demurrer for that the charitable legacies were void, allowed. *Attorney-general v. Nash*, 3 B. C. C. 588.

29. Bequests within the statute — devise of freehold houses to eight poor persons of a parish.

Devise of freehold houses to eight poor persons of a parish; the gift being void by the statute of mortmain, a personal fund attached to the real is also void, and the court will not apply the gift to any other purpose. *Attorney-general v. Goulding*, 2 B. C. C. 428.

30. Bequests within the statute — legacy to the governors of queen Anne's bounty.

A legacy to the corporation of queen Anne's bounty is void, as by the rules of the corporation it must be laid out in land. *Widmore v. Corporation of queen Anne's bounty*, 1 B. C. C. 13. n.

31. Bequests

31. Bequests within the statute — legacy “to the society for increasing clergymen’s livings in England and Wales,” (which means the trustees of Queen Anne’s bounty,) for the perpetual purpose of increasing their livings.

Bequest to the society for increasing clergymen’s livings in England and Wales for the perpetual purpose of increasing their livings: the governors of Queen Anne’s bounty alone answer the description; and as all their funds are not in land, the bequest is void by the statute of mortmain. *Middleton v. Crofton*, 3 Ves. 734.

32. Bequests within the statute — trusts for establishing a perpetual botanical garden, the testator adding, that he trusted it would be a public benefit.

Trust of real and personal estate by will, for the purpose of establishing a perpetual botanical garden, declared void, upon the expression of the testator, that he trusted it would be a public benefit. *Townley v. Bedwell*, 5 Ves. 194.

33. Bequests within the statute — bequest of a navigation share for the improvement of the city of Bath.

Specific disposition by will, in trust to sell, and, in the first place, pay debts, legacies, and charges of probate and execution of the trust; and in the next place, that the residue of the money be appropriated to the improvement of the city of Bath, is void by statute 9 Geo. 2. c. 36. as to a navigation share, which being real estate goes to the heir, and as to money on real securities, as mortgages, turnpike bonds, and commissioners’ bonds for the improvement of the city of Bath; which go to the next of kin: the general residue undisposed of, was first applied to the debts and other charges; and the deficiency was borne by the trust property, that passed to the city of Bath, and that, of which the disposition failed by the statute, *pro rata*. *Howse v. Chapman*, 4 Ves. 542.

34. Bequests within the statute — a citizen of London cannot, under the custom, give land out of London in mortmain.

Vide 4 B. C. C. 409.

35. Bequests within the exception in the statute — general rules.

1. The legislature intended to except such devises as were really and bona fide for the benefit of colleges, not those where the legal interest only passes to the college in trust for other charitable uses. *Attorney-general v. Tancred*, 1 Eden, 15.; 1 Blk. 90.; Amb. 354.

2. The legislature intended by the exception in the statute of mortmain, to save devises for the benefit of particular members as well as of the whole body. *Attorney-general v. Tancred*. Ibid.

36. Bequests within the exception in the statute — the exception only extends to colleges established at the time when the statute was enacted.

The exception in the statute of mortmain only extends to colleges established at the time when the statute was enacted. *Attorney-general v. Tancred*. Ibid.

37. Bequests within the exception in the statute — devise to the “thirteen fellows of A. living at testator’s death.”

Devise of lands to “the thirteen fellows of Christ’s, and the fellows of Gonville and Caius living at the testator’s death,” is a devise for the benefit of the whole body-corporate, not of the particular fellows in their natural capacities,

capacities, and valid under the exception in the statute of mortmain. *Attorney-general v. Tancred*, 1 Eden, 10.; 1 Blk. 90.; Amb. 354.

38. Bequests not within the statute — devise in mortmain by a will before the statute.

Vide *Dick*. 414.

39. Bequests not within the statute — appointment in mortmain after the statute, under a power in a will executed before.

Vide 1 Eden, 482.

40. Bequests not within the statute — gift of personalty to establish a school.

The gift of personalty to establish a school not within the statute of mortmain. *Attorney-general v. Williams*, 4 B. C. C. 526.; *Cox*, 387.

41. Bequests not within the statute — devise of real and personal estate to trustees to take a house for a school, to educate children and grandchildren of particular persons.

Devise of real and personal estate to trustees to take a house for a school, to educate children and grandchildren of particular persons, and other children; good as to the particular objects, but bad as a general charity. *Blandford v. Fackerell*, 4 B. C. C. 394.

42. Bequests not within the statute — legacy to erect a school and blind asylum, with a direction that lands should not be purchased, and the expression of an expectation that lands would be given for the charities.

A sum of money was bequeathed to erect a blue-coat school and establish a blind asylum, with a direction that lands should not be purchased, and the expression of an expectation that lands would be given for the charities. The bequest held not to be void under the mortmain act. *Henshaw v. Atkinson*, 3 Mad. 306.

43. Bequests not within the statute — bequest for building a house for reduced gentlewomen.

A bequest of a sum of money for building a house for reduced gentlewomen, is valid, and not against the mortmain acts. *Attorney-general v. Power*, 1 Ball & Beatty, 145.

44. Bequests not within the statute — money to build a parsonage-house, where no land is to be purchased.

Money left to build a parsonage house, where no land is to be purchased, is not within the statute of mortmain. *Brodie v. Duke of Chandos*, 1 B. C. C. 444. n.; *Attorney-general v. Bishop of Oxford*, *Ibid*.

45. Bequests not within the statute — money to repair parsonage houses.

Money left to repair parsonage houses is not within the statute of mortmain. *Attorney-general v. Bishop of Chester*, 1 B. C. C. 444.

46. Bequests not within the statute — legacy to be laid out in building upon land already in mortmain.

Bequest of money to be laid out in building upon land already in mortmain good. *Attorney-general v. Munby*, 1 Mer. 327.

47. Bequests not within the statute — bequest for rebuilding, repairing, &c. alms-houses, is valid to the extent of any application upon the land already in mortmain.

Vide 8 Ves. 186.

48. Bequests

48. Bequests not within the statute — legacy towards “erecting an endowment of a hospital for the county of D.” may go in aid of an endowment of any hospital already existing.

Vide Cox, 163.

49. Bequests not within the statute — legacy for the increase and improvement of christian knowledge.

Vide 10 Ves. 22.

50. Bequests not within the statute — bequest of money to be invested in the funds, until it could be laid out in land “to the satisfaction” of the trustees.

Five twenty-fourth parts of the residue of the testator's personal estate, after the death of his widow, and 20*l.* a year after the death of his brother, or which shall be deemed equivalent, 750*l.* in some of the public funds, to stand in the names of trustees, until the whole could be laid out in lands to the satisfaction of the governors of the charity; and his executors, who were always to be considered as trustees of the charity to which it was given, held not to come within the statute of mortmain. *Grimmet v. Grimmet*, Dick. 251.

51. Bequests not within the statute — money to be laid out in the purchase of heritable securities in Scotland.

Money given by will, to be laid out in the purchase of heritable securities in Scotland, for the use of a charity, is not within the statute. *Oliphant v. Hendrie*, 1 B. C. C. 571.

52. Bequests not within the statute — legacy to be laid out in land in Scotland.

Legacy to be laid out in land in Scotland, for a charity, established; not being within the statute 9 Geo. 2. c. 36. *Mackintosh v. Townsend*, 16 Ves. 330.

53. Bequests not within the statute — devise of real estates to be sold, and the produce, with the personal estate, upon trust, to be laid out in lands or the funds, subject to debts and legacies, for the maintenance of a charity in Scotland; void as to the produce of the real estate; valid as to the personal property, by the effect of the option.

Vide 14 Ves. 537.

54. Bequests not within the statute — legacy to be laid out in land in Ireland.

Money upon mortgage in England, given to a charity in Ireland; the executrix by her will affirmed the legacy: this was held to be an admission of assets of the testator, and not within the statute of mortmain. *Campbell v. Radnor*, 1 B. C. C. 271.

55. Bequests not within the statute — *quære*, whether a bequest of money upon mortgage is.

Vide 1 B. C. C. 271.

56. Bequests of doubtful class — devise upon a secret trust for a charity, not declared pursuant to the statute of frauds.

To a bill by the heir against a devisee, alleging, that the devise was upon a secret trust or undertaking for charitable purposes, against the statute 9 Geo. 2. c. 36., a plea of the statute of frauds was ordered to stand for an answer, with liberty to except. *Stickland v. Aldridge*, 9 Ves. 516.

57. Bequests

## 57. Bequests of a doubtful class — bequest of money upon mortgage.

Vide 1 B. C. C. 271.

## 58. Conveyances within the statute — mortgage of turnpike tolls.

Mortgage of turnpike tolls is within the statute 9 Geo. 2. c. 36. Knapp v. Williams, 4 Ves. 430. n.

## 59. Conveyances within the statute — influence of a will upon a deed executed within the year.

1. Assignment of mortgaged premises, and of the principal sum due thereon to the same college, upon the like trust, void, as being executed within a twelvemonth before the death of the donor, not to be set up by reference to a will made afterwards, giving the advowson of the living beneficially to the college. Attorney-general v. Munby, 1 Mer. 327.

2. Recital in a will, of property given by deed to charitable uses, which fails not by any defect in the instrument itself but by the grantor not having lived to the period prescribed by the statute for rendering the deed effectual, does not operate as a confirmation or by way of relation so as to pass the property thereby assigned. Attorney-general v. Munby, Ibid.

## 60. Conveyances not within the statute — reservation to the grantor of a power of regulating the charity.

Vide 2 Cox, 301.

## 61. Conveyances not within the statute — deed, when enrolled, need not be executed by grantees; sufficient, if by grantor.

Ibid.

## 62. Conveyances not within the statute — a case in which the grantor retained the deed, after enrolment, in his possession, and was himself rector of the benefice endowed.

Grant by indenture executed more than twelve months before the grantor's death, and duly enrolled, of a house and premises held under a church lease to Trinity college, Cambridge, in trust for the rector of G.: valid under the statute of mortmain, and not affected by the circumstance of the grantor being himself rector of G. at the time of the grant, and retaining the deed in his own possession. Attorney-general v. Munby, 1 Mer. 327.

## 63. Conveyances not within the exception in the statute — grant to a college, not beneficially, but in trust for other objects.

Grant of land to a college, not beneficially, but in trust for other objects, not within the exception of the statute in favor of the universities, &c. Attorney-general v. Munby, 1 Mer. 327.

IV. *In relation to the question, what bequests are to charitable uses; what not.*

## 1. What are — bequest to poor relations.

Bequest to poor relations sustained as a charity. White v. White, 7 Ves. 423.

## 2. What are — devise, with a discretion yearly to distribute so much amongst testator's poor kinsfolk, and their issue, dwelling in B.

Devise to A. and his heirs, with a direction, that yearly he and his heirs shall for ever divide and distribute, according to his and their discretion, amongst the testator's poor kinsmen and kinswomen, and amongst their offspring and issue dwelling within the county of B., 20*l.* by the year. This is in the nature of a charitable bequest; and the will being made in 1581,

was



was sustained; and inquiries directed as to the poor relations dwelling within the county of B. *Attorney-general v. Price*, 17 Ves. jun. 371.

3. What are — bequest of residue “to the widows and children of seamen belonging to the town of Liverpool.”

Bequest of residue “to the widows and children of seamen belonging to the town of Liverpool;” held a valid charitable bequest, to be applied in aid of a subsisting charity for such poor sailors’ widows and children as should, in the judgment of the persons appointed to administer, be deserving objects of it. *Powell v. Attorney-general*, 3 Mer. 48.

4. What are not — bequest for such “benevolent” purposes as the trustees in their discretion may agree on.

Bequest in trust for such “benevolent” purposes as the trustees in their integrity and discretion may unanimously agree on; not to be supported as a charitable legacy; the word “benevolent” not being to be restricted to the sense of “charitable,” so as to authorize the court to say, that the application of the property must be confined to such objects as are, strictly speaking, objects of charity. Therefore void for uncertainty, and distributable among the next of kin. *James v. Allen*, 3 Mer. 17.

5. What are not — bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve.

Bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, cannot be supported as a charitable legacy; and is therefore a trust for the next of kin. *Morice v. the Bishop of Durham*, 9 Ves. 300. 10 Ves. 522.

#### V. In relation to the construction of devises to charitable uses.

1. Rule of construing wills in charity cases, different from the cases of individuals.

Rule of construction as to wills in case of a charity, different from that which applies to the case of individuals. *Mills v. Farmer*, 1 Mer. 94. 101.

2. Rule of construction, where the intention is obscure.

Where a trust is created for religious worship, and it cannot be discovered from the deed creating the trust, what was the nature of the religious worship intended by it, it must be implied from the usage of the congregation. But if it appears to have been the founder’s intention, although not expressed, that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution. *Attorney-general v. Pearson*, 3 Mer. 400.

3. Bequest to “erect,” imports that land is to be bought, unless a contrary intent is manifested.

Bequest to “erect” a charitable foundation, imports that land is to be bought, unless the will manifests a purpose that it is to be otherwise procured. 8 Ves. 191.

4. Whether a bequest for repairing a chapel, authorizes the building a new one.

Trustees of copyholds in trust for repairing the church of A. and chapel of B. in that parish, by desire of the parishioners, bought new ground and built a new chapel, the old one being too small and in ruins. This was held not

not a deviation from the trust, and they were allowed to apply the rents and savings, but not to mortgage the estate. *Attorney-general v. Foyster*, 1 Anst. 116.

5. A legacy substituted for one void by the statute, without naming the fund, was held to be out of the same fund as the other.

Testator gives a legacy to a charity, void by statute of mortmain; by codicil he gives a less legacy "instead thereof," to a different charity: this shall be held to be out of the same fund, and void. *Leacroft v. Maynard*, 3 B. C. C. 233.

6. Where testator "directs" the residue "to be divided for" certain charitable purposes named, "and other charitable purposes to be named hereafter," which he omits.

Vide 1 Mer. 55. 722.

7. A surplus, with its increase, was held to result, after a term, to the charity, under the general trust; not to the heir.

Land settled in trust for maintenance of a charity, with special directions as to part of the rents, the land to be let for a certain term, subject to a rent to that extent; at the expiration of the lease, the surplus with its increase results to the charity under the general trust; not to the heir. *Attorney-general v. Tonner*, 2 Ves. 1.

8. A case in which the question was, whether the amount of the sum to be appointed was discretionary in the appointor.

Information and bill to quiet the possession of the relators and plaintiffs (one claiming as the surviving trustee, the other as minister of a protestant dissenting meeting-house,) for an appointment of new trustees; and an injunction to stay proceedings in ejectment by the defendants, claiming also to be trustees of the meeting-house. Upon motion for an injunction, it appearing that the meeting-house was erected in the year 1701, under a trust deed, whereby the purpose was declared to be "for the worship and service of God;" the plaintiffs and relators contending, from the purpose so expressed, that the intention was for promoting the doctrine of the holy trinity, and that the trust could not be diverted from the purpose for which it was intended, the defendants insisting that the intention was as general as the purpose expressed, had no regard to any particular tenets, it being also made a question, whether a trust for supporting unitarian worship is legal, and can be supported; and it being further disputed, who, according to the true construction of the deed, were entitled as trustees to the possession; and whether the minister of a dissenting congregation, elected for a limited period, is afterwards removable at pleasure; and also as to the construction of the deed, and as to an alleged agreement or understanding between the parties, with regard to such removal. The injunction was granted (upon the parties undertaking to abide by such order as the court should thereafter make,) and it was referred to the master to inquire in whom the legal estate was vested, the particular object, with reference to worship and doctrine, for which the trust was created, the usage of protestant dissenters as to the election of ministers, and the duration of their office, and whether any agreement or understanding relative thereto subsisted between the parties. *Attorney-general v. Pearson*, 3 Mer. 353.

9. A bequest in trust "for the worship and service of God."

Vide 3 Mer. 353.

**VI. In relation to the construction of deeds to charitable uses.**

In relation to religious worship.

1. If land or money be purposely given for "maintaining the worship of God" *without more*, the court will execute the trust in favor of the established religion. But if it be *clearly expressed*, that the purpose is that of maintaining dissenting doctrines, so long as they are not contrary to law, the court will execute the trust according to the express intention. And where, as in this case, the intention *clearly appears aliunde*, though not *expressed* in the instrument creating the trust, the court will also carry the manifest design of the founder into execution, so far as it is consistent with law. *Attorney-general v. Pearson*, 3 Mer. 409.

2. A clause, in a deed for establishing a place of religious worship, enabling the trustees to make orders, &c. upon matters relating to the meeting-house, not to be construed as enabling them to convert the objects of the charity, as by introducing a new form of worship, and new doctrines, &c. *Attorney-general v. Pearson*, 3 Mer. 411.

3. Inference from a clause in a trust deed for establishing a place of religious worship, relating to the possible future prohibition of the worship thereby intended to be established, that the worship was such as, at the time of the execution of the deed, was not excepted out of the benefits of the toleration act. *Attorney-general v. Pearson*. *Ibid*.

**VII. Of the era of the jurisdiction of the court of chancery upon informations for establishing charities.**

It arose since the reign of Elizabeth.

The jurisdiction of the court of chancery upon informations for establishing charities, arose since the reign of Elizabeth. 3 Ves. 726.

**VIII. Of the general jurisdiction exercised by the court of chancery over charities.**

1. Distinction between the internal management of a charity, and management of the revenue.

1. The internal management of a charity the exclusive subject of visitatorial jurisdiction: but under a trust as to the revenue abuse by misapplication controled in this court. *Ex parte Berkhamstead Free School*, 2 Ves. & Beam. 134.

2. Jurisdiction of the court of chancery in the case of abuse of a charity upon the receipt and management of the revenue by the governors, the visitor, as heir of the founder, being generally one, and for a considerable time, while there were no governors, without authority. The heir being a lunatic, the order vacating regular appointments of governors and a school-master, and for filling up those offices, was made upon petition to the lord chancellor, as visitor. Under the information an inquiry and account were directed as to leases of the charity estate, without involving the charity in a general account to a remote period; and a general account of the more recent period, limited to the time, when the information was filed; with costs. *Attorney-general v. Dixie*, 13 Ves. 519.

3. Information for the regulation of Harrow school, dismissed as to the removal of governors, unduly elected according to the founder's statutes, not being inhabitants; the court of chancery having no jurisdiction with regard to either the election, or a motion of corporators of any description; eleemosynary corporations being the subject of visitatorial jurisdiction; therefore, in the case of the crown becoming visitor for want of an heir of the founder, the removal of a corporator *de facto* to be sought by petition to the great seal; not by bill or information. *The Attorney-general v. Earl of Clarendon*, 17 Ves. 491.

4. As

4. As to the effect of the time during which the defendants had held their offices against an inquiry into their original eligibility, *quære*. Attorney-general v. Earl of Clarendon, 17 Ves. 491.

5. As to the revenues, including the management of the estates, and the application of the income, inquiries directed, to ascertain whether the estates are properly and advantageously managed; with a view to prospective regulation, and a lease to one of the governors, though without fraud; set aside upon general principles, as inconsistent with his duty, charging him with the full value, if exceeding the rent reserved. *Ibid*.

6. The application of the income to purposes partly specified by the founder's rules, partly left to discretion, not being in all respects agreeable to the founder's directions, though with no improper motives, to be ascertained by a scheme, having regard, on the one hand, to the founder's directions, on the other, to the alteration of circumstances which might render a literal adherence to them adverse to their general object and spirit. *Ibid*.

7. The expenditure not to be measured by the number of parish boys, who are to be immediately benefited by it, and if fairly referrible to the purposes of the school. A considerable allowance, therefore, to the master towards repairs, and a considerable expenditure for enlarging and improving his house for the accommodation of boarders, considered, upon the whole, not extravagant, as a benefit from the increased revenue in that shape, instead of an increased salary; nor improper with reference to the general advantage of the school. *Ibid*.

8. No objection to encourage attention to parish scholars by an allowance to the master for each. *Ibid*.

9. An alteration in the constitution of the school, with the view of reducing it to a mere parochial school, by restraining the number of foreigners, *i. e.* boys not on the foundation, refused; the admission of foreigners; without prejudice to the children of the poor inhabitants, being expressly directed, and the small resort of the latter not proved the result of abuse. *Ibid*.

2. Where the charity is regulated by governors under a charter.

The general controlling power of the court over charities, does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues, and abuse their trust; which will not be presumed, but must be apparent or made out by evidence. The foundling hospital is an institution of this kind; therefore on motion, injunction to restrain the governors from building round it, refused, breach of trust or probability of it not being made out; and held not in nature of waste to turn meadow into buildings, unless clearly injurious. Attorney-general v. the Governors of the Foundling Hospital, 2 Ves. 42.

3. To enforce trusts on laches of visitor.

Vide 2 V. & B. 134.

4. In the case of the visitor becoming lunatic.

Vide 13 Ves. 519.

5. To enforce trusts, on abuse by trustees, by decreeing an account for the time past.

1. An account decreed, and a receiver appointed upon the laches of the heirs, substituted by decree as trustees to execute a devise to a charity. Attorney-general v. Bowyer, 3 Ves. 714.

2. Under a devise for founding a new college in the university of Cambridge, to be called Downing college, the crown having at length granted the application for a charter and licence, and the university waving the account against the heir at law, who had been substituted as the trustee, farther

back than six years; the lord chancellor, doubting his authority to confine it, made the decree accordingly upon the terms of their taking an act of parliament to confirm it. A commission was directed to distinguish lands intermixed with those devised to the charity, and a receiver appointed. *The Attorney-general v. Bowyer*, 5 Ves. 300.

6. To enforce trusts, on abuse by trustees, by vacating appointments to offices.

Vide 13 Ves. 519.

7. Breach of trust, by pulling down and selling the materials of a chapel, and converting to other uses the burial-ground, relieved against.

Breach of a trust created for the benefit of a charity, by pulling down a chapel, and selling the materials and converting burial-ground to other uses, relieved against. *Ex parte Greenhouse*, 1 Mad. 92.

8. To enforce trusts on laches of trustee, by directing an application for the sign manual to erect a charity.

The king's sign manual directed to be applied for, to dispose of 500*l.* of a testator's estate, given to a trustee to dispose in charity in his discretion, which he never executed. *Attorney-general v. Berryman*, Dick. 168.

9. To enforce trusts on laches of trustees, by appointing receiver, and decreeing account.

Vide 3 Ves. 714.

10. By correcting deviations from the will of the founder.

Decree on information, correcting deviations from the will of the founder of a charity-school, by separating the school from the master's house, taking foreign pupils, so as to deprive the poor children of the master's attention, &c., and applying the surplus revenue beyond the maintenance of the existing objects arisen since the founder's death, *cy pres*, to the same uses, comprehending every object, the poor children, the master's salary, and the alms people. *Attorney-general v. the Coopers' Company*, 19 Ves. 187.

11. To administer in case of non-acceptance of bequest.

1. See the *Attorney-general v. Andrew*, 3 Ves. 633.; *Andrew v. the Merchant Taylors' Company*, 7 Ves. 223.

2. The next of kin bound by the compromise, decreed, with the consent of the attorney-general to be carried into execution; and therefore another bill, setting up a farther claim of interest upon the sums to be accounted for, by trinity hall, was dismissed. Trinity hall was held entitled to the legacies of 100*l.*, and some plate; as being distinct from the other disposition, which they refused to accept. *Andrew v. Trinity Hall*, 9 Ves. 525.

12. Obligation to administer trusts for the benefit of protestant dissenting congregations.

The court is bound to administer trusts for the benefit of protestant dissenting congregations. *Attorney-general v. Pearson*, 3 Mer. 396.

13. Of marshalling bequests by wills made before and after the mortmain act, so as to render all available.

A. (before the statute of mortmain) gave real and personal estates to a use which would be within the statute, and the residue to uses not affected by it: B. (after the statute) gave personal estates to the uses of A.'s will. A.'s estate being sufficient for the first use, the whole of the second gift shall go to the valid use. *Attorney-general v. Hartley*, 4 B. C. C. 412.

14. Of

14. Of marshalling assets in the case where realty and personalty are bequeathed, and the real bequest is void.

Leasehold estate given by will, to a charity, and the residue of the personal estate also to the charity; the bequest of the leasehold void; but the produce of the leasehold to be applied, first, in payment of debts, &c.; and if deficient, then to have recourse to the other part of the personal estate. *Negus v. Coulter*, Dick. 326.

15. In relation to injunctions.

In cases of charity the court is not bound by the strict rules of practice, as with respect to granting an injunction, whether common or special, to stay proceedings at law; but will act according to what the justice of the case seems to require, so as to save the parties unnecessary expence and delay. *Attorney-general v. Pearson*, 3 Mer. 396.

16. In the case of the foundling hospital.

Vide 2 Ves. 42.

17. Presumptions are in favor of a charity.

Presumptions are to be made in favor of a charity. 2 Ves. 584.

18. Presumption in favor of the regularity of proceeding.

1. Governors of an eleemosynary corporation, even where their election might be said to be a fraud, not removed without a petition to the lord chancellor in his visitatorial capacity; but corporations, constituted trustees, have sometimes been, by decree, divested of their trust for an abuse of it; as any other trustees. 17 Ves. jun. 499.

2. The course of education and internal discipline left to the governors and masters. The governors being expressly authorized to alter the founder's rules; alterations, long known and acquiesced in, presumed to have been by their authority, though the precise order does not appear. Any subsequent deviation from the principle and purpose of the institution, the subject of visitatorial interposition. *Ibid.*

IX. In relation to commissions and commissioners of charitable uses.

1. Commission — the mode of objecting to a commission issued in an unwarrantable case, may be by exceptions.

Objection to the decree under a commission of charitable uses, as having issued in a case not warranted by the statute 43 Eliz. c. 4., may be in the form of exceptions. *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305.

2. Commissioners — a contempt offered to them is punishable by the great seal.

Contempt towards commissioners of charitable uses, punishable by the great seal. *Commissioners of Charitable Uses v. Hicks*, 1 Dick. 61.

X. In relation to the question, whether a charitable bequest is such as a court of equity will execute.

1. Where the property is devoted to charity in general.

The court has never executed a charitable purpose, unless described by the will, or the property devoted to charity in general. In the latter case the application, either by the trustees, or the crown, must be to purposes expressed in the stat. 43 Eliz. c. 4. or analogous to those. 10 Ves. 540.

2. Where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object.

Trust, but for uncertain objects, results to those, to whom the law gives property

property in default of disposition. Exception as to charity. Where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object: but the particular mode of application will be directed by the king in some cases; in others by this court. 9 Ves. 405.

3. The most general gifts for charity will be executed.

The most general gifts for charity executed. 1 Ves. 475.

4. It has never executed a charity unless described by the will, or the property has been devoted to charity in general.

Vide 10 Ves. 540.

5. A power to trustees to continue testator's charities, or to give any others they should think fit.

The court will not execute a power given by the testator to trustees to continue his charities, or to give any others they should think fit. *Coxe v. Basset*, 3 Ves. 155.

6. Bequest of residue "to the widows and children of seamen belonging to the town of Liverpool."

Vide 3 Mer. 48.

7. Where no executor has been named to carry the purpose into effect.

So long as the intention to give to charitable uses is clearly expressed, it makes no difference as to the validity of the bequest whether the testator has or has not named an executor to carry those purposes into effect. *Mills v. Farmer*, 1 Mer. 96.

8. Where the trustee died in testator's lifetime, and the bequest was to such charitable purposes as he should appoint.

1. Gift of a residue to I. V. to such charitable purposes as he should appoint, recommending, &c. I. V. dies in testator's lifetime; the charity shall be sustained and executed by the court. *Moggridge v. Thackwell*, 3 B. C. C. 517.

2. Bequest to A., his executors, and administrators, desiring him to dispose in such charities as he thinks fit, recommending poor clergymen with large families and good characters. A. died nine years before testatrix, who had notice of that: executed by the court by reference to the master to settle a plan, having particular regard to that recommendation. *Moggridge v. Thackwell*, 1 Ves. jun. 464.; 13 Ves. 416.

9. Where the executor who was to name the hospital to which, &c. was struck out of the will.

A legacy was given to such lying-in-hospital as the executor should name; the testator afterwards struck out the name of the executor: the court will sustain the legacy, and appoint what lying-in-hospital shall take it. *White v. White*, 1 B. C. C. 12.

10. A conveyance defective from limitation to certain officers, instead of the corporate body, aided under 43 Eliz. c. 4.

Conveyance to charitable uses, defective on account of the uses being limited to certain officers of a corporation, and not to the corporate body, aided under 43 Eliz. c. 4. *Attorney-general v. Tancred*, 1 Eden, 10.; 1 Blk. 90.; *Amb. 354.*

11. Bequest to a charity in Scotland.

Decree establishing a charity in Scotland. *Attorney-general v. Lepine*, 19 Ves, 309.

**XI. In relation to preliminaries to carrying charitable uses into execution.**

**Acceptance of the bequest by the beneficiary.**

A college, devisee in remainder after estates for lives, in trust for purposes partly for their own benefit, and very specific with respect to them, held not to have accepted the devise by acts done merely to preserve the fund; and refusing to accept after the death of the tenants for life, the master was directed to receive a proposal in order to have it determined whether it could be executed *cy pres*. *Attorney-general v. Andrew*, 3 Ves. 633.

**XII. In relation to the mode in which charitable uses will be carried into execution.**

**1. Where the property is devoted to charity in general.**

Vide 10 Ves. 540.

**2. Where the purpose is indefinite, the disposition is in the sign manual; where a trustee is to be interposed, with an object defined, the court will administer.**

Upon a re-hearing of that part of the decree, which relates to the charity, the decree was affirmed: the lord chancellor collecting the result of the authorities; that, where there is a general, indefinite, purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but, where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. The costs of all parties were given out of the fund as between attorney and client. *Moggridge v. Thackwell*, 7 Ves. 36.

**3. Where the will interposes a trust, the disposition must be by a scheme before the master; where no trust, by sign manual.**

Under a trust by will for charity, the disposition must be by a scheme before the master: but if the object is charity, and no trust interposed, it is by sign manual. *Paice v. the Archbishop of Canterbury*, 14 Ves. 346.

**4. Where the intention is obscurely expressed.**

It is incumbent on persons meaning to create a trust for charitable purposes, to make their intention clear by the deed creating the trust; and if it is not so, the court has no other means of carrying it into execution, than by collecting the intention from inference and fair presumption. *Attorney-general v. Pearson*, 3 Mer. 410.

**5. Where the mode prescribed is left uncertain.**

In all cases where a testator has expressed an intention to give to charitable purposes if that intention is declared absolutely, and nothing left uncertain but the mode of effecting it, the court will supply the mode. *Mills v. Farmer*, 1 Mer. 95.

**6. Where testator "directs" the residue "to be divided for" certain charitable purposes named, "and other charitable purposes to be named hereafter," which he omits.**

Held a disposition of the residue in favour of charity, to be carried into execution by the court having regard to the objects particularly pointed out by the testator. *Mills v. Farmer*, 1 Mer. 55. 722.

**7. Where the trustee died in testator's lifetime, and the bequest was to such charitable purposes as he should appoint.**

Vide 3 B. C. C. 517.; 1 Ves. 464.; 13 Ves. 416.

**8. Where a charity is so given that there can be no objects.**

Where a charity is so given, that there can be no objects, the court will  
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order a different scheme; but not where objects may (though they do not at present) exist. *Attorney-general v. Oglander*, 3 B. C. C. 166.

9. Where the objects of a charity may, though they do not at present, exist.

*Ibid.*

10. Where a gift to a charity was not void, but such as the court could not tolerate.

Where a gift to a charity was not void, but such as the court could not tolerate, application was directed to be made to the king for his sign manual to direct to what charitable uses he would have it applied. *Da Costa v. Da Paz*, Dick. 258.

11. Where a charity cannot be executed as directed, but may substantially in another mode, it shall be executed *cy pres*.

1. Where a charity cannot be executed as directed, but the general purpose appears distinct, and may be in substance attained by another mode, it shall be executed *cy pres*: but a personal bequest attached to a void charity, as an endowment, must fall with its principal. *Attorney-general v. Whitchurch*, 3 Ves. 141.

2. In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres*: therefore, upon a trust for the vicars of P., provided they should be presented at the recommendation of the trustees, the trustees neglecting to recommend, the chancellor, the presentation being in the crown, presented: held, the vicar was entitled to the benefit of the trust. *Attorney-general v. Boulton*, 3 Ves. 220.

3. The general charitable purpose of the testator shall be executed upon the doctrine of *cy pres*; though the particular purpose fails. *Attorney-general v. Bowyer*, 3 Ves. 714.

4. Principle of *cy pres*, as applied to a charity; where the precise object cannot be attained. 11 Ves. 251.

5. The nature of a charity can be changed by an application to objects different from those intended by the founder, only, where it is clear, that by a strict adherence to the plan his general object will be destroyed: not upon the notion of advantage to the inhabitants of the place. Therefore, the foundation being a free grammar school at Leeds, for teaching grammatically the learned languages, the court refused to permit application of part of the funds to procure masters for French, German, and to other establishments with a view to commerce. *Attorney-general v. Whiteley*, 11 Ves. 241.

12. In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres*.

In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres*; therefore, upon a trust for the vicars of P., provided they should be presented at the recommendation of the trustees, the trustees neglecting to recommend, the chancellor, the presentation being in the crown, presented: held, the vicar was entitled to the benefit of the trust. *Attorney-general v. Boulton*, 2 Ves. 380.

13. On failure of the particular mode prescribed.

If the general substantial intention of a will is charity, the failure of the particular mode shall not defeat it: but the law will substitute another mode. 7 Ves. 69.

14. The court will not execute a trust differently from that intended, unless it cannot be executed literally.

The court will not execute a trust of a charity, in a manner different from that intended, unless it cannot be executed literally, but may in substance

by another mode, consistent with the general intent; thus, where the object was to build a church in the parish of A. and the parish would not permit it, it could not be executed any where else; but where it was to distribute bread to poor persons, attending divine service and chaunting the donor's version of psalms, though the chaunting could not take effect, the rest was executed. 2 Ves. 387.

15. Authority of the great seal, having summary powers to regulate a charity, to vary the foundation of the trust.

Where summary powers are given to lord chancellor by a private act of parliament, to make regulations for a charity, he cannot vary the foundation of the trust. Bolton School *ex parte*, 2 B. C. C. 662.

16. A case in which the direction of the founder was varied.

Under a commission of charitable uses, the direction of the founder varied; but persons, to whom the benefit of the charity was appointed for life, irregularly, according to the decree, were permitted to enjoy. 2 Ves. 389.

17. The doctrine of *cy pres* is now much narrower than formerly.

The doctrine of *cy pres*, formerly pushed to a most extravagant length, is now much restrained. 4 Ves. 14.

18. Where two parties differ as to the mode of execution, the leaning is in favour of the original system.

Where two parties seeking the benefit of a trust for charitable purposes, differ as to the mode of carrying it into effect, one party being in support of the original system, the other for some proposed alteration to be made in it; the leaning of the court must be to the former, however useful it may judge the proposed alteration to be. Attorney-general v. Pearson, 3 Mer. 418.

19. Administrators of charities becoming subject to a foreign power, a new scheme must be laid before the court.

The college of William and Mary, in Virginia, who were appointed administrators of certain charities, having become subject to a foreign power, a new scheme must be laid before the court for the administration of the charity. 3 B. C. C. 171.

20. A trust for the advancement of christianity, wanting objects, must be appointed *de novo*.

A trust for the advancement of christianity, wanting objects, must be appointed *de novo*. Attorney-general v. City of London, 3 B. C. C. 171.

21. In the case of an increase of revenue.

1. An increase of the revenues of a charity applied for the benefit of the charity. *Ex parte Jortin*, 7 Ves. 340.

2. Application of the increase of the revenue of a charity, by way of augmentation to the original objects. 2 Ves. & Beam. 139.

3. On demurrer, held that the increased value of certain charitable gifts belonged to charities. Attorney-general v. Bristol Corporation, 3 Mad. 319.

4. Charitable bequest before the statute 9 Geo. 2. c. 36. to the congregation of presbyterians, to which the testator belonged, for placing out apprentices two poor boys of such as were members of the said congregation, and living in the parish of St. Martin, in New Sarum. The fund, being considerably more than sufficient, the surplus was applied, upon the principle of *cy pres*, to place out sons of members of the congregation within that parish: 2dly, Such boys in other parishes: 3dly, Daughters of members of the congregation, in the same manner: 4thly, Sons of presbyterians generally; previously to building a school, or other purposes. A proposal  
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in favor of sons of persons, within the parish, of the established religion, was rejected. *Attorney-general v. Wansey*, 15 Ves. 231.

22. In the case of a surplus.

1. Where an intention appears in a testator to give the whole of a fund to a charity, the objects whereof are not sufficient to exhaust the whole, the court will apply the residue as nearly to the testator's designation as it can. But such defects will not be supplied without some such intention appearing to guide the court; which cannot go so far as to dispose of a fund merely on seeing a general intention in the testator to die testate as to the whole. *Attorney-general v. The Stationer's Company*, 2 Cox, 51.

2. Testator bequeathed the residue of his personal estate in trust, to pay 12*l.* *per annum* to the schoolmaster of R., and to apply the surplus (if any) in the clothing and putting out apprentice of two children of R., and one child of W., and he made no further disposition of it. The residue being more than sufficient for the specific purposes of the will, the surplus is not considered as increasing the number of the objects of the charity. The court will not marshal assets in favour of a charity. *Attorney-general v. Hurst*, Cox, 365.

23. Where the beneficiary refuses to accept.

Vide 3 Ves. 633.

24. A devise of lands to build and endow a college, may be executed on a grant of a charter from the crown.

Devise in mortmain by a will made before the st. 9 Geo. 2. is good; and it being of lands to build and endow a college; held it might be carried into execution on a grant of a charter from the crown. *Attorney-general v. Downing*, 1 Dick. 414.

25. In the case of a bequest for the increase and improvement of christian knowledge.

Vide 10 Ves. 22.

26. Legacy to repair parsonage houses; the election of the objects is in the court.

Legacy to repair parsonage houses, the election of the objects is in the court. *Attorney-general v. Bishop of Chester*, 1 B. C. C. 444.

27. Where advowsons are devised to a college already having its number.

Devise of estates to trustees, for the use of University college, Oxford, to levy advowsons; the college having obtained since the gift as many as are allowed by the act, the devise is to be performed by the exchange of advowsons, or otherwise *cy pres*. The heir at law being disinherited, where the gift is good at the time of making the will. *Attorney-general v. Green*, 2 B. C. C. 492.

28. In the case of a bequest of residue "to the widows and children of seamen belonging to the town of Liverpool."

Vide 3 Mer. 48.

29. By building a new chapel where the trust was for repairs.

Vide 1 Anst. 116.

30. Where a devise to a corporation was in trust "from time to time," to expend upon a road "at their discretion."

Vide 1 Mer. 495.

31. The case of Harrow school.

Vide 17 Ves. 191.

**XIII. In the relation to leases of charity lands.**

1. The power of trustees to lease, will be controlled for the benefit of the charity.

Power of leasing in trustees of a charity controlled for the benefit of the charity. 2 Ves. & Beam. 138.

2. A charity lease will be set aside for undervalue.

Lease of a charity estate set aside for undervalue, if considerable. An under-lease, at a fine, not conclusive; part being ascribed to the good-will of a trade established and repairs. Inquiry directed, whether the rent was fair and adequate; distinguishing how much of the premium on the under-lease resulted from the good-will and repairs, and how much from the value of the lease above the rent reserved to the charity. *Attorney-general v. Magwood*, 18 Ves. jun. 315.

3. Cases in which leases will be set aside for undervalue.

Leases of charity estates for 21 years, the lessors being not mere trustees, but having also a beneficial interest, set aside as breaches of trust by undervalue. *Attorney-general v. Wilson*, 18 Ves. jun. 518.

4. Cases in which long leases have been set aside.

1. A long lease of a charity estate, in 1715, at a great undervalue, decreed to be delivered up; and an account directed, with just allowances. *Attorney-general v. Green*, 6 Ves. 452.

2. A lease for 99 years of a charity estate, a farm, as a husbandry lease, cannot stand, without proof of a consideration, shewing, that it is fair and reasonable, and for the benefit of the charity. Under the circumstances, long possession permitted, and the defendant being the personal representative, such a lease was set aside, without costs, and without imposing an additional rent, previous to the bill; but future cases will not be so treated. *Attorney-general v. Owen*. 10 Ves. 555.

3. A long lease of a charity estate, in 1760, set aside, the trustees joining in the application, as a breach of trust; not only as against the express directions of the founder, but also generally, as an improper administration of a charity estate: the relators not desiring to disturb under-leases. The account was confined to the filing of the information or previous demand. Such cases to be marked with costs. *Attorney-general v. Griffith*, 13 Ves. 565.

4. A lease of charity lands for 99 years, as a mere husbandry lease upon terms, and at a rent, adapted to a lease for 21 years not allowed: nor a building lease for 999 years upon an expenditure, commensurate to a term of 99 years. 17 Ves. 291.

5. Trustee for a charity cannot without an adequate consideration let for 99 years, not being the ordinary course of provident management; much less with covenant for perpetual renewal without an equivalent for the inheritance. 18 Ves. jun. 326.

5. Cases in which leases with covenant for perpetual renewal, have been set aside.

Bill will not lie to compel a hospital to renew a lease upon payment of a fine of one year's rent. *Somerville v. Chapman*, 1 B.C.C. 61.

6. Cases in which leases impeached for inadequacy of value, have been upheld.

1. Leases of charity estates may be set aside on the mere ground of undervalue. But it must be undervalue satisfactorily proved, and considerable in amount. *Attorney-general v. Cross*, 3 Mer. 541.

2. Tenant of a charity estate, provided he has acted fairly, not to be turned out of possession, or to have his lease set aside, merely on the ground of inadequacy

be no decree but to dismiss the information; and in that case costs cannot be given out of the charity. *Attorney-general v. Oglander*, 1 Ves. 246.

8. The course of correcting the omission, in a decree in a charity case, to declare the nature of the charity, may be upon further directions, without a re-hearing.

In a charity case, an omission in the original decree, not declaring the nature of the charity, corrected upon further directions, without a re-hearing. *Attorney-general v. Whiteley*, 11 Ves. 241.

9. Of perpetuating an information, by executing under it from time to time.

The only way of administering a charity is under general direction to trustees: in case of misbehaviour there must be a new information: but the court will not keep the information, and execute under it from time to time. *Attorney-general v. Haberdashers' Company*, 1 Ves. 295.

10. The strict rules of practice, whether applicable to injunctions in charity causes.

Vide 3 Mer. 396.

11. Mode of proceeding to remove a governor fraudulently elected.

Vide 17 Ves. 499.

12. Course of proceeding to remove an officer *de facto*, where, from failure of heirs, the crown becomes visitor.

Vide 17 Ves. 491.

## XVII. In relation to the rights of third persons.

1. A void bequest to a charity is as none, under a settlement with limitations over, on default of appointment.

Settlement of the wife's estate to such uses as the husband and wife, or the survivor, should appoint by deed or will, with three witnesses; in default, thereof, to the heirs of the husband: the wife surviving, made a disposition by her will to a charity, and therefore void: decreed to the heir of the husband. *Attorney-general v. Ward*, 3 Ves. 327.

2. A void charge in favour of a charity sinks for the devisee.

1. Where lands were devised, subject to, and charged with, a sum not exceeding 10,000*l.*, which testator afterwards directed to be paid to charities; held, that the charge sunk for the benefit of the devisee. *Jackson v. Hurlock*, 2 Eden, 263.; *Amb.* 487.

2. Charge on a real estate for a charity, (void by the mortmain act), shall sink in favour of the devisee; not go to the heir at law or residuary legatee. *Wright v. Row*, 1 B. C. C. 61.; *S. P.* *Jackson v. Hurlock*, 1 B. C. C. 61. n.; *sed vide* *Bland v. Wilkins*, 1 B. C. C. 61. n.

3. Trust of an annuity for a charity charged upon a devised estate being void under the act 9 Geo. 2. c. 36., does not pass by a residuary disposition, but sinks for the benefit of specific devisees. *Baker v. Hall*, 12 Ves. 497.

3. Right of the devisee, subject to a charitable charge, to accumulations previous to the charity taking effect.

Where an estate is devised subject to a yearly charitable charge, if the charity cannot take effect for a period, although without the default of the devisee, the arrears shall accumulate. *The Attorney-general v. Boken*, 3 Anst. 820.

4. Right of the next of kin to the surplus of a bequest to a charity.

Bequest in trust for the poor inhabitants of several parishes; to be applied at

at times and in proportions, and either in money, provision, physic, or clothes, as the trustees think fit. The fund being very considerable in proportion to the objects, the application was upon the principle of *cy pres* extended for the benefit of the same objects to purposes not expressly pointed out by the will; instruction and apprenticing of children, against the claim of the next of kin. *The Bishop of Hereford v. Adams*, 7 Ves. 324.

5. Right of the next of kin to the surplus of a residue left to a charity.

Where the residue is left to a charity, and it turns out to be more than adequate to the objects, the surplus must be applied to similar purposes. *Attorney-general v. Earl of Winchelsea*, 3 B. C. C. 373.

6. Right of the next of kin, on a void bequest, to promote popery.

Residuary bequest for the purpose of educating and bringing up poor children in the Roman Catholic faith, void. The fund does not go to the next of kin; but is in the disposition of the crown to some other charitable use by sign manual. *Cary v. Abbot*, 7 Ves. 490.

7. Right of the heir to accumulations, previous to devise executed.

Upon a devise to a good charitable use, the heir has no right to the rents and profits accrued before the devise is carried into effect. *Attorney-general v. Bowyer*, 3 Ves. 714.

8. Right of the heir to the surplus of rents bequeathed to a charity.

Devise in 1719, to charitable purposes, limiting the sums: there not being objects sufficient to exhaust the whole rents according to the directions of the will, and the whole being appropriated to the charities specified, the surplus was applied to increase them against the claim of the heir. *Attorney-general v. Minshull*, 4 Ves. 11.

9. Right of the heir to the surplus, where the rents of an estate bequeathed to a charity, are increased.

Where an estate is given to a charity, and the rents are afterwards increased, there is no resulting trust for the heir at law, but the charity shall have the surplus rents. *Attorney-general v. Haberdashers' Company*, 4 B. C. C. 103.

10. Bequest of a doubtful class — legacy for cloathing such poor children as should be educated in the school of the nunnery of Waterford.

Whether a bequest of a sum of money, to be applied "in cloathing such poor children as should be educated in the school of the nunnery of Waterford," be legal, *quære*. An inquiry directed to ascertain the character and description of the school. *Attorney-general v. Power*, 1 Ball & Beatty, 145.

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NAME.

I. In relation to the name of confirmation.

It is the real name.

II. Force of the name taken under an act of parliament.

The former name still continues.

III. Force of the name taken under the king's licence.

The licence only permits the user, without imposing the name.

IV. Force

**IV. Force of the name given on profession in a convent.**

With respect to the rest of the world, the former name continues.

**I. In relation to the name of confirmation.**

It is the real name.

Name of confirmation is the real name. 1 Ves. 416.

**II. Force of the name taken under an act of parliament.**

The former name still continues.

A person taking a name by act of parliament, does not lose his original name, and might take a legacy by it. 15 Ves. 100.

**III. Force of the name taken under the king's licence.**

The licence only permits the user, without imposing the name.

The effect of the king's licence is only permission to use a name; not imposing it. 15 Ves. 100.

**IV. Force of the name given on profession in a convent.**

With respect to the rest of the world, the former name continues.

Name given on profession in a convent, is not meant for the rest of the world; but former name continues. 1 Ves. 446.

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**NOTICE.**
**I. Of constructive notice.**

1. The effect of a mistaken representation made by one who, from documents in his possession, might have known the truth.
2. Of presuming notice, of the execution of a deed, to a trustee who prepared it under a power.

**II. Of notice on an agent.**

During what period it must have place, that it may be followed by consequences.

**III. See in tit. Contract between vendor and purchaser.**


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**I. Of constructive notice.**

1. The effect of a mistaken representation made by one who, from documents in his possession, might have known the truth.

A person making a false representation, through mistake, but where he might, from deeds in his possession, have had notice of the truth, bound by the representation. *Pearson v. Morgan*, 2 B. C. C. 388.

2. Of presuming notice, of the execution of a deed, to a trustee who prepared it under a power.

*Quære*, whether a trustee, having prepared a deed of appointment under a power, but not knowing of the execution of the deed, shall be presumed to have

have such notice, as to affect him in respect of his payment of the money to a legatee, under a subsequent will of the person who had the power. *Cothay v. Sydenham*, 2 B. C. C. 391.

## II. Of notice on an agent.

During what period it must have place, that it may be followed by consequences.

Notice actual, or constructive; as, to an agent; which must be, while concerned for the principal, and in the course of the transaction, which is the subject of the suit. 13 Ves. 120.

## III. See in tit. Contract between vendor and purchaser.

## NUISANCE.

### I. What are not public nuisances.

Trades, offensive, and in some degree unwholesome, may not be.

### II. Of the abatement of nuisances.

Public nuisances in a highway or a harbour.

### III. Of the equitable jurisdiction to restrain a nuisance by injunction.

When the establishment at law, of the right infringed, is a preliminary to its exercise.

### I. What are not public nuisances.

Trades, offensive, and in some degree unwholesome, may not be.

1. Instances of trades, offensive, and in some degree unwholesome, not legally a nuisance. A sugar-house, brewhouse, &c.; injunctions in such cases cautiously granted, and not *ex parte*. 18 Ves. jun. 217.

2. A manufacture of bricks not a nuisance. *Ibid.* 219.

### II. Of the abatement of nuisances.

Public nuisances in a highway or a harbour.

1. Jurisdiction upon public nuisances in a highway or a harbour; if upon the king's soil, the crown may abate; if not, the fact must be tried by a jury. 18 Ves. jun. 218.

2. Where a nuisance and purpresture are committed in a harbour, an information in equity lies to abate it. *The Attorney-general v. Richards*, 2 Anst. 603.

### III. Of the equitable jurisdiction to restrain a nuisance by injunction.

When the establishment at law, of the right infringed, is a preliminary to its exercise.

Bill stated the plaintiff to be lessee of an ancient mill, and that the defendant had erected flood-gates and other works on the river, which obstructed plaintiff's mill, and prayed that defendant might be decreed to pull down these works, and be restrained from erecting new ones. Such  
Vol. VIII. 3 F works



works having been erected above three years, such a bill will not lie until the right be established at law; and a demurrer, for want of equity, is good. *Weller v. Smeaton*, 1 Cox, 102.

### OCCUPANCY, SPECIAL.

#### I. Of the subjects of special occupancy.

A rent cannot be.

#### II. Of persons who may be special occupants.

An executor.

#### III. When a party takes as special occupant; when not.

In the case of an executor taking a lease *pur autre vie* to a man, his executors and administrators.

#### I. Of the subjects of special occupancy.

A rent cannot be.

No special occupancy of a rent; being an incorporeal hereditament; but if the heirs, &c. are named in the grant, the executor is said to be *quasi* occupant. 7 Ves. 448.

#### II. Of persons who may be special occupants.

An executor.

Executor may be a special occupant. 7 Ves. 440.

#### III. When a party takes as special occupant; when not.

In the case of an executor taking a lease *pur autre vie* to a man, his executors, and administrators.

A lease *pur autre vie* to one, his executors and administrators; the executor does not take as special occupant. *Semble*, 1 Sch. & Lef. 289.

### OFFICE.

#### I. Of the sale of offices contrary to the statute.

Validity of an appointment subject to a private condition.

#### II. Of the consequences of neglecting the duty of an office.

Non-user is a misdemeanor punishable by a common information.

#### III. Of the forfeiture of an office.

By non-user.

#### I. Of the sale of offices contrary to the statute.

Validity of an appointment subject to a private condition.

Bond to secure an annuity to the obligor's mother for life: the condition reciting, that by the recommendation of friends he had been appointed to succeed

succeed his father in the command of a government packet ; but on the express condition of his making an allowance for the support of his mother, &c. the master of the rolls inclined to dismiss the bill filed against his executrix ; but gave the plaintiff leave to bring an action. *Hartwell v. Hartwell*, 4 Ves. 811.

## II. Of the consequences of neglecting the duty of an officer.

Non-user is a misdemeanor, punishable by a common information.

Non-user is a misdemeanor, punishable by a common information. 1 Ves. 8.

## III. Of the forfeiture of an officer.

By non-user.

Whether non-user is cause of forfeiture of a public office, depends on circumstances. 1 Ves. 6.

## OFFICER.

### I. Of the officers of the court of chancery.

1. Privilege of a sixty clerk to be sued in the petty bag.
2. Vide in tit. CHANCERY. — CHANCERY PRACTICE.

### II. Of military and naval officers.

1. Assignment of their half-pay, void.
2. Their half-pay not liable to process.
3. A pension for supporting the grantee in the performance of future duties, is inalienable.
4. A pension for past services, may be aliened.
5. Of the period at which the marriage must have taken place, to entitle an officer's widow to a pension.

### III. Responsibilities of public officers.

To an action for money in hand, issued by government, for the use of an individual.

### IV. Responsibilities of officers concerned in the execution of process.

The act of the court is an indemnity to the gaoler.

### I. Of the officers of the court of chancery.

Privilege of a sixty clerk to be sued in the petty bag.

One of the sixty clerks of the court of chancery having been arrested in an action brought against him in one of the common law courts, he insisted on his privilege to be sued in the petty bag only. But it appearing by affidavit, that he had not for a considerable time attended at his seat, but had secreted himself to avoid his creditors, the court would not make any order for his discharge. *Ex parte Sheppard*, 2 Cox, 398.

### II. Of military and naval officers.

1. Assignment of their half-pay, void.
1. The half-pay of an officer is not assignable or attachable, on principles of public policy. 1 Ball & Beatty, 389.

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2. An assignment of the half-pay of an officer in the army is bad, in equity as well as at law. *Stone v. Lidderdale*, 2 Anst. 583.

2. Their half-pay not liable to process.

Vide 1 B. & B. 389.

3. A pension for supporting the grantee in the performance of future duties, is inalienable.

A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties, is inalienable. *Davis v. Duke of Marlborough*, Swanst. 79.

4. A pension for past services, may be aliened.

*Ibid.*

5. Of the period at which the marriage must have taken place, to entitle an officer's widow to a pension.

To entitle the widow of an officer in the army to the pension from government, the marriage must have taken place before he retired from the service. 3 Ves. 204.

### III. Responsibilities of public officers.

To an action for money in hand, issued by government for the use of an individual.

It is clear that a suit may be maintained against a public officer, having in his hands money issued by government, for the use of an individual, for the recovery of such money. But where government, has ordered the money to be withheld, the question is only between government and the individual or his assignee; and equity has no jurisdiction. *Priddy v. Rose*, 3 Mer. 102.

### IV. Responsibilities of officers concerned in the execution of process.

The act of the court is an indemnity to the gaoler.

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## OUTLAWRY.

### I. Of the consequences of outlawry.

Outlawry of a co-debtor does not make the debt separate.

### II. Of the plea of outlawry.

When not allowable.

### I. Of the consequences of outlawry.

Outlawry of a co-debtor does not make the debt separate.

Judgment of outlawry against two of three joint debtors, does not make the debt a separate one as against the third debtor; and it cannot be proved under his separate commission. *Ex parte Dunlop; in re Beasley*, 1 Buck. 253.

**II. Of the plea of outlawry.**

When not allowable.

No plea of outlawry in a suit for the same duty or thing, for which relief is sought by the bill. *Phillips v. Gibbins*, 1 Ves. & Beam. 184.

**PAPIST.****I. Of the privileges of Roman catholics.**

They may keep schools, without a licence from the ordinary.

**II. Of grants and agreements by Roman catholics.**

1. The period ascertained at which an agreement to convey became a lien upon the land.
2. A case in which a covenant to settle lands was held inoperative, by reason of the statute 2 Anne, c. 6.
3. A case in which a settlement was held inoperative, except as to making a provision for younger children.
4. A case in which judgments confessed in trust for the use of a settlement, were held not a fraud on the existing disabling statutes.

**III. Of bequests to Roman catholics.**

A bequest to "Roman catholic bishops, and their successors," is void.

**IV. Of the construction of statutes relating to Roman catholics.**

1. Statutes relaxing the old popery penal laws, not to be construed to defeat previous acts upon the faith of them.
2. The statute 8 Anne, c. 6. s. 2.
3. The statute 17 & 18 Geo. 3. c. 49.

**V. Of the oaths of office.**

Substitution of one oath for another refused, on swearing a master-extraordinary.

**VI. Of the bishop's certificate of the conformity of a papist.**

1. Its form.
2. It is not conclusive of the fact certified.

**VII. Of protestant discoverer.**

Effect of a decree obtained by a protestant discoverer.

**I. Of the privileges of Roman catholics.**

They may keep schools, without a licence from the ordinary.

Roman catholics may keep schools, without a licence from the ordinary *Farrell v. Gregg*, 1 Ball & Beatty, 152.

be no decree but to dismiss the information; and in that case costs cannot be given out of the charity. *Attorney-general v. Oglender*, 1 Ves. 246.

8. The course of correcting the omission, in a decree in a charity case, to declare the nature of the charity, may be upon further directions, without a re-hearing.

In a charity case, an omission in the original decree, not declaring the nature of the charity, corrected upon farther directions, without a re-hearing. *Attorney-general v. Whiteley*, 11 Ves. 241.

9. Of perpetuating an information, by executing under it from time to time.

The only way of administering a charity is under general direction to trustees: in case of misbehaviour there must be a new information: but the court will not keep the information, and execute under it from time to time. *Attorney-general v. Haberdashers' Company*, 1 Ves. 295.

10. The strict rules of practice, whether applicable to injunctions in charity causes.

Vide 3 Mer. 396.

11. Mode of proceeding to remove a governor fraudulently elected.

Vide 17 Ves. 499.

12. Course of proceeding to remove an officer *de facto*, where, from failure of heirs, the crown becomes visitor.

Vide 17 Ves. 491.

### XVII. In relation to the rights of third persons.

1. A void bequest to a charity is as none, under a settlement with limitations over, on default of appointment.

Settlement of the wife's estate to such uses as the husband and wife, or the survivor, should appoint by deed or will, with three witnesses; in default, thereof, to the heirs of the husband: the wife surviving, made a disposition by her will to a charity, and therefore void: decreed to the heir of the husband. *Attorney-general v. Ward*, 3 Ves. 327.

2. A valid charge in favour of a charity sinks for the devisee.

1. Where lands were devised, subject to, and charged with, a sum not exceeding 10,000*l.*, which testator afterwards directed to be paid to charities; held, that the charge sunk for the benefit of the devisee. *Jackson v. Hurlock*, 2 Eden, 263.; *Amb.* 487.

2. Charge on a real estate for a charity, (void by the mortmain act), shall sink in favour of the devisee; not go to the heir at law or residuary legatee. *Wright v. Row*, 1 B. C. C. 61.; *S. P. Jackson v. Hurlock*, 1 B. C. C. 61. n.; *sed vide Bland v. Wilkins*, 1 B. C. C. 61. n.

3. Trust of an annuity for a charity charged upon a devised estate being void under the act 9 Geo. 2. c. 36., does not pass by a residuary disposition, but sinks for the benefit of specific devisees. *Baker v. Hall*, 12 Ves. 497.

3. Right of the devisee, subject to a charitable charge, to accumulations previous to the charity taking effect.

Where an estate is devised subject to a yearly charitable charge, if the charity cannot take effect for a period, although without the default of the devisee, the arrears shall accumulate. *The Attorney-general v. Boken*, 3 Anst. 820.

4. Right of the next of kin to the surplus of a bequest to a charity.

Bequest in trust for the poor inhabitants of several parishes; to be applied at

at times and in proportions, and either in money, provision, physic, or clothes, as the trustees think fit. The fund being very considerable in proportion to the objects, the application was upon the principle of *cy pres* extended for the benefit of the same objects to purposes not expressly pointed out by the will; instruction and apprenticing of children, against the claim of the next of kin. *The Bishop of Hereford v. Adams*, 7 Ves. 324.

5. Right of the next of kin to the surplus of a residue left to a charity.

Where the residue is left to a charity, and it turns out to be more than adequate to the objects, the surplus must be applied to similar purposes. *Attorney-general v. Earl of Winchelsea*, 3 B. C. C. 373.

6. Right of the next of kin, on a void bequest, to promote popery.

Residuary bequest for the purpose of educating and bringing up poor children in the Roman Catholic faith, void. The fund does not go to the next of kin; but is in the disposition of the crown to some other charitable use by sign manual. *Cary v. Abbot*, 7 Ves. 490.

7. Right of the heir to accumulations, previous to devise executed.

Upon a devise to a good charitable use, the heir has no right to the rents and profits accrued before the devise is carried into effect. *Attorney-general v. Bowyer*, 3 Ves. 714.

8. Right of the heir to the surplus of rents bequeathed to a charity.

Devise in 1719, to charitable purposes, limiting the sums: there not being objects sufficient to exhaust the whole rents according to the directions of the will, and the whole being appropriated to the charities specified, the surplus was applied to increase them against the claim of the heir. *Attorney-general v. Minshull*, 4 Ves. 11.

9. Right of the heir to the surplus, where the rents of an estate bequeathed to a charity, are increased.

Where an estate is given to a charity, and the rents are afterwards increased, there is no resulting trust for the heir at law, but the charity shall have the surplus rents. *Attorney-general v. Haberdashers' Company*, 4 B. C. C. 103.

10. Bequest of a doubtful class — legacy for cloathing such poor children as should be educated in the school of the nunnery of Waterford.

Whether a bequest of a sum of money, to be applied "in cloathing such poor children as should be educated in the school of the nunnery of Waterford," be legal, *quære*. An inquiry directed to ascertain the character and description of the school. *Attorney-general v. Power*, 1 Ball & Beatty, 145.

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NAME.

I. In relation to the name of confirmation.

It is the real name.

II. Force of the name taken under an act of parliament.

The former name still continues.

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## PARENT AND CHILD.

**I. Jurisdiction of the court of chancery to control the exercise of a parent's authority.**

1. It exists, and upon proper occasions will be exerted.
2. Vide in tit. GUARDIAN. — INFANT.

**II. When children take per capita ; when per stirpes.**

Taking interests in their own right, they take *per capita* ; by representation, *per stirpes*.

**III. Who are considered younger children ; who not.**

1. They are those who do not take the estate.
2. Every one but the heir is a younger child in equity.

**IV. Whether once a younger child, and always such.**

1. The character of a younger child must continue till the time of payment.
2. The character of a younger child must continue till the time of payment, notwithstanding he is particularly named to take.
3. Every appointment to a younger son is under a condition that he becomes not the eldest son and heir.

**I. Jurisdiction of the court of chancery to control the exercise of a parent's authority.**

It exists, and upon proper occasions will be exerted.

Father restrained from exercising paternal authority over his children, by the court, under certain circumstances. Warner *ex parte*, 4 B. C. C. 101.

**II. When children take per capita ; when per stirpes.**

Taking interests in their own right, they take *per capita* ; by representation, *per stirpes*.

Children taking interests in their own rights, take *per capita* ; when by representation *per stirpes*. 1 Ball & Beatty, 484.

**III. Who are considered younger children ; who not.**

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Younger children are those who do not take the estate. 1 Ball & Beatty, 278.

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The character of a younger child must continue till the time of payment. 1 Ball & Beatty, 278.

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2. The character of a younger child must continue till the time of payment, notwithstanding he is particularly named to take.

A younger son, though particularly named to take part of a sum, charged for younger children, afterwards becoming the eldest, before the portions were raised, and as heir taking the estate charged, is not entitled to any part of the charge. *Savage v. Carroll*, 1 Ball & Beatty, 265.

3. Every appointment to a younger son is under a condition that he becomes not the eldest son and heir.

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## PARLIAMENT.

### I. Of qualification to serve in parliament.

A contract to re-convey a qualification, will not be executed.

### II. Of petitions to the house of commons.

Liability for the costs of.

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### I. Of qualification to serve in parliament.

A contract to re-convey a qualification, will not be executed.

Bill for a reconveyance of a qualification to sit in parliament given by a father to his son, dismissed with costs. 6 Ves. 747.

### II. Of petitions to the house of commons.

Liability for the costs of.

Party presenting and attending a petition to the house of commons, cannot by setting up the engagement of another person, deliver himself from the expence of his own suit. 3 Ves. 500.

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## PARTITION.

### I. Of the jurisdiction of the court of chancery in the matter of partition.

1. General rule.
2. Partition at law, and in equity, distinguished.
3. In the case of a tenancy in common of a copyhold.

### II. Of the considerations which influence in granting or refusing a partition.

1. The possibility of others coming *in esse*.
2. Minuteness of interest.
3. Suspicious title.

### III. Of the analogy or difference between partition and other conveyances.

Between exchange and partition.

IV. Of

**IV. Of the subjects of partition.**

1. Advowsons.
2. Houses.
3. Manors.

**V. Of persons who, in respect of their interest, are entitled to a partition.**

Lessee for life or years.

**VI. Of an agreement to make partition.**

Its effect to take from the party the power of ulterior disposition.

**VII. Of the terms in which a power to make partition may be conferred.**

It is implied in a power to exchange.

**VIII. Influence of a partition upon the rights of others.**

Rights of common.

**IX. Of the commission.**

1. The court, not the commissioners, are to ascertain the interests and proportions.
2. In the case of opposite returns by the commissioners.
3. Of excepting to their certificates.
4. In miscellaneous cases.
5. The commissioners have no lien upon the commission.

**X. Of the mode of making partition.**

In a miscellaneous case.

**XI. Of barring the right of partition.**

By the act of one party.

**L. Of the jurisdiction of the court of chancery in the matter of partition.****1. General rule.**

1. Partition is a proceeding at common law; but chancery entertains suits for it; though no original jurisdiction, and no express authority is given by the statute as to joint tenants. 2 Ves. 124.

2. Concurrent jurisdiction of equity upon partition. 1 Ves. & Beam. 555.

3. Commission to make partition, not under the authority of any act of parliament; but from the difficulty attending partition at law, where the plaintiff must prove his title as he declares, and also the titles of the defendants; by analogy to the equitable jurisdiction in the case of dower. 17 Ves. jun. 522.

**2. Partition at law, and in equity, distinguished.**

Difference between partition at law and in equity. The former operates by the judgment of a court of law, conclusive on the parties: the latter proceeds on conveyances to be executed between the parties, and cannot be

be effectual, if the parties be incompetent to execute. *Whaley v. Dawson*, 2 Sch. & Lef. 372.

3. In the case of a tenancy in common of copyhold.

Tenants in common of a copyhold; chancery has no jurisdiction to grant them a commission of partition. *Scott v. Fawcett*, Dick. 299.

II. Of the considerations which influence in granting or refusing a partition.

1. The possibility of others coming *in esse*.

No objection to a partition, that other persons may come *in esse* and be entitled. *Wills v. Slade*, 6 Ves. 498.

2. Minuteness of interest.

No objection to partition from the minuteness of the interest, the inconvenience, difficulty, or reluctance of the other tenants in common. 1 Ves. & Beam. 554.

3. Suspicious title.

Discretion, in equity, to refuse partition upon a suspicious title; but, if clear, as the writ would lie, the commission is due of right. 1 Ves. & Beam. 556.

III. Of the analogy or difference between partition and other conveyances.

Between exchange and partition.

Distinction between exchange and partition. 11 Ves. 476.

IV. Of the subjects of partition.

1. Advowsons.

Decree for a partition of an advowson. *Bodicoate v. Steers*, Dick. 69.

2. Houses.

1. A commission for partition of a house, decreed. *Turner v. Morgan*, 8 Ves. 143.

2. Partition of a house, by writ. 8 Ves. 145.

3. Manors.

Partition of a manor, decreed. *Sparrow v. Fiend*, Dick. 348.

V. Of persons, who in respect of their interest, are entitled to a partition.

Lessee for life or years.

1. Bill for partition by lessee for years. *Baring v. Nash*, 1 Ves. & Beam. 551.

2. Partition between tenants in common and joint tenants by statute 31 Hen. 8., extended by statute 32 Hen. 8. to limited interests for life or years; and the same right in equity by bill, as at law by writ. 1 Ves. & Beam. 555.

VI. Of an agreement to make partition.

Its effect to take from the party the power of ulterior disposition.

Agreement for partition established against a conveyance and against a devise; operating as a revocation by depriving the testatrix of all interest in the estate devised. *Knollys v. Alcock*, 5 Ves. 148.

VII. Of

### VII. Of the terms in which a power to make partition may be conferred.

It is implied in a power to exchange.

Partition included in a power to exchange. *Abel v. Heathcote*, 4 B. C. C. 278.

### VIII. Influence of a partition upon the rights of others.

Rights of common.

A partition never affects third parties; rights of common for instance. 17 Ves. jun. 544.

### IX. Of the commission.

1. The court, not the commissioners, are to ascertain the interests and proportions.

Upon a bill for partition, the interests and proportions to be ascertained by the court, not the commissioners. 17 Ves. jun. 543.

2. In the case of opposite returns by the commissioners.

Under a commission of partition to four commissioners, two different returns were made; each by two commissioners. The court would not act upon either; and another commission issued to five commissioners. *Watson v. Duke of Northumberland*, 11 Ves. 153.

3. Of excepting to their certificates.

Exceptions lie to the certificates of commissioners in commissions of partition, which certificates are confirmed, as reports are. *Nicholas v. Mills*, 1 Dick. 533.

4. In miscellaneous cases.

Commission of partition directed to divide the estate in moieties between plaintiff and defendant. *Trigg v. Trigg*, 1 Dick. 325.

5. The commissioners have no lien upon the commission.

Commissioners under a commission of partition, have no lien on the commission for their charges. *Young v. Sutton*, 2 Ves. & Beam. 305.

### X. Of the mode of making partition.

In a miscellaneous case.

Decree for partition among several joint proprietors, and no objection from a covenant not to inclose without general consent, rights of common, and the inequality and uncertainty of the shares, in proportion to other estates. The decree directed a reference to the master to inquire whether the plaintiff and defendants, or any and which are entitled; and in what shares, according to the respective values of the other estates; and then a commission to divide accordingly: the costs of the partition to be borne by the parties, in proportion to the value of their respective interests; and no previous or subsequent costs; by analogy to the proceeding at law. *Agar v. Fairfax*, 17 Ves. jun. 533.

### XI. Of barring the right of partition.

By the act of one party.

The estate of a tenant in common cannot be so settled on marriage of one, as to prevent the right of the others to make partition. 2 Ves. 100.

## PARTNER.

**I. What are partnerships with reference to the parties themselves.**

A miscellaneous case.

**II. What are partnerships with reference to third persons.**

1. A specific interest in the profits as such.
2. Agreement for a participation in profits, or their application.
3. Share in profits, without interest in capital.
4. Lending one's name, though without participating in the profits, and stipulating to suffer no loss.
5. Public declaration in advertisement of dissolution.

**III. What are not partnerships with reference to third persons.**

Receipt of a sum of money, though in proportion to a given share of the profits.

**IV. Of the construction of instruments creating partnerships.**

1. A case in which a will was held not to create a partnership, co-extensive with the duration of certain leases.
2. A case in which the representative of a partner was held not entitled to share in the sale of the good-will.

**V. Of the equities between partners.**

1. General rules.
2. A bill by one against the other for relief, must pray a dissolution.

**VI. Of the duties of partners towards each other.**

1. To use the joint property for the benefit of all.
2. To apply property to partnership purposes.

**VII. Of the duties of partners towards third persons.**

A retired partner.

**VIII. Of agreements between partners, binding upon third persons.**

Purchase of the concern, though insolvent, from a retiring partner.

**IX. What property is to be considered joint property.**

1. Profits accrued after the bankruptcy of one partner.
2. Profits accrued from trading, after dissolution, with joint property.
3. Lease clandestinely renewed by one partner.

**X. What property is to be considered separate property.**

Ships, under the circumstances.

**XI. In relation to the conversion of property.**

1. The agreement must be express.
2. Property held, under the circumstances, not converted.
3. Vide in tit. ESTATE.

XII. In

**XII. In relation to the conversion of partnership items.**

By accepting the separate security of one partner.

**XIII. Of a creditor's lien on partnership property.**

1. Creditors, independent of contract, have no specific lien.
2. Assignment by one partner to secure his own debt, must be subject to joint debts.

**XIV. Of taking partnership property in execution.**

On a judgment against one partner for his separate debt.

**XV. Of the liability of the estate of a deceased partner.**

1. There is no difference between bankers and other partnerships.
2. Whether barred by non-claim, and payment in part by survivor.
3. Right of simple-contract creditors.
4. Right of simple-contract creditors, before the account, to retain separate property.
5. Extent of the liability, in the case of a breach of trust, by sale of stock.
6. In case of a sale, after the death, of a previous deposit.
7. Where the survivors carry on business without changing the firm.
8. In a case of deposit — dissolution — new partnership — and failure.
9. Of the necessity and effect of notice of the death, to discharge from future debts.

**XVI. Where the act of one partner shall bind the other.**

1. General rule.
2. An agreement, or subsequent approval, must appear, in order to bind by a separate transaction.
3. Executing an instrument in his presence.
4. Signature.
5. Payment to one partner.
6. Bill for goods ordered before, but delivered after, partnership dissolved.
7. In bankruptcy.

**XVII. The management of the concern may be transferred to others.**

1. General rule.
2. Analogy between a bill for this purpose, and to restrain waste.
3. A receiver appointed.
4. Refused under the circumstances.
5. In the case of the opera house.
6. Whether on a dissolution of partnership.

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**XXV. Of**



**XXV. The meaning of phrases applied in partnerships, ascertained.**

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Not by the evidence of the partners, and their private communications.

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Legality of a partnership of 1600 shares.

**I. What are partnerships with reference to the parties themselves.**

A miscellaneous case.

A testator entitled, by leases of unequal duration, to iron mines and works, by will gave a pecuniary legacy to B., as a capital for him to become a partner with any executor, of one-fourth share in the trade of all those works, "as long as the lease endures;" and gave all the residue of his real and personal estates to H. and his wife, and appointed H. executor. By a codicil he gave to C. three-eighths of the concern at this iron work, and of the premises at C., "so the partnership will stand at my demise, C. three-eighths, H. three-eighths, B. two eighths;" C., H., and B. jointly carried on the works for two years after the testator's death, selling iron manufactured by them, not only from ore procured from the testator's mines, but from ore and old wrought iron which they purchased; but not merely for the purpose of mixing with the produce of the testator's mines for improving the iron. C., at the end of the two years, purchased B.'s share, and the business was carried on in the same manner by C. and H. till H. died. There was no written or other agreement for the duration of the partnership. Held, that this was not a mere joint interest in the produce of land, but a trading partnership; that it was dissolved by the death of H.; and that the fact of C. and H. having purchased and taken assignments to a trustee for themselves, of some of the rents reserved by the leases, did not furnish any inference of an agreement to continue the partnership for any definite period; and a sale of the property was ordered on motion. *Seemle*, too, that this was a trading within the bankrupt laws. *Crawshay v. Maule*, 1 W. C. C. 181.

**II. What are partnerships with reference to third persons.**

**1. A specific interest in the profits as such.**

Distinction as to partners with reference to third persons, and as between themselves. Partner as to third persons by a specific interest in the profits, as such; not by receiving a sum of money, even in proportion to a given share of the profits. *Ex parte Hamper*, 17 Ves. jun. 403.

**2. Agreement for a participation in profits or their application.**

Partnership by agreement for a participation in profits, or their application. *Ex parte Langdale*, 18 Ves. jun. 300.

**3. Share in profits, without interest in capital.**

Partner by a share in profits, without interest in capital. *Ex parte Hodgkinson*, 19 Ves. 291.

**4. Lending**

4. Lending one's name, though without participating in the profits, and stipulating to suffer no loss.

Partner, without participation of profit, by lending his name, though contracting that he shall suffer no loss. 18 Ves. jun. 301.

5. Public declaration in advertisement of dissolution.

Partnership by a public declaration in an advertisement of dissolution. *Ex parte Matthews*, 3 Ves. & Beam. 125.

### III. *What are not partnerships with reference to third persons.*

1. Receipt of a sum of money, though in proportion to a given share of the profits.

Vide 17 Ves. 403.

### IV. *Of the construction of instruments creating partnerships.*

1. A case in which a will was held not to create a partnership, co-extensive with the duration of certain leases.

A testator entitled, by leases of unequal duration, to iron mines and works, by will gave a pecuniary legacy to B., "as a capital for him to become a partner with my executor, of one fourth-share in the trade of all those works, as long as the lease endures;" and gave all the residue of his real and personal estates to H. and his wife, and appointed H. executor. By a codicil he gave to C. three-eighths of the concern at this iron work, and of the premises at C.; "so the partnership will stand at my demise, C. three-eighths, H. three-eighths, B. two-eighths." Held, that this did not create a partnership co-extensive with the duration of the leases. *Crawshay v. Maule*, 1 W. C. C. 181.

2. A case in which the representative of a partner was held not entitled to share in the sale of the good-will.

F., on entering into articles of partnership with B., paid a premium; F. dies. After his death B. sold the good-will of the trade. Held, on the construction of the articles, that the representative of F. was not entitled to a share of the money for which such good-will was sold. *Farr v. Pearce*, 3 Mad. 74.

### V. *Of the equities between partners.*

1. General rules.

Equity among partners; and the consequences upon a dissolution, with reference to each other and creditors. 11 Ves. 5.

2. A bill by one against the other for relief must pray a dissolution.

No relief upon a bill by one partner against another, not praying a dissolution. *Forman v. Homfray*, 2 Ves. & Beam. 329.

### VI. *Of the duties of partners towards each other.*

1. To use the joint property for the benefit of all.

Implied obligations among partners, as far as they are not regulated by express contract; for instance, to use the joint property for the benefit of all the owners. 15 Ves. 226.

2. To apply property to partnership purposes.

Obligation of a partner to apply property, as received, to partnership purposes, or to charge himself as debtor in the partnership books. 3 Ves. & Beam. 36.

## VII. Of the duties of partners toward third persons.

### A retired partner.

*Quære*, whether one of two partners, who has retired from an active concern in the business, can be compelled to look into the partnership accounts, to state the result of them as to particular transactions which the acting partner had transacted, and given an account of by his answer. *Seeley v. Boehm*, 2 Mad. 176.

## VIII. Of agreements between partners binding upon third persons.

Purchase of the concern, though insolvent, from a retiring partner.

One partner may agree with a retiring partner to give him a sum for the concern, though they knew the partnership to be insolvent, provided no fraud on creditors was intended. *Ex parte Peake*, 1 Mad. 346.

## IX. What property is to be considered joint property.

### 1. Profits accrued after the bankruptcy of one partner.

A partnership being dissolved by the bankruptcy of one partner, the assignees are entitled, beyond an account and distribution of the stock, &c. to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the bankruptcy. As far as the profits may have been produced by a joint application of that and other funds, *quære*. *Crawshay v. Collins*, 15 Ves. 218.

### 2. Profits accrued from trading, after dissolution, with joint property.

Partner, after the dissolution of the partnership, continuing to trade with the joint property, must account for the profits. *Featherstonhaugh v. Fenwick*, 17 Ves. jun. 298.

### 3. Lease clandestinely renewed by one partner.

Lease of premises, where a partnership trade was carried on, renewed by one partner in his own name clandestinely; a trust for the partnership; to be accounted for as joint property. *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

## X. What property is to be considered separate property.

### Ships, under the circumstances.

Ships purchased by one partner held separate property as between the creditors after his bankruptcy and the death of the other, upon the circumstances; particularly the registry being made in the name of the one partner only; and being afterwards continued for a purpose, that would have prevented any claim of the other; viz. a fraud upon an act of parliament. *Curtis v. Perry*, 6 Ves. 739.

## XI. In relation to the conversion of property.

### 1. The agreement must be express.

Though a co-partnership agreement may alter the nature of real estate, it must be express, so to do. *Thornton v. Dixon*, 3 B. C. C. 199.

### 2. Property held, under the circumstances, not converted.

Purchase by partners of real estate to them and their respective heirs, equally, as tenants in common, &c., to be used in trade during the partnership; with covenants against alienation and partition. The nature of the property is not varied. *Balmain v. Shore*, 9 Ves. 500.

### 3. Vide in tit. ESTATE.

## XII. In

## XII. In relation to the conversion of partnership items.

By accepting the separate security of one partner.

A joint creditor taking a security from one partner on account, but which is not paid, does not render the debt a separate debt. *Ex parte Hodgkinson*, Cooper, 99.

## XIII. Of a creditor's lien on partnership property.

1. Creditors, independent of contract, have no specific lien.

Creditors, as such, independent of special contract, have no lien or charge on the effects; but in the distribution of joint estate, obtain payment through the equities of the parties among themselves. 17 Ves. jun. 526.

2. Assignment by one partner to secure his own debt, must be subject to joint debts.

Assignment by one partner of joint property to secure his separate debt, must be subject to the joint debts. *Young v. Keighley*, 15 Ves. 557.

## XIV. Of taking partnership property in execution.

On a judgment against one partner for his separate debt.

1. Execution against joint property, though the foundation of the action had no relation to the joint concern. 17 Ves. jun. 413.

2. Execution at law, under judgment against a partner, *formerly*, by seizing the joint effects, and selling the undivided share; *now*, by selling the actual interest; how to be ascertained, except in a court of equity, *quære*. 2 Ves. & Beam. 301.

3. Judgment against one of two partners: execution to be only of a moiety; but in equity, upon the failure of one, the partnership fund is to be distributed among the joint creditors. 1 Ves. 240.

4. Execution under a judgment by a separate creditor as to a moiety: whether in equity, subject to the partnership account, *quære*. 11 Ves. 85.

5. Execution by a separate creditor against joint property; subject to account; ascertaining the specific interest of the partner in the joint effects. 17 Ves. jun. 407.

6. A separate creditor of a partner has no right against the joint property, farther than the separate interest of that partner; viz. his share upon a division of the surplus, subject to the accounts of the partnership; therefore, joint property of an insolvent partnership, taken in execution for a separate debt, cannot be held against the joint creditors. *Taylor v. Fields*, 4 Ves. 396.

7. Assignee, executor, or separate creditor, coming in the right of one partner against the joint property, comes into nothing more than an interest, subject to an account between the partnership and the partner, and therefore to the joint debts. Assignee, under a separate commission of bankruptcy, has only the same right to stand in the place of the bankrupt by the common law, not under the bankrupt laws. 4 Ves. 397.

## XV. Of the liability of the estate of a deceased partner.

1. There is no difference between bankers and other partnerships.

No difference in principle between the case of a banking-house and any other partnership, as to the equity of the creditor against the deceased partner's estate. Money paid into a banker's, constitutes a debt, not a deposit. A creditor's leaving money in the hands of the surviving partners in a bank, does not constitute a new contract, nor operate as relinquishment of the old security. 1 Mer. 568.

2. Whether barred by non-claim, and payment in part by survivor.

1. Equity of a creditor against the estate of a deceased partner, not barred

by eight months' non-claim, and payment in part by the surviving partner. 1 Mer. 566.

2. No rule of convenience fixing any period within which a creditor of a banking-house, not making his demand on the surviving partners, is held to have waived his equity against the estate of the deceased partner. 1 Mer. 569.

### 3. Right of simple-contract creditors.

A joint creditor by simple-contract, may go against the assets of a deceased partner; but cannot before the account retain separate property of that partner in his possession. *Stephenson v. Chiswell*, 3 Ves. 566.

4. Right of simple-contract creditors, before the account, to retain separate property.

*Ibid.*

5. Extent of the liability in the case of a breach of trust, by sale of stock.

Creditors in respect of stock standing in the names of the partners, which was sold in breach of trust, and the proceeds applied to the use of partnership, entitled as against the estate of the deceased partner, either to consider it as a debt, or to have the stock replaced at their option. It makes no difference, that the stock stood in the name of, and was sold by one of the partners only, the proceeds having been applied to the partnership use. 1 Mer. 611.

6. In case of a sale, after the death, of a previous deposit.

Deposit of bills with a banking-house, in the lifetime of D., (a partner since deceased,) which were sold by the house, part in D.'s lifetime, and part after his death. Held, the estate of D. is not answerable in respect of the latter, though the party depositing had no notice of the death of D. 1 Mer. 616.

7. Where the survivors carry on business without changing the firm.

On the death of a partner in a banking-house, the surviving partners carry on the business without changing the firm, and afterwards become bankrupt. The equities of the several classes of creditors of the partnership against the estate of the deceased partner, with reference to the alleged solvency of the house at his death, to the effect of subsequent dealings, and transactions with the survivors, and of notice expressed, or implied, and to the custom of bankers declared upon exceptions to the report of the master, distinguishing the classes of creditors according to the different nature of the circumstances. *Devaynes v. Noble*, 1 Mer. 580.

8. In case of a deposit — dissolution — new partnership — and failure.

Bankers, upon a deposit of money with them, gave notes bearing interest: the partnership was dissolved; one of the partners soon afterwards died, and his creditors were called by advertisement: another partnership was formed by the survivors and others, who re-issued notes of the former partnership, and paid the interest of the deposit-notes for near two years, when they failed: the assets of the deceased partner are not discharged. *Daniel v. Cross*, 3 Ves. 277.

9. Of the necessity and effect of notice of the death, to discharge from future debts.

1. Notice of the death of the deceased partner, whether before or after the creditor had received payment in part from the surviving partners, not material. The creditor, by drawing on the surviving partners, recognizes them as his debtors, but not exclusively. 1 Mer. 570.

2. Notice to the surviving partners given by a creditor of the partnership,

as solicitor for the representatives of the deceased partner, that the estate of the deceased will not be liable for their future dealings, does not operate as discharging the estate from a debt previously incurred to that creditor of which he was at the time ignorant; payments subsequently made in respect of cash balances, not to be taken as operating in extinction of such a debt. 1 Mer. 579.

3. The death of a partner of itself works a dissolution of the partnership; and the mere want of notice does not, it seems, make the estate of the deceased partner liable to the debts of the continuing partners. *Secus*, if one of the surviving partners is an executor of the deceased. *Valliamy v. Noble*, 3 Mer. 614.

## XVI. Where the act of one partner shall bind the other.

### 1. General rule.

1. In general, a partnership is bound by the acts of an individual partner, in such cases only as in the usual course of dealing are referrible to the partnership concerns. *Ex parte Agace*, 2 Cox, 312.

2. Power of a partner to bind the partnership; unless from the nature of the transaction it can be inferred to be separate; in which case previous authority or subsequent approbation must be shown. Under the circumstances, proof in bankruptcy undisputed since 1793, and no one to explain the transaction, but one partner; inquiry refused. *Ex parte Bonbonus*, 8 Ves. 540.

2. An agreement, or subsequent approval, must appear, in order to bind by a separate transaction.

1. To make a partnership liable to a demand in respect of a separate transaction, an agreement must appear. *Ex parte Peel*, 6 Ves. 602.

2. Vide 8 Ves. 540.

### 3. Executing an instrument in his presence.

Firm; bound by an instrument executed by one in the presence of the others. 3 Ves. 578.

### 4. Signature.

Partnership, bound by the signature of one partner. *Ex parte Gardom*, 15 Ves. 286.

### 5. Payment to one partner.

Payment to one partner, a good discharge. *Ibid.* 213.

6. Bill for goods ordered before, but delivered after, partnership dissolved.

Order for goods by two partners, afterwards partnership dissolved; a bill drawn on the two partners, but accepted only by one, who carried on a separate trade, and the goods delivered to him, no claim can be made on the other partner. *Ex parte Harris*, 1 Mad. 583.

### 7. In bankruptcy.

1. One partner acts for all, almost universally in bankruptcy. *Ex parte Hodgkinson*, 19 Ves. 293.

2. One partner allowed to act for another in bankruptcy for various purposes: as to prove debts; to execute powers of attorney, for voting in the choice of assignees, signing the certificate, &c. *Ex parte Mitchell*, 14 Ves. 597.

## XVII. The management of the concern may be transferred to others.

### 1. General rule.

1. The court will not appoint a receiver of the effects of a subsisting partnership

partnership trade, unless on the grossest abuses of some of the partners. *Oliver v. Hamilton*, 2 Anst. 453.

2. The principle upon which a court of equity interferes between partners, by appointing a manager, receiver, &c. is merely with a view to the relief, by winding up and disposing of the concern, and dividing the produce; not to carry it on. The court therefore would not upon motion appoint a manager, &c. of the opera house, except upon the principle, applicable to any other partnership, as necessary to the relief, a foreclosure: taking into consideration also the difficulties from the nature of the subject and the contract, an anxious provision for arbitration, and that one party was by the express contract manager. *Waters v. Taylor*, 15 Ves. 10.

3. Receiver not ordered merely on a dissolution of partnership, ordered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. *Harding v. Glover*, 18 Ves. jun. 281.

2. Analogy between a bill for this purpose, and to restrain waste.

The court will not treat a bill to restrain an acting partner from collecting or creating debts, and appointing a receiver, as if it were in nature of a bill, to restrain waste, whatever they might do were such partner shown to have been guilty of culpable conduct, or to be insolvent. Nor will they permit the plaintiff, in aid of such a motion, to use an affidavit made and filed after the coming in of defendant's answer; though in a case analogous with that of irreparable waste, such an affidavit made and filed before answer, may be used. *Lawson v. Morgan*, 1 Price, 303.

3. A receiver appointed.

1. In a cause for an account for co-partnership, both parties being dead, a receiver shall be appointed; *secus*, in the case of a surviving partner. *Phillips v. Atkinson*, 2 B. C. C. 272.

2. Court sometimes takes the management of a brewery out of the hands of the parties. 1 Ves. 130.

3. Receiver appointed of partnership stock in the brewing trade. *Skipp v. Harwood*, Dick. 114.

4. Refused under the circumstances.

Motion for a receiver on a mining concern, refused upon a claim of partnership in the equitable interest, not raised, until the concern at a great expence became prosperous, and denied by the answer. *Norway v. Rowe*, 19 Ves. 144.

5. In the case of the opera house.

Vide 15 Ves. 10.

6. Whether on a dissolution of partnership.

Vide 18 Ves. 281.

#### XVIII. How far the common law conforms to the *lex mercatoria*.

In relation to survivorship in interest only, not of obligation.

The common law only partially adopts the *lex mercatoria* in respect of partnerships in trade, holding that there is no survivorship in respect of interest in such partnership, but that in respect of partnership contracts, the obligation is joint, and attaches exclusively on the survivors. Relief in equity upon joint bonds given on the ground of mistake. *Devaynes v. Noble*, 1 Mer. 563.

**XIX. Of the rights of survivorship.****1. The legal property survives, not the beneficial interest.**

Partnership determined by death; the legal property survives, not the beneficial interest. Right of the executor to the value of the testator's interest, to be ascertained, not by calculation, but by sale. 15 Ves. 227.; Vide 1 Mer. 563.

**2. The good-will of a trade.**

1. The good-will of a trade carried on in partnership without articles, survives, and is not partnership stock. Profits accrued after the death of one partner are joint property. *Hammond v. Douglas*, 5 Ves. 539.

2. Whether upon the death of a partner the good-will survives, *quære*. 15 Ves. 227.

**3. The good-will of a professional business.**

*Semble*, on a partnership between professional persons, the good-will of a business, on the death of one, survives. *Farr v. Pearce*, 3 Mad. 74.

**4. Profits accrued since the death.**

Vide *supra*, pl. 1.

**5. Mode of taking the account.**

Under the usual decree for an account on a bill by creditors, the master refused to proceed upon the claim of the surviving partners of the testator, in respect of a debt alleged to be due to them on the balance of certain dealings between the partnership and the testator, in his separate capacity: but, on motion, to be admitted to go in before the master, and prove this debt under the decree, it was referred to the master to take the account. *Paynter v. Houston*, 3 Mer. 297.

**6. Right of survivor, executor continuing trade, to allowance.**

1. Surviving partner, being executor, not entitled, without expressed stipulation, to any allowance for carrying on the trade after the testator's death. *Burden v. Burden*, 1 Ves. & Beam. 170.

2. Allowed expences actually incurred under an erroneous conception, that he was sole proprietor by purchase from his co-executors; set aside as a breach of trust, though *bond fide*. *Ibid*.

**XX. Of the obligations of survivorship.**

The obligation of partnership contracts, survives.

Vide 1 Mer. 563.

**XXI. In relation to the dissolution of partnerships.****1. The court will dissolve, though the partnership was without writing.**

Bill by partner under a parol agreement, charging misconduct in the other partner, and praying a dissolution, account and injunction, from executing securities in the name of the firm; demurrer to the prayer for a dissolution, because there was no writing between them, overruled. *Master v. Kirton*, 3 Ves. 75.

**2. Preliminary notice, whether essential to dissolution.**

1. Partnership without any provision as to its duration may be determined without previous notice; subject to the accounts to wind up the concern. *Peacock v. Peacock*, 16 Ves. 49.

2. A partnership without articles, and for an indefinite period, may be dissolved by any partner, at any time, without previous notice, subject to the engagements of the partnership; but the existence of engagements with



third persons cannot prevent the right of dissolution, as amongst themselves. *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

3. Where the concern cannot be carried on pursuant to the spirit of the articles.

The court will dissolve a partnership, where it appears that the business cannot be carried on according to the true intent and meaning of the articles of co-partnership, although one partner objects to the dissolution. *Baring v. Dix*, 1 Cox, 213.

4. Where the conduct of the parties makes it impossible to carry it on upon the terms stipulated.

Partnership in the opera house, dissolved, by the conduct of the parties, making it impossible to carry it on upon the terms stipulated. *Waters v. Taylor*, 2 Ves. & Beam. 299. Decree accordingly for a sale of the whole concern, restraining the managing partner from acting; with liberty to either party to lay proposals before the master for management until the sale. *Ibid.*

5. On the lunacy of a partner.

1. If a partner is so far disordered in his mind as to be incapable of conducting the business according to the terms of the articles of co-partnership, a court of equity will dissolve the partnership. *Sayer v. Bennet*, 1 Cox, 107.

2. How far the lunacy of a partner is ground of dissolution, depending upon the degree and probable duration of the disorder, affecting the capacity to fulfil his contract, *quære*. 2 Ves. & Beam. 303.

3. Dissolution of partnership on the lunacy of a partner, if to be obtained, only by decree; not by the act of the survivors; not determined where they had carried on the business with his capital. 2 Ves. & Beam. 303.

6. By the death of a partner.

1. Vide 3 Mer. 614.

2. A partnership for a term of years is dissolved by the death of a partner before the term has expired. *Gillespie v. Hamilton*, 3 Mad. 251.

7. In the case of a partner retiring, subject to a trust.

1. If a retiring partner assign all his share in the concern to two of the continuing partners, upon trust to pay him an annuity for his life, subject to abatement or enlargement with the fluctuation of the profits of the trade, that will not, with reference to creditors determine the partnership. *Ex parte Wilson*, Todd. *In re Colbeck*, 1 Buck. 48.

2. A retiring partner assigns all his share in the concern to two of the continuing partners, upon trust for his infant children, in such shares as he should appoint, and in default of appointment upon trust for the children, to be divided amongst them, when the youngest shall attain to twenty-one. Held, that the contingent interest the father had in the share so assigned depending upon the death of any of the children under twenty-one, was such an interest reserved by him in the concern as, with reference to creditors, prevented determination of the partnership. *Ex parte Williams*, 1 Buck. 48.

8. In the case of a partner retiring, with notice of a trust.

A general devisee in trust for the testator's widow and children having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the estate, in settling the affairs of the partnership on the retirement of one partner, who had notice of the trust, delivered to him the bonds to be cancelled without the privity of the *cestui que trust*; continuing to make remittances

tances on that account from the funds of the new partnership; the partner, who retired, is not discharged. *Dickenson v. Lockyer*, 4 Ves. 36.

9. The consequence of dissolution is a general sale and account of the joint property.

The consequence of the dissolution of partnership, where there are no articles prescribing the terms, is a general sale and account of the joint property; one or more partners therefore cannot insist on taking the share of another at a valuation; or that he shall remove his proportion from the premises; thereby securing the good-will. *Featherstonhaugh v. Fenwick*, 17 Ves. jun. 298.

10. Admissibility of parol evidence to extend the effect of an award touching the good-will of the trade.

On one of two partners retiring from trade, it was left to arbitrators to determine (among other things) what was to be paid to the retiring partner for the good-will of the trade; and they, on an understanding that the retiring partner would not set up the trade in the same street, or its vicinity, awarded 500*l.* as the share of the retiring partner, for the good-will which was paid, but no mention was made in the award as to the retiring partner not carrying on the trade in the same street, or its vicinity. Afterwards, he having set up the trade in the same street, a decree was made, on parol evidence of the understanding upon which the award was made, enjoining him, on the ground of fraud, from carrying on the same trade in the same street, or its vicinity. *Harrison v. Gardner*, 2 Mad. 198.

11. Payment to partners, after dissolution.

Bill by assignees of a bankrupt claiming a debt, which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring, and the bankrupt continuing, dismissed: the terms of the alleged arrangement not being made out, so as to establish the right, in equity of the bankrupt, against the legal right of the other partner. The other questions, therefore, were not determined: 1st, Whether a demand, the result of an over-payment, in advance, upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchants' accounts in the statute of limitations: 2dly, As to the effect of that exception: whether including merchants' accounts generally or those only with items continuing within the six years: 3dly, Upon the objection of laches, independent of the statute. *Duff v. East India Company*, 15 Ves. 198.

12. Continuance after dissolution, for the purpose of winding up.

Partnership may, after the determination of it by the contract of the partners, continue for the purpose of winding up engagements with third persons. 15 Ves. 226.

## XXII. *In relation to the time and mode of accounting.*

1. The right, when not lost by laches.

Account directed four years after dissolution, circumstances showing that the partner retired from a conviction that the partnership was insolvent. *Anderson v. Maltby*, 4 B. C. C. 423.

2. The presumption is in favour of equal moieties.

Partnership, without any stipulation as to the proportions; the partners entitled in equal moieties. *Peacock v. Peacock*, 16 Ves. 49.

3. Allowance for the expence of entertaining customers.

The court cannot make any allowance to one partner for the expence of entertaining the customers. The accounts having been annually balanced without such an item, is conclusive. *Thornton v. Proctor*, 1 Anst. 94.

XXIII. *On the*

**XXIII. What acts amount to a waiver of partnership articles.****1. Acts *in pais*.**

Where articles of partnership contained a clause providing for the settlement of the partnership accounts annually, upon a certain day, and that upon the death of a partner this share should be taken and paid for by the survivors, according to the account next before his death; but the parties had for several years omitted to settle the accounts annually, and had engaged in adventures rendering it difficult that they should do so. Held, that the clause relative to the annual settlement of accounts was to be considered as waived, and that a deceased partner's share was liable to losses, happening after his death, on adventures previously existed and unclosed; and an injunction was granted against proceeding at law against the surviving partners, on a bond given to the executors of the deceased partner, before the accounts were taken. *Jackson v. Sedgwick*, 1 W. C. C. 297.

**2. Presumption of a different agreement, from the conduct of the parties.**

The conduct of the parties in a partnership, may supersede the stipulations of the articles, and raise a presumption of assent to a different agreement, and an approbation of a mode of dealing with the partnership funds, from their knowledge of, and acquiescence in it. *Ex parte Harris*, 1 Rose, 487.

**XXIV. In relation to bankruptcy.****1. Right of joint creditors to prove against separate estate.**

C. and D. were in partnership, and the same was dissolved. D. carried on afterwards a trade, and became bankrupt, and C. was insolvent. Held, that the joint creditors of C. and D. could not prove against the separate estate of D. *Ex parte Janson*, 3 Mad. 229.

**2. A partner cannot claim in competition with the joint creditors.**

A partner cannot claim in competition with the joint creditors. 17 Ves. jun. 521.

**3. Lien of the separate estate of one partner, upon the other's share of a surplus of the joint estate, under a joint commission.**

Equitable right of partners, subject to the joint debts, depending upon the result of the account between them; therefore, under a joint commission of bankruptcy, the separate estate of one has a lien on the other's share of a surplus of the joint estate, in respect of a debt proved under bills drawn in the name of the firm, for a separate debt, and may come in with the other creditors for the deficiency. *Ex parte King*, 17 Ves. jun. 115.

**4. Mode of distribution, whether affected by articles of partnership.**

By deed of partnership between A., B., and C., it was provided, that in case of a dissolution of the partnership by the death, or certain act of misconduct of any partner, or by notice, the other partners should have the option of taking his share at a valuation, to be paid by yearly instalments, the last of which was not to be payable till seven years after the dissolution; and that in case of the bankruptcy or insolvency of a partner, the partnership should be dissolved, the property sold, and the produce divided among the parties, according to their proportions. The partners, four years afterwards, by another deed, recited and declared it to have been their intention in the former deed, that the same mode of arranging the partnership concerns should take place, in case of the bankruptcy or insolvency of a partner, as in the cases of dissolution by death, notice, or misconduct. B. became bankrupt, four months after the last deed was executed. Held, that on B.'s bankruptcy, the partnership effects were to be disposed of, as if the second deed had not been made. And, *semble*, such a provision, even if it had

had been in the first deed, would have been void, as against the policy of the bankrupt laws. *Wilson v. Greenwood*, 1 W. C. C. 223.

**5. Obligation of one partner making bankrupt the other, to refund a proportion of a premium paid.**

One partner making bankrupt another, whom he has prevailed on to join him in his business (an attorney) for a certain term, and to pay him a premium in consideration, will be ordered to refund such part of the premium as shall be commensurate with the remainder of the term. *Hamil v. Stokes*, 4 Price, 161.

**XXV. The meaning of phrases applied in partnership, ascertained.**

The term "good-will."

Good-will of a trade in two distinct senses, as between a continuing and a withdrawing partner; one, as it necessarily arises out of, and is connected with ownership; the other, where it is made matter of contract, as not to carry on the same trade, or not within a certain distance, &c. *Kennedy v. Lee*, 3 Mer. 452.

**XXVI. Of the media through which the existence of a partnership may be established.**

Not by the evidence of the partners, and their private communications.

A partnership cannot be established by the evidence of the partners, and their private communications. The fact must be proved *aliunde*. For want of such proof, a commission against the ostensible partners was sustained. *Ex parte Benfield*, 5 Ves. 424.

**XXVII. In relation to the statute 6 Geo. 1. c. 8. s. 18.**

Legality of a partnership of 1600 shares.

As to the legality of a partnership of 1600 shares, (see statute 6 Geo. 1. c. 18. s. 18.) and, if legal, the capacity of some to sue for a dissolution on behalf of the rest, and as to the necessity of an offer of contribution to losses, &c. *quære*. *Carlew v. Drewry*, 1 Ves. & Beam. 154.

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PATENT.

**I. To what ends a patent is essential.**

There can be no exclusive right in an invention without one.

**II. What inventions are the subjects of patent.**

1. General rules.
2. Improvements.

**III. What inventions are not the subjects of patent.**

Improvements that cannot be used without the engine for which an existing patent has been granted.

**IV. Of implied conditions.**

1. A patent must be taken under proper restraints.
2. Abuse destroys the exclusive right.

**V. Of the specification.**

1. Of the entirety of the specification.

2. It must be so clear as to enable any one to use the invention on the right expiring.
3. The specification must not cover more than is actually new and useful.
4. Validity of a specification describing the original machine with the improvements, as one entire machine.

#### VI. Of signing and sealing patents.

1. The great seals are distinct for patents.
2. The court will of their own accord, protect the interest of the king and the public.

#### VII. Of the enrolment.

Enrolment cannot be dispensed with, though to keep the specification secret; nor can the time of enrolment be enlarged.

#### VIII. Of amending patents.

By changing the date, where through mistake the enrolment has not been in due time.

### I. To what ends a patent is essential.

There can be no exclusive right in an invention without one.

No exclusive right in a subject not protected by patent, preventing sale by another person under the same title, not assuming the name and character of the plaintiff. *Canham v. Jones*, 2 Ves. & Beam. 218.

### II. What inventions are the subjects of patent.

#### 1. General rules.

To establish the validity of a patent, the invention must be both new and useful, and the specification must accurately describe it. Also, if the specification seeks to cover more than is actually new and useful, it vitiates the patent, rendering it ineffectual, even to the extent to which it might otherwise have been supported. *Hill v. Thompson*, 3 Mer. 629.

#### 2. Improvements.

1. Injunction upon possession under a patent; until the right can be tried; though subject to considerable doubt: the patent being for improvements upon a machine, the subject of a former patent, expired; and the specification describing the original machine, with the improvements, as one entire machine, the subject of the latter patent; not distinguishing the improvements. *Harmer v. Plane*, 14 Ves. 190.

2. Patent for improvements valid: but not to restrain the use of the original machine. 14 Ves. 133.

3. Patent granted for an improved steam engine; as not infringing upon an existing patent. *Ex parte Fox*, 1 Ves. & Beam. 67. If the improvements could not be used without the engine for which a patent has been granted, they must wait the expiration of the patent. *Ibid*.

### III. What inventions are not the subjects of patent.

Improvements that cannot be used without the engine for which an existing patent has been granted.

Vide 1 V. & B. 67.

### IV. Of

## IV. Of implied conditions.

1. A patent must be taken under proper restraints.  
A patent must be taken under proper restraints. 1 Ves. 128.
2. Abuse destroys the exclusive right.  
Patent even in fee could not stand if abused. 1 Ves. 118.

## V. Of the specification.

1. Of the entirety of the specification.  
Vide 3 Mer. 629.
2. It must be so clear as to enable any one to use the invention on the right expiring.  
To support a patent, the specification should be so clear, as to enable all the world to use the invention from the moment of the expiration of the patent. *Newbury v. James*, 2 Mer. 446.
3. The specification must not cover more than is actually new and useful.  
Vide 3 Mer. 629.
4. Validity of a specification describing the original machine with the improvements, as one entire machine.  
Vide 14 Ves. 190.

## VI. Of signing and sealing patents.

1. The great seals are distinct for patents.  
Since the union of Great Britain and Ireland, the great seals are distinct for patents among other purposes. 6 Ves. 708.
2. The court will of their own accord, protect the interest of the king and the public.  
1. The court refused to seal a patent for representing Italian operas ; because the provisions for carrying it on were by agreement with the lord chamberlain, his executors and administrators ; and the right to the patent was not sufficiently connected with the property in the house. Not sufficient for the party applying merely to answer objections : but he must lay a proper case. Upon such application, the court will take care that the king is not deceived, nor his object disappointed : and will represent the whole to the king ; but will not decide upon the merits of the various claimants. *Ex parte O'Reilly*, 1 Ves. 112.
2. Court will not sign a patent, which does not put the parties under some control, though there is no *caveat*. 1 Ves. 113.

## VII. Of the enrolment.

- Enrolment cannot be dispensed with, though to keep the specification secret ; nor can the time of enrolment be enlarged.
1. Enrolment of a patent cannot be dispensed with, for the purpose of preventing the specification being made public. *Ex parte Koops*, 6 Ves. 599.
  2. After a patent has passed, the time for enrolment cannot be enlarged without an act of parliament. *Ibid*.

## VIII. Of amending patents.

- By changing the date, where through mistake the enrolment has not been in due time.
- The date of a patent cannot be altered, though it has not been enrolled in due time by mistake. *Beck ex parte*, 1 B. C. C. 578.

## PEER.

## I. Of the paraphernalia which descend with the title.

The journals of the house of lords.

## II. Of the privileges of Irish peers.

They are entitled as are English peers, except to sit in the house of lords.

## I. Of the paraphernalia which descend with the title.

The journals of the house of lords.

Whether the journals of the house of lords, delivered to a peer, go with the title, *quære*. Upton v. Lord Ferrers, 5 Ves. 801.

## II. Of the privileges of Irish peers.

They are entitled as are English peers, except to sit in the house of lords.

Since the union with Ireland, Irish peers, with the exception of those who are members of the house of commons, are entitled to every privilege, except sitting in the house of lords, and therefore to the letter missive. Robinson v. Lord Rokeby, 8 Ves. 601.

## PENALTY.

## I. When a sum shall be considered a penalty; when liquidated damages.

1. In the case of an agreement not to do an act, and entry into a bond with a penalty, to be forfeited on his doing it.
2. Bond for performance of covenants to build a bridge, and the money secured, being the sum actually paid.
3. In the case of a covenant upon the sale of good-will.

## II. Whether the amount of the penalty limits the extent of the security.

Interest on an old bond cannot be allowed in the master's office, beyond the penalty.

## III. In relation to the stat. 8 &amp; 9 Will. 3.

It is remedial for the purpose of recovering successive breaches to the extent of the penalty.

## I. When a sum shall be considered a penalty; when liquidated damages.

1. In the case of an agreement not to do an act, and entry into a bond with a penalty, to be forfeited on his doing it.

If a man agree not to do an act, and enter into a bond, with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price

price for doing such act: but the court will relieve, by injunction, until the actual damage sustained shall be ascertained by an issue. *Hardy v. Martin*, 1 Cox, 26.

2. Bond for performance of covenants to build a bridge, and the money secured, being the sum actually paid.

Bond for performance of covenants to build a bridge, and the money secured, being the sum actually paid; yet an injunction granted to restrain an action on the bond; and an issue *quantum damnificatus* ordered, the sum contained in the bond being a penalty. *Evrington v. Aynesley*, 2 B. C. C. 341.

3. In the case of a covenant upon the sale of good-will.

Distinction between penalty and liquidated damages, under a covenant upon sale of good-will. 14 Ves. 469.

II. Whether the amount of the penalty limits the extent of the security.

Interest on an old bond cannot be allowed in the master's office, beyond the penalty.

Interest on an old bond cannot be allowed in the master's office, beyond the penalty. *Tew v. Earl of Winterton*, 3 B. C. C. 489; *Knight v. Maclean*, 3 B. C. C. 496.

III. In relation to the stat. 8 & 9 Will. 3.

It is remedial for the purpose of recovering successive breaches to the extent of the penalty.

The statute 8 & 9 Will. 3. remedial for the purpose of recovering successive breaches to the extent of the penalty. 5 Ves. 331.

## PERJURY.

I. Qualities essential to the crime.

The facts sworn must be both false and material.

II. Of perjury, by answer, in equity.

1. Course of proceeding, on application to take answer off the file, to found a prosecution.
2. Explanation by a second answer, does not render the first innocent.
3. Bill retained, that plaintiff might indict defendant for perjury.

III. Of the proof of the crime.

1. Two witnesses are requisite.
2. The original affidavit, not merely an office-copy, must be laid before the grand jury.

IV. Of false swearing, short of perjury.

It may be indictable as a misdemeanor.



**I. Qualities essential to the crime.**

The facts sworn must be both false and material.

To convict for perjury, what is sworn must be both false and material. 8 Ves. 38.

**II. Of perjury, by answer, in equity.**

1. Course of proceeding, on application to take answer off the file, to found a prosecution.

On an application to take an answer off the file, to ground a prosecution for perjury; the court has no jurisdiction to inquire, whether there be probable grounds for the prosecution, or what may be the motives of the prosecution; it being only interested to see, that the record be not defaced. *Stratford v. Greene*, 1 Ball & Beatty, 294.

2. Explanation by a second answer, does not render the first innocent.

Explanation by a second answer, does not take away the opportunity of indicting upon the former answer. 2 Ves. & Beam. 258.

3. Bill retained, that plaintiff might indict defendant for perjury.

Bill retained, in order that the plaintiff might indict the defendant for perjury. *Fell v. Chamberlain*, Dick. 484.

**III. Of the proof of the crime.**

1. Two witnesses are requisite.

Distinction of perjury; requiring two witnesses. 13 Ves. 134.

2. The original affidavit, not merely an office-copy, must be laid before the grand jury.

The original affidavit ought to be laid before the grand jury, in order to find bills of indictment for perjury; the office-copy is not sufficient. Though otherwise in case of a civil action. *Keenan v. Boylan*, 1 Sch. & Lef. 232.

**IV. Of false swearing, short of perjury.**

It may be indictable as a misdemeanor.

False swearing, not strictly amounting to perjury, is an indictable offence as a misdemeanor. *Ex parte Overton*, 2 Rose, 257.

**PLEDGE.****I. Effect of a deposit.**

Lease deposited to secure a debt; the depositary decreed to take an assignment.

**II. Obligations of a depositary.**

1. Bailee, though without reward, accepting the office, bound throughout.

2. A custodee shall account, in a suit on behalf of creditors, in the same manner as mortgagee in possession.

**I. Effect of a deposit.**

Lease deposited to secure a debt; the depositary decreed to take an assignment.

Lease deposited to secure a debt: depositary decreed to take an assignment,

ment, paying the costs of it; and cannot abandon, because, being entitled to a legal conveyance, equity will consider him as having it. *Lucas v. Comerford*, 1 Ves. 235.

## II. Obligations of a depositary.

1. Bailee, though without reward, accepting the office, bound throughout.

Bailee, though without consideration, accepting the office, bound throughout: for instance, by a direction to insure. 13 Ves. 158.

2. A custodee shall account, in a suit on behalf of creditors, in the same manner as mortgagee in possession.

A custodee shall account, in a suit on behalf of creditors, in the same manner as mortgagee in possession. *Latouche v. Lord Dunsany*, 1 Sch. & Lef. 137.; *Lord Dunsany v. Latouche*, Id. 154.

## POLITICAL.

### I. When a country shall be bound by the acts of its subjects.

Acts done by subjects, under powers given by the country.

### II. Right of a foreign state to sue in our courts.

1. A state not acknowledged by this country.
2. Vide in tit. CHANCERY.

### I. When a country shall be bound by the acts of its subjects.

Acts done by subjects, under powers given by the country.

Acts done by subjects, under powers given by the country, bind the country; as signing of plenipotentiary in its own nature, though that is not now understood to bind till ratification. 1 Ves. 392.

### II. Right of a foreign state to sue in our courts.

A state not acknowledged by this country.

Whether a foreign state, not acknowledged by this country, can maintain a suit here, viz. the government of Switzerland, in consequence of the revolution, suing for stock, vested in trustees by the former government, *quare*. *Dolder v. Huntingfield*, 11 Ves. 283.

## POWER.

### I. Nature, class, and properties of.

1. How viewed in equity.
2. Power and property distinguished.
3. It does not prevent the fee from vesting.
4. Nor does it suspend the vesting of remainders.
5. Of usual powers in settlements.
6. Of leasing powers.

### II. By what words created.

1. Whether power or interest.

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2. In

2. In the case of a woman *cestui que* trust of a reversion, and about to marry.
3. Of implication.

### III. ~~Whether~~ valid or void.

As creating a perpetuity.

### IV. Subjects of.

Estate purchased with trust-fund.

### V. Appointor, his rights and interests.

1. To bequeath.
2. Under power to appoint amongst children.
3. To file a bill.

### VI. Construction of powers.

1. Upon whom conferred.
2. Who may be appointees, and to what amount.
3. Power to appoint land.
4. Power to appoint estates to be purchased with others.
5. Power to appoint money.
6. Power to invest trust-money.
7. Power of sale.
8. Power of exchange.
9. Power of sale or exchange.
10. Power of charging.
11. Power of raising portions.
12. Power of partition.
13. Power of changing uses.
14. Whether a power of revocation.
15. Leasing powers.
16. In relation to the time of execution.
17. In the case of a limitation in default of appointment at twenty-one.
18. Implication in default of appointment.
19. A special and a general power of sale, conferred by distinct instruments.
20. Where the words "from time to time," in a clause to appoint rents and profits, are omitted in a clause to appoint personalty.
21. Priority of a power over antecedent limitations.

### VII. Execution of powers.

1. Its effect, and when requisite.
2. Cannot be delegated.
3. Conditional.
4. Partial.
5. Need not recite or refer to the power.
6. Nor recite an intention to execute it.
7. By what instruments.
8. By separate instruments.

9. When

9. When an instrument operates as an appointment; when not.
10. With reference to the subject matter.
11. With reference to the time of execution.
12. With reference to the extent.
13. With reference to a partial invalidity.
14. Void for excess only.
15. Must not be illusory.
16. Though at law, there is no execution that is illusory.
17. And in equity, an execution *quasi* illusory, is good, under circumstances of advancement, or otherwise.
18. Must not be fraudulent.
19. Who are appointees.
20. Who an appointee, under the execution of a leasing power of renewal.
21. Effect of the appointee's releasing the fund.
22. Revocation of.
23. Under a power to appoint among children.
24. Of a power to change uses.
25. By a *feme covert* of her sole interest.
26. By a *feme covert* in the lifetime of her husband.
27. Notwithstanding a covenant in restraint.
28. Priority.

### VIII. Defective execution.

1. Defined.
2. The consequences.
3. Whether aided at law.
4. Whether aided in equity.
5. Favour of children.
6. Whether void for excess only.

### IX. Non-execution.

1. Defined.
2. Whether aided in equity. — Vide *infra*, X.

### X. Whether equity will aid a defective or non-execution.

1. Distinction in this respect between equity and law.
2. The grounds upon which equity supplies defects in the execution of powers.
3. Pursuant to the intent.
4. Whether by accelerating valid limitations.
5. Whether in favour of children.
6. Whether in favour of a husband.
7. Whether in favour of creditors.
8. Whether in favour of purchasers for value.
9. Whether to fulfil a testator's intention.
10. Whether against a remainder-man.
11. Whether, where to aid it, would support a fraud.
12. Whether it will supply the want of execution.

### XI. Extinguishment and discharge of power.

1. By complete execution.
2. By partial execution.

3. By merger.
4. By satisfaction.
5. By the death of an appointor.
6. By the death of an appointee.

### I. Nature, class, and properties of.

#### 1. How viewed in equity.

Powers, in this court, considered as trusts. 5 Ves. 856.

#### 2. Power and property distinguished.

1. Distinction between a power and absolute property. A power, unless executed, not assets for debts. *Holmes v. Coghill*, 7 Ves. 499.

2. Distinction between a power and absolute property. A power, unless executed, not assets for debts. *Holmes v. Coghill*, 12 Ves. 206.

3. Distinction between property and power. *Bradley v. Westcott*, 13 Ves. 445.

#### 3. It does not prevent the fee from vesting.

1. Power of appointment does not prevent the fee vesting, subject to be divested by execution of the power. Such a power is a mode, which the owner of the estate reserves to himself, or gives to another, through the medium of the statute of uses, of raising and passing an estate. 10 Ves. 265.

2. Limitation to such uses as A. shall appoint; and in default of appointment to him in fee: the fee is in him until appointment. 7 Ves. 583.

#### 4. Nor does it suspend the vesting of remainders.

Under marriage articles 15,000*l.* was vested in trustees on trust, together with 5000*l.*, covenanted by the husband to be paid, to be laid out in land to be settled upon the husband for life; remainder to the wife for life; remainder to the use of such child and children, in such shares, for such estates and subject to such powers, limitations, and provisions as the husband and wife, or the survivor, should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust-fund in an estate lately purchased by the husband for 16,300*l.*, and directing them to deliver the said stock, &c. to him at the price they were at on the day of the purchase; which was done. The wife died. There were two daughters. The father by will, reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention, that the said purchase should be an investment of the trust-fund, but that the said fund with its increase should be taken out of his personal estate, gave 10,000*l.* part of the trust-fund, in trust to be laid out in land to be conveyed to one daughter for her life, for her separate use; remainder to her children in tail; remainder to the other daughter in fee, for whom he also appointed the residue of the fund, but revoked that by codicil, reciting a portion given on her marriage. Held, 1st, that grandchildren are not objects of the power, but the excess only would be void: 2dly, the fund with its increase was invested in the purchase: 3dly, there was no appointment of the estate or money due on the covenant: 4thly, the remainders in default of appointment are vested, subject to be divested by appointment, and will take effect as to what is ill-appointed or unappointed: 5thly, the share of a daughter, to whom the portion was advanced on marriage, was thereby satisfied. *Smith v. Lord Camelford*, 2 Ves. 698.

#### 5. Of usual powers in settlements.

1. Powers of sale and exchange inserted in a settlement, under a clause in articles for all usual powers. *Peake v. Penlington*, 2 Ves. & Beam. 311.

2. Powers

2. Powers of selling, exchanging, and investing in new purchases, usual. Ves. & Beam. 311.

6. Of leasing powers.

Power to make leases is to be construed as liberally as powers of jointuring, charging, &c.; and a contract to make a lease pursuant to a power shall be as binding as a contract to make a jointure or charge pursuant to a power. Shannon v. Bradstreet, 1 Sch. & Lef. 52. 61.

## II. By what words created.

### 1. Whether power or interest.

1. Where a particular, limited, interest and a power concur, though the latter alone might amount to an absolute gift, they are distinct. 7 Ves. 398.

2. Effect of power to dispose; amounting to property; notwithstanding a limitation of what should be left undisposed of; from the uncertainty. 13 Ves. 451.

3. Distinction, though slight, established between gifts for life, and indefinitely, with power of disposition. The latter vests the property without appointment: the former requires appointment. Ibid. 453.

4. Where a person has an absolute and general power of appointing a fund as well in his lifetime as at his death, and there is no gift over, yet if no appointment be made, his administrator cannot claim the fund, and even creditors will not be entitled to the benefit of it without some step taken towards an appointment, though, where any such appointment be made, the court will arrest the fund *in transitu* for the benefit of creditors. Harrington v. Harte, 1 Cox, 131.

5. Testator devised to his wife several houses; to his sisters his money in securities for their lives; then divided his fortune in small legacies; but the legatees to take nothing till the death of his wife and sisters; and made residuary legatees: under the following clause, "I empower my wife to give away at her death 1000*l.*; to A. and B. 100*l.* each, the rest to be disposed of by her will:" there is no absolute legacy, but a naked power to the wife; who being dead without any disposition, the objects specified are not entitled. Bull v. Vardy, 1 Ves. 270.

6. Testator gave 1000*l.* stock to a married woman for her separate use, and whenever she should die, to be absolutely in her own power to dispose of by will or writing purporting to be her will, to any person or persons, purpose or purposes she should think proper: but in case of failure of any such disposition or appointment, to go over: this is not a power, but an absolute gift, qualified only to exclude the husband upon the death of his wife: therefore it passed by general words in her will. Hales v. Margerum, 3 Ves. 299.

7. Investment of stock directed in trust to pay the dividends to the testator's son for life; and after his death to transfer part of the capital according to his appointment: an interest for life only, with a power. Nannock v. Horton, 7 Ves. 391.

8. An express estate for life, with a power to dispose by will, does not give the absolute interest, so as to preclude the necessity of executing the power. An execution by will, revoked by a subsequent conveyance upon a sale by the tenant for life, having obtained the legal estate; and that not being an execution within the intent of the power, the estate passed under a general residuary devise against the purchaser. Reid v. Shergold, 10 Ves. 370.

### 2. In the case of a woman *cestui que* trust of a reversion, and about to marry.

A woman being entitled to the trust of a reversion in fee of lands, by articles previous to her marriage, reserves to herself a power of disposing of all

all her estate to such uses as she should think proper: an appointment afterwards made by her in favour of her husband and children, held good, although no conveyance of the reversion was ever executed. *Wright v. Lord Cadogan*, 2 Eden, 239.; Amb. 468.; 1 Tomb. P. C. 486.

### 3. Of implication.

Powers must be expressed, not implied; and are construed strictly. Though defects in execution are in certain cases supplied in equity: the want of execution cannot be supplied. 13 Ves. 114.

## III. Whether valid or void.

As creating a perpetuity.

Power of alteration of estates tail as they were to come *in esse* into tenancies for life, held void. *Heath v. Heath*, 2 Eden, 331.

## IV. Subjects of.

Estate purchased with trust-fund.

Vide 2 Ves. 698.

## V. Appointor; his rights and interests.

### 1. To bequeath.

An interest under a power of disposition is not before execution the estate of the party; and will not pass by general words; nor are they alone sufficient to dispose free from incumbrance. 1 Ves. 525.

### 2. Under power to appoint amongst children.

Gift to A. and his issue to be divided among them, as he thinks fit: the issue have an interest at all events; and A. has no authority but as to the proportions. If no appointment, equally. Where to be divided among issue, the proportions must not be illusory. "*Issue*" will extend to any remote degree, as a description of objects of the power of A. to distribute among them, as he thinks fit: but they must all be in existence during his life. 1 Ves. 150.

### 3. To file a bill.

Interest under power of appointing, the application of a charity not sufficient to sustain a bill. *Attorney-general v. City of London*, 1 Ves. 243.

## VI. Construction of powers.

### 1. Upon whom conferred.

Power under an act of parliament to lessee, his executors, administrators, and assigns, to grant building leases, does not extend to the tenant in a renewed lease, according to the usual course of church leases. *Collett v. Hooper*, 13 Ves. 255.

### 2. Who may be appointees, and to what amount.

1. Under a power to appoint to and among several persons, each of the objects must have a part: but a court of law will not enter into the amount of the share appointed. 4 Ves. 785.

2. Not now the rule, that under a power to appoint among several objects they must take equally, unless a good reason appears. 5 Ves. 859.

3. Under a power of appointment, discretionary as to the shares, the distribution may be unequal, the inequality considerable, and no reason assigned; until it becomes such as to render some share illusory. 9 Ves. 397.

4. The donee of a power cannot appoint to any persons, not the objects of the power. *Palmer v. Wheeler*, 2 B. & B. 27.

5. Appointment void as far as it exceeds the power: viz. to grandchildren under

under a power to appoint to children. *Butcher v. Butcher*, 1 Ves. & Beam. 79.

6. The old practice of executing a power of appointment after the death of one of the objects, by giving part to the survivors, and letting the rest go, as in default of appointment, among all, incorrect. 1 Ves. & Beam. 92.

7. Agreement by one of the objects of a power of appointment to return a part in consideration of an appointment in its favour, is a fraud in the appointee as well as in the appointor, both on the other objects of the power and on the party who would take in default of appointment. *Daubeny v. Cockburn*, 1 Mer. 644.

8. *Secus*, where the appointee is not privy to the corrupt agreement. *Daubeny v. Cockburn*, 1 Mer. 645.

9. Appointment to one child under a power of appointment to one or more, is good, if fairly made; but if fraudulent, has no consideration to support it. *Daubeny v. Cockburn*, 1 Mer. 644.

10. Power to appoint to the use of such child and children, &c.: an appointment to one or more good. 5 Ves. 857.

11. Settlement upon such child or children as the father should appoint. Appointment excluding one established. *Kenworthy v. Bate*. 6 Ves. 793.

12. Bequest to such of the children of A. as B. shall by will, direct; and, in default of such direction, among the children, share and share alike. B.'s disposition by will, in favour of the children living at her death, established against the claim of one born afterwards, under the general words. *Paul v. Compton*, 8 Ves. 375.

13. Voluntary bond to pay to and among all such child or children of A., in such parts, &c. as the obligor should by deed or will appoint; and for want of appointment, and as to what should be unappointed, to and among all such child or children of A. as might survive the obligor. Appointment by will, of the whole fund to one of six children established. *Wollen v. Tanner*, 5 Ves. 218.

14. Appointment to a deceased child or its representatives, void. 1 Ves. & Beam. 91.

15. Under a power to appoint among children, interests may be given to grandchildren by way of settlement, with the concurrence of their mother, an object of the power, and her husband. *White v. St. Barbe*, 1 Ves. & Beam. 399.

16. Power of appointment in a marriage settlement, held to comprehend, as to its objects, all the children of the marriage, and to be confined to such of the children only as should be living at the death of the survivor of the parents. *Howgrave v. Cartier*, *Cooper*, 66.

17. Bequest to executors in trust that they shall pay, &c. unto and amongst the testator's two brothers and his sister, or their children, in such shares, &c. and at such times, &c. as the trustees, or the major part, or the survivor, his executors, &c. shall think proper. All the children living at the death of the testator held entitled with the parents, *per capita*: the court not having a discretion. *Longmore v. Broom*, 7 Ves. 124.

18. A power to divide among children is not well executed by giving to one of them for life, with remainder to his sons in tail. *Robinson v. Hardcastle*, 2 B. C. C. 22, 344. *S. P.*; but that the property shall go *cy pres*. *Pitt v. Jackson*, 2 B. C. C. 51.

19. By articles, the wife's fortune and an equal sum advanced by the husband, were agreed to be settled for the husband for their joint lives; and if he should die first, leaving issue by her, for her life; after her decease, as to the capital, in such manner as he should appoint; in default of appointment to be divided equally among the issue at twenty-one, with maintenance and survivorship; after marriage, in pursuance of the articles, an estate purchased with the fund was settled upon the husband, for the joint lives of him and his wife; remainder to trustees to preserve, &c.; remainder, in case of



his death, first, without issue, to certain uses; remainder, in case of his death, first, leaving any child or children, to the wife for life; remainder to all the children, in such shares as the husband should appoint; for want of appointment, equally in tail, with cross-remainders, remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children, as he shall appoint, is an excess of power; and the doctrine of *cy pres*, by giving the child an estate tail, is not applicable; but the appointment is void for the excess only; and what is ill-appointed goes as in default of appointment. *Bristow v. Warde*, 2 Ves. 336.

20. Personal settled on marriage, for the husband for life, then for the wife for life, then to and among all and every the children and grandchildren or issue, in such shares, under such restrictions, at such times, and in such manner, as they or the survivor should appoint by deed or deeds, or will; for want of appointment, to all and every the children and grandchildren or issue living at the decease of the survivor, equally payable at twenty-one or marriage; if but one, to that one; provided that in case of no appointment, the issue of any children dead should not have a greater share than their parents would have had; issue only are within the power; but in any degree; but an appointment to any issue not living, must be restrained to twenty-one years, after lives in being at the creation of the power; otherwise it is void, even as to such as come *in esse* within those limits; but on marriage of a daughter, interests may be given to her children generally and to the husband. What is ill-appointed goes as in default of appointment; but children of a living parent cannot take under the proviso. *Routledge v. Dorrill*, 2 Ves. 357.

21. Trust in marriage articles, to pay certain funds, the property of the wife, to all and every her child and children, in such parts, shares, and proportions, as she should by will, give, &c.; and for want of such gift, &c. to all and every her child and children, part and share alike; and for want of such issue, over. By her will, she gave ten guineas, part of the fund, to her eldest son, declaring, that he was otherwise provided for by the will of his uncle; and the remainder she gave to all her other children, naming them, equally, with survivorship in case of the death of any during minority, and before receipt of his, her, or their shares; and in case of the death of her eldest son before he comes to the possession of his uncle's fortune, she gave her second son only ten guineas. The only provision of the eldest son was a remainder in tail, after the life-estate of his father; who survived his wife. The court was of opinion, 1st, that children illegitimate, being born after elopement, and no access, clearly could not take: 2dly, that the share appointed to a child, who died in the life of her mother, lapsed: but the case was determined upon the third point; that under the circumstances the appointment of ten guineas was illusory; and therefore the whole was void; and the fund was distributed among the surviving children, and the representative of the deceased child; the interest vesting on the birth, liable to be vested only by appointment. *Vanderzee v. Aclom*, 4 Ves. 771.

22. Settlement in pursuance of articles, previous to marriage, to convey to the use of the husband for life; remainder to wife for life; remainder upon trust to convey unto and amongst all and every or any of the children in such parts and proportions, &c. as the husband and wife, or the survivor, should by deed or writing with or without power of revocation, or by will, appoint: in default of appointment, to the first and other sons in tail male; remainder, subject to trusts that failed to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation and re-appointment by the husband and wife and the survivor, well revoked by the wife surviving; and by the same deed a re-appointment to the daughter and two sons successively for life, with remainders in tail to the grandchildren, and the ultimate remainder to the daughter in fee, void for the excess beyond the power, viz. the estates to the grandchildren, and the ultimate

limitation upon them to the daughter ; and the principle of *cy pres* not applicable ; all beyond the life-estates of the children, therefore, to go as in default of appointment. *Brudenell v. Elwes*, 7 Ves. 382.

23. Father, tenant for life, with a power to appoint the fee among his sons in such shares as he pleased, by one deed, upon the coming of age of his eldest son, appoints the fee to him ; by a second deed, dated two days after, the son is made to join the father in a mortgage, to secure a debt due by the father ; and by a third deed, dated the next day, the son is made tenant for life, of the equity of redemption, with remainder to his issue in tail male, reversion in fee to the father, and an additional charge for the younger children of the father is created : on bill, by the son of the appointee, to be relieved from the additional charge and mortgage ; held : 1st, that the deed, so far as it charged the additional sum for younger children, was good, but the limitations void, and the excess connected : 2dly, that the mortgage was a fraud upon the power, the father deriving a benefit to himself, and declared void, the mortgagee having notice of it. *Palmer v. Wheeler*, 2 B. & B. 18.

24. Father having power to appoint among children, and purchasing the share of one, cannot by appointment entitle himself to more than the share of that child in default of appointment. 2 Ves. 714.

25. Appointment by father and son, under a power, of money charged on an estate ; that in case the son should survive, it should be applied by him in and towards payment of the debts of the father ; and subject thereto, the residue, if any, should go and be considered as part of the personal estate of the father ; and in case the father should survive, it should go and be paid by him, his executors, &c. in and towards satisfaction of his debts, with a similar provision as to the residue. The father surviving, appointed in favor of another son, for valuable consideration, as to part. As to that the decree directed payment under the appointment ; the residue to be paid into court, with liberty to apply in case of no application within twelve months, to be paid according to the appointment. *Lady Clinton v. Lord Robert Seymour*, 4 Ves. 440.

26. Under a power to appoint among younger children, one who becomes an eldest, cannot take a share appointed to him *nominatim*. *Broadmead v. Wood*, 1 B. C. C. 77.

27. Power of appointment to or among one or more younger children, in default of appointment equally. One of two objects being removed by the effect of an express satisfaction, by way of advancement, the other takes the whole, as in the case of death, by analogy to the customs of London and York. *Folkes v. Weston*, 9 Ves. 456.

28. Where a person has a power of distribution among poor relations, he may distribute among all poor relations however remote : but where the court is called on to distribute on the failure of the person so empowered, it will confine itself to relations within the statute of distributions. 1 Sch. & Lef. 111.

29. Power to appoint for the benefit of a married woman and her family, would not include the husband in general : but upon the whole, will, an appointment in his favour was established. *Mac Leroth v. Bacon*, 5 Ves. 159.

### 3. Power to appoint land.

1. Power to appoint land, well executed by a charge. 6 Ves. 797.

2. Power to appoint an estate, includes a power to dispose of the estate, and appoint the produce. 1 Ves. & Beam. 478.

3. The same effect has been given in the more doubtful case of a power to charge ; and a power to appoint the money, produced by an estate, directed to be sold, has been considered as a power to appoint the estate itself. *Ibid*.

### 4. Power

## 4. Power to appoint estates to be purchased with others.

Power to appoint estates to be purchased with money produced by the sale of other estates, well executed by an appointment operating directly on the original estates. *Bullock v. Flodgate*, 1 Ves. & Beam. 471.

## 5. Power to appoint money.

Vide 1 V. & B. 478.

## 6. Power to invest trust-money.

Power to lend trust-money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond. *Langston v. Ollivant*, Cooper, 33.

## 7. Power of sale.

1. Power of sale not well executed by a partition. *M'Queen v. Farquhar*, 11 Ves. 467.

2. Whether a power to exchange can be executed by partition, *quære*. 11 Ves. 476.

## 8. Power of exchange.

1. Power to exchange includes making partition. *Abel v. Heathcote*, 4 B. C. C. 278.

2. Power of exchange or partition does not include a power of sale. 11 Ves. 473.

3. *Semble*, a power to exchange does not warrant a partition. *Attorney-general v. Hamilton*, 1 Mad. 214.

## 9. Power of sale or exchange.

Partition of an estate in common is a good execution of a power to sell or exchange. *Abel v. Heathcote*, 2 Ves. 98.

## 10. Power of charging.

1. Power to charge includes a power to sell. 6 Ves. 797.

2. Recovery by tenant in tail, (the tenants for life being dead,) the mortgages outstanding, the debts unpaid, and the trustees for the jointure not parties, valid; as an equitable recovery, if those trustees took a fee: as to the equitable estates; viz. subject to the debts and mortgages, if an estate for life; and, as to the legal estates, if a limitation in a deed can be reduced by implication, the circumstances, that the purpose did not require a fee, that it might disturb subsequent estates in the instrument creating the power, and the restraint of the covenant for quiet enjoyment to the wife's land, could not prevail against the legal effect of the limitation to the trustees and their heirs. *Wykham v. Wykham*, 18 Ves. jun. 395.

3. The proper mode of executing such a power, is limiting a rent-charge to the wife by way of jointure, secured, if not by the ordinary power of entry and distress, by a trust-term for 99 years, with a proviso for *cesser* on payment of the jointure during her life, and all arrears at her death. *Ibid*.

4. Distinction upon the execution of a power in law and equity; a strict, literal, *i. e.* a due execution the same in both; but, though void at law, the substantial intention, upon meritorious consideration, enforced in equity. *Ibid*.

## 11. Power of raising portions.

Devise, subject as to part to a devise to trustees and their heirs, for debts in aid of the personal estate; and as to part, to mortgages in fee, to sons and a daughter, and their respective issue male in strict settlement, &c., with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees, on trust, by the rents and profits, to raise a rent-charge as and for a jointure for any wife or wives for each such wife's natural life only;

only ; and also to charge portions by deed, and to lease for twenty-one years. Execution of the power by conveyance to trustees and their heirs, on trust, by the rents and profits, to raise and pay a jointure during the wife's natural life only ; and charging portions ; with covenant for title and quiet enjoyment by the trustees during the natural life only of the wife. As to the estate of the trustees at law, *quære* : the court of K. B. certifying that they took an estate in fee ; and the court of C. B. that they took no estate whatever. *Wykham v. Wykham*, 18 Ves. jun. 395.

#### 12. Power of partition.

Vide 11 Ves. 473.

#### 13. Power of changing uses.

1. Power to revoke uses, substituting other estates : *quære*, whether a substitution of equitable for legal estates ; though a bad execution at law, is sufficient in equity ; as where it is done by appointment under a power, and declaring uses upon the appointment ; which are consequently mere trusts. *Cox v. Chamberlain*, 4 Ves. 631.

2. Under a power to alter uses the new use will not arise except in the very circumstances prescribed by the contract. 11 Ves. 475.

#### 14. Whether a power of revocation.

Settlement of personal estate upon a second marriage, upon trust, to pay to such persons, &c. as the settler shall by deed or will appoint ; and, in default thereof, to his issue. Construction, upon the whole, that it was to operate ; unless a subsequent instrument should be executed. A prior will therefore revoked. *Leigh v. Norbury*, 13 Ves. 340.

#### 15. Leasing powers.

1. A lease at a fair rent, lessee paying two years rent in advance, secured by lessor's bond, and insurance on his life, not impeachable either as fraudulent on a power to lease without fine, or as being accompanied with a loan of money. *O'Brien v. Grierson*, 2 B. & B. 323. A sale under a decree of the reversion to the lessee at full value, not set aside. *Ibid*.

2. Trustees having power to make leases in possession until *cestui que* trust attained twenty-one, granted a lease in reversion, and another lease after the *cestui que* trust attained twenty-one : such leases held to be bad ; and that being granted by trustees, they could not take effect out of their absolute legal estate in the premises ; and that the receipt of rent by the *cestui que* trust for several years after he attained twenty-one, he being ignorant of the defects in the leases, did not operate as a new agreement ; but as the plaintiff had neglected to look into his rights, and the lessees might have expended money on the premises, no account directed beyond the filing of the bill, and no costs given to the plaintiff. *Bowes v. East London Water-works*, 3 Mad. 375.

#### 16. In relation to the time of execution.

A power was given, by marriage settlement, to the husband, to raise 10,000*l.* for a single younger child when he should think proper : the child (a female) being fourteen years old, he called upon the trustees to raise the portion immediately, and afterwards, the child being dead, filed his bill to have it raised as her administrator. Bill dismissed. *Hinchinbroke v. Seymour*, 1 B. C. C. 395.

#### 17. In the case of a limitation in default of appointment at twenty-one.

Under a general power of appointment among all the children by deed or will, from time to time, &c. ; in default of appointment, equally at twenty-one, &c. : the death of one above that age, does not prevent an appointment to the survivors. *Butcher v. Butcher*, 1 Ves. & Beam. 79.

#### 18. Im-

## 18. Implication in default of appointment.

1. Where there is a power to dispose among children, and there is only one child, the property vests in such child without appointment. *Madoc v. Jackson*, 2 B. C. C. 588.

2. Devise in trust to dispose of the premises unto and amongst the devisee's four children, in such manner, shares, &c. as he should by deed or will appoint: one dying in the life of his father, before appointment, was held entitled to a fourth; the father after that child's death having appointed three-fourths to his three surviving children respectively. *Reade v. Reade*, 5 Ves. 744.

## 19. A special and a general power of sale, conferred by distinct instruments.

A testator having by his will devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given, by his first codicil, a special power of sale over a part of his estates, to be exercised at the request of his son, in favor of his nephew; and, by his second codicil, a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees: the conveyance by the trustees must contain both the particular and the general power of sale. *Greene v. Wigglesworth*, Swanst. 234.

## 20. Where the words "from time to time," in a clause to appoint rents and profits, are omitted in a clause to appoint personalty.

*Quære*, whether the words "from time to time," in a power to appoint rents and profits of real, but omitted in the power to appoint the produce of personal, will prevent a sweeping appointment of the whole, the power extending to the whole after death. *Pybus v. Smith*, 1 Ves. 190.

## 21. Priority of a power over antecedent limitations.

Power by marriage settlement to the husband to charge, not confined to the immediately preceding limitation of the reversion to him; but held to over-reach all the prior limitations. *Stackhouse v. Barnston*, 10 Ves. 453.

## VII. Execution of powers.

## 1. Its effect, and when requisite.

1. Act done under power in a deed, is as if incorporated in the deed, when executed. 1 Ves. 510.

2. The execution of a power of appointment operates by way of limitation of a use under and by the effect of the instrument reserving the power: the fee vesting in the mean time. 10 Ves. 255.

3. Execution of a power is a limitation of a use; which must arise, if at all, at the time of execution; and is, as if expressed in the original settlement. 17 Ves. jun. 457.

4. The execution of a power of appointment operates as a limitation of a use, attaching upon the seisin in the feoffees, &c. under the old instrument. 10 Ves. 264.

5. Execution of a power a limitation of a use, not requiring an immediately preceding estate of freehold. 18 Ves. jun. 416.

6. A power must be executed in order to create a charge. 1 Ves. 272.

## 2. Cannot be delegated.

A power to husband alone to appoint a sum of 4000*l.*, which, in default of appointment, was limited in a particular way, was not well executed by an appointment by husband and wife, of 6000*l.* given in lieu of the 4000*l.* by a subsequent deed, and which 6000*l.* was to go differently in default of appointment. *Hamilton v. Royse*, 2 Sch. & Lef. 315.

## 3. Con-

## 3. Conditioned.

Under a power for raising portions for younger children, an appointment by a charge confined to the particular event of four or more, was not extended by implication from general words in a subsequent part of the deed, providing for the case of no appointment. *Mosley v. Mosley*, 5 Ves. 248.

## 4. Partial.

4000*l.* settled on marriage, in trust, after the decease of the husband and wife, to pay among all and every the child and children, other than an eldest or only son, at such times and in such proportions as he or she, or the survivor, should appoint by deed or will; for want of appointment among such child and children, other than, &c., equally to be divided; if but one, to that one; payable at twenty-one or marriage, or as soon after as the life-interests should drop; the shares of any dying before, payable in the 4000*l.*, or so much as should not be appointed, to go to the survivors at the same time. There were four younger children; the marriage settlement of one recited, that she was entitled to 1000*l.*, part of this fund; one-fourth of it was appointed to another on his marriage; and to a third, 1000*l.* as her share of that portion; the fourth died above twenty-one, before his father, who survived his wife, and died without any farther appointment; held, that 3000*l.* was well appointed, and that the remainder vested in all equally, according to the direction, for want of appointment. *Wilson v. Piggott*, 2 Ves. 351.

## 5. Need not recite or refer to the power.

1. It is not necessary that an instrument to operate under a power, or refer to it in any manner in the execution of it. If a person, having a power, does an act with all the solemnities required, and which can have no effect but by virtue of the power, the act is taken to be done in execution of the power. 2 Sch. & Lef. 464.

2. On the execution of a power, it is not necessary to refer to it, a reference to the subject of it is sufficient. 1 Ball & Beatty, 92.

3. The recital of a power is not necessary to the due execution of it. *Blake v. Marnell*, 2 B & B. 44.

4. Power may be executed by will, applying to the subject, without an express reference to the power. 13 Ves. 453.

5. Though to effect the execution of a power by a will, a direct reference to the power is not necessary, the intention must distinctly point to the subject of it; as if something is included, which the testator had not otherwise than under the power, and part of the will, unless applied to it, would be wholly inoperative. *Bennett v. Aburrow*, 8 Ves. 609.

6. A will, referring to the estate, but not to the power, declared a good execution of it, to the extent of limiting estates to the objects of the power. *Dillon v. Dillon*, 1 Ball & Beatty, 77.

7. Testator having a power over 3000*l.*, originally the property of his wife, gave several legacies, and then (after the decease of his wife,) gave the residue to the defendant: his estate was not sufficient to pay the legacies; yet held, that the will is not an execution of the power, the same not being referred to, nor any thing by which an intention appeared to the testator to execute it. *Andrews v. Emmet*, 2 B. C. C. 297.

## 6. Nor recite an intention to execute it.

Not necessary to recite an intention to execute a power; if the act can be done only by that authority. But, where the act purports to pass the interest, it shall be considered so intended, and not to exercise an authority. 10 Ves. 257.

## 7. By what instruments.

1. Husband having a power to make a jointure of any part of the estate  
not

not exceeding 400*l.* *per annum*, covenants on his marriage, to settle lands of the yearly value of 400*l.*, clear of taxes and reprises; he afterwards makes a settlement of lands, with a covenant, that if they should fall short of 400*l.* *per annum*, he would make up the deficiency. Held, that the settlement was intended as an execution of the power, and the making the jointure clear of taxes and reprises, in the articles, was a mistake. *Lady Londonderry v. Wayne*, 2 Edén, 170.; *Amb.* 424.

2. Three powers by settlement; first, to the husband and wife jointly, to raise and appoint 3000*l.*; secondly, to husband alone, to raise and appoint 2000*l.*; thirdly, to survivor, to raise and appoint such sum as would, with the sum before raised, make 5000*l.* The wife joining in raising 3000*l.* under the joint power, for the husband, he covenanted not to charge by the power reserved to him alone, or any other power whatsoever during her life, and so long as said 3000*l.* should remain unpaid, without her consent. After her death, he, by deed poll, did charge with 2000*l.* more, to be paid to his executors for debts, &c. and otherwise, in performance of his will, or as he should appoint by it; and died, leaving his second wife executrix, without taking notice by his will of the charge; but the deed-poll was found uncanceled among his papers: the 2000*l.* well charged; and went to the executrix, without a special appointment. *Earl of Uxbridge v. Bayly*, 1 Ves. 499.

3. A. having both a power and an interest, the estate being conveyed to such uses as he should appoint, and, in default of appointment, to him in fee, conveys by lease and release, using also words of appointment: the deed operates as a conveyance of his interest, not as an execution of his power; especially if the effect of the latter construction will defeat the object. *Cox v. Chamberlain*, 4 Ves. 631.

4. Power of appointment by deed, to be signed and sealed in the presence of witnesses. The attestation applying only to sealing and delivery, though the deed purported to be signed, sealed, and executed, it was presumed, that the signature was in the presence of the witnesses. *M'Queen v. Farquhar*, 11 Ves. 467.

5. Under a power of sale, with consent of parties, testified by any writing or writings under their and his hands and seals, &c. attested by two or more witnesses; the attestation, going only to the sealing and delivery; held, not sufficient; nor a subsequent attestation, that they also signed: but a case was directed. *Wright v. Wakeford*, 17 Ves. jun. 474.

6. Power to be executed by a deed signed and sealed in the presence of witnesses, and the deed expressed to be so executed, though the attestation appeared to be only to the sealing and delivery, signature in the presence of the witnesses, presumed. 17. Ves. jun. 458.

7. By fine and deed declaring the uses, the estate of a *feme covert* is conveyed to a trustee, to discharge certain specified debts, "and other sums borrowed by the husband and wife for the like or other purposes," and subject thereto, "to such uses as the wife shall appoint by deed under hand and seal." A joint bond and warrant to confess judgment, executed by husband and wife, was a good execution of the particular power given to both, or, *semble*, of the general power given to the wife. *Dillon v. Grace*; *Hearne v. Cavenagh*, 2 Sch. & Lef. 456.

8. Power to trustees, with consent of A. under her hand, with two witnesses, to advance 1500*l.* to her husband. They advance the money without the consent of A. Afterwards, A. by an instrument under her hand, attested by two witnesses, testifies that the money was advanced with her consent. Held, on a bill filed by A., that the trustees must refund the 1500*l.* *Bateman v. Davis*, 3 Mad. 98.

9. *Quære*, whether on a power given to L. E. to revoke uses, "from time to time during his natural life," such revocation and reappointment "to be signed, sealed, and delivered in the presence of, and attested by, two or more

more credible witnesses," can be executed by will. *Edwards v. Edwards*, 3 Mad. 197.

10. Power of appointment, in such shares and proportions as husband and wife should, by any deed in writing, direct, not well executed by appointment by the will of the husband, with a written endorsement thereon made by the wife after his death, expressing her approbation. *Bushell v. Bushell*, 1 Sch. & Lef. 90. 96. Nor would it have been better if the wife had ratified it at the time of the execution, it being revocable by the husband during his life. *Ibid.* 96.

11. Power of appointment not executed by appointing an executor. 13 Ves. 452.

12. A *feine covert* having a power to dispose of 300*l.* by will, signed and sealed by her, made a testamentary paper, not sealed, but on a stamp: this is equivalent to sealing, and is a good execution of the power. *Sprange v. Barnard*, 2 B. C. C. 505.

13. Where the testator, having a power of disposing, expresses a desire as to the disposition of property, and the objects to which he refers are certain, the desire so expressed amounts to a command. *Cary v. Cary*, 2 Sch. & Lef. 189.

14. Power not executed by general words in a will. *Langham v. Nenny*, 3 Ves. 467.

15. A power of appointment not executed by a general disposition by will. *Croft v. Slee*, 4 Ves. 60.

16. Power of appointment not executed by will having no reference to the power or the subject of it; and the court will not inquire into the circumstances of the property. *Nannock v. Horton*, 7 Ves. 391.

17. Power attempted to be executed by invalid instruments; held not executed, by the general words of a will containing no reference to it. *Mac Leroth v. Bacon*, 5 Ves. 159.

18. Power not executed by a general bequest of "my estate and effects;" which will pass only what the testator has an interest in, not what he has an authority over. 8 Ves. 588.

19. Power of appointment not executed by general words in a will, "all my personal estate," &c. and "all my estate and interest therein." *Bradley v. Westcott*, 13 Ves. 445.

20. Power executed by will, but afterwards discharged; and a new power created. A subsequent codicil will not, by the mere effect of republishing the will, be an execution of the power. *Holmes v. Coghill*, 7 Ves. 499.

21. Devise of real estate to be sold, and the produce, with the personal, to testator's wife for life, with power to appoint a moiety by deed or will, with two or more witnesses: the estate was not sold; the wife, having no other real estate, by will, with three witnesses, gave specific legacies, some described to have been her husband's, and all the rest, residue, and remainder of her estate and effects, of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils, which she should be possessed of, interested in, or entitled to, at her decease; the power is executed by the residuary clause. Evidence of conversations with the person who drew the will, to show the testatrix had no other real estate, rejected. *Standen v. Standen*, 2 Ves. 589.

22. Testatrix gave a fund, over which she had a power of appointment, and some specific articles, to trustees, in trust for her residuary legatee after named; and gave the general residue to A. By a codicil she revoked the bequest of the residue; and gave it to A. and B. A. was held solely entitled to the fund under the appointment. *Roach v. Haynes*, 6 Ves. 153.; 8 Ves.

23. Power executed by will; but afterwards discharged; and a new power created. A subsequent codicil will not, by the mere effect of republishing the will, be an execution of the power. *Holmes v. Coghill*, 12 Ves. 206.

24. Co-



24. Covenant to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, and at such times as he should appoint. The power was held well executed by a will directing a sale, and appointing the money. *Long v. Long*, 5 Ves. 445.

25. Power of appointing real estate well executed by a devise to trustees to sell, and an appointment of the money produced by the sale. *Kenworthy v. Bate*, 6 Ves. 793.

26. *Quare*, whether, when a power is given to be executed by a will, signed and published in the presence of, and attested by two or more credible witnesses, a will signed by the testatrix, and attested generally, thus, witness B. H. and I. H.; is a good execution of the power. *Moodie v. Reid*, 1 Mad. 517.

27. A power given to testator's wife to dispose of a moiety of a leasehold estate, by a will "duly executed and attested;" and in default of appointment, the same was bequeathed "unto the executors or administrators of her my said wife, to and for his, her, or their own use and benefit." A will neither signed nor sealed, nor attested, held not to be an execution of the power; and no executor being named in the will, the administrator of the testatrix was held entitled to the moiety of the leasehold for his own benefit. *Sanders v. Franks*, 2 Mad. 147.

28. Will, under a power, not attested to pass real estate, is a good execution as to the personalty. *Duff v. Dalzell*, 1 B. C. C. 147.

#### 8. By separate instruments.

Vide 2 Ves. 351.

#### 9. When an instrument operates as an appointment; when not.

1. A rent charge till a debt paid, granted by a tenant for life, having a power to raise by sale or mortgage a certain sum for payment of his debts, a good execution of the power; though referrible to his interest, as well as to his power. Parol evidence to show that the deed was not intended to be in execution of the power, inadmissible, as going to contradict it. *Blake v. Marnell*, 2 B. & B. 35.

2. M. M. gives to the defendant all her freehold and copyhold estates, upon trust, to permit E. S. to receive the rents, &c. during her life; and after her death, to sell, and out of the produce to pay 100*l.* to such person as she should by will appoint. E. S. by will, without reference to the power, gives 100*l.*, and the whole of her household furniture to the plaintiff. It was charged by the bill, and not denied, that the testatrix had no personal property at the time of her death, besides some household furniture to a very small amount in value; but no evidence was gone into, and an inquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of the 100*l.* as in execution of her power. But the inquiry was refused, and the bill dismissed. *Jones v. Tucker*, 2 Mer. 533.

3. No inquiry as to the *quantum* of personal property, to determine whether a gift is or is not in execution of a power. *Secus* as to an inquiry whether there be any thing but copyhold to answer a devise of land; the question there being, whether there was any thing for the will to operate upon at the time when it was made; whereas, a will of personalty speaks at the death. *Jones v. Tucker*, 2 Mer. 537.

4. The will (attested by three witnesses) of a person having a power to dispose of a fund, consisting partly of real estates and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen, and plate," is not an execution of the power. Parol evidence is not admissible to show the inadequacy of the personal estate of the testatrix to satisfy the

the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass realty appeared on the will. *Jones v. Curry*, Swanst. 66.

10. With reference to the subject matter.

Difference between land and money subject to a power of appointment. 5 Ves. 749.

11. With reference to the time of execution.

Vide 1 B. C. C. 395.

12. With reference to the extent.

Appointment to all and every the daughter and daughters of A., and the heirs of their body and bodies, and in default of such issue, over. There being only two daughters, and one of them dying under twenty-one without issue; held, that the surviving daughter was entitled, though there were no cross-remainders. *Wright v. Lord Cadogan*, 2 Eden, 239.; *Amb.* 468.; 1 Toml. P. C. 486.

13. With reference to a partial invalidity.

Under a power to appoint among all children, if part is well appointed to some, leaving a share not illusory, which is afterwards appointed so as entirely to exclude one, the last appointment only is void. 2 Ves. 355.

14. Void for excess only.

1. Under a power to devise among children, testatrix gives to A. (one of the children) for life; remainder to trustees to preserve contingent remainders; remainder to first and other sons, &c.; remainder to B. (another son) in the same manner. *Qu.* whether the excess being void, the power is null, and the heir at law shall take, or the sons shall take successive estates for life, as good under the power; or whether, to maintain the general interest, the sons shall take estates tail. *Griffith v. Harrison*, 3 B. C. C. 410.

2. An appointment exceeding the power, by a limitation to objects not within the power, is void as to the excess; as, where the power is to appoint to children, and the appointment is to a child for life, and after his decease to his wife and children: but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving. *Crompe v. Barrow*, 4 Ves. 681.

3. Nonconformity of the nature of estates, raised by the execution of a power to those in the instrument creating it, is not of itself sufficient to reduce the legal effect of the latter instrument by reference to the former. 18 Ves. jun. 416.

4. Construction of an instrument intended to be an execution of a power, with reference to the instrument creating it, as operating to create an estate by way of use, to be put in its proper place; in remainder for instance, the words importing an immediate conveyance; but the excess at law, the legal effect of words in a deed, beyond the occasion and purpose, not corrected. 18 Ves. jun. 419.

15. Must not be illusory.

1. The question, whether an appointment is, or is not, illusory, must be determined upon the circumstances of each case, according to a sound discretion: the power, however large the terms, being in some degree coupled with a trust: but an equal distribution is not required: nor any reason for the inequality, unless a share is clearly unsubstantial. *Butcher v. Butcher*, 1 Ves. & Beam. 79.

2. Various contradictions upon the subject of illusory appointments. 1 Ves. & Beam. 97.

3. Equitable jurisdiction upon illusory appointment: discretionary according to the circumstances. *Bax v. Whitbread*, 16 Ves. 15.

4. An appointment grossly unequal cannot stand, though made through mistake, without intentional injustice. 2 Sch. & Lef. 155.

5. A power in a marriage settlement was created to J. P. (the husband,) to appoint the settled estate among the children in such shares as he should think proper, not exceeding estates tail. He appointed to two of the children, one acre for their lives and the life of the survivor, then to fall into the residue, which he appointed to his second son for life, with remainders over. This execution is illusory and bad. *Pocklington v. Bayne*, 1 B. C. C. 450.

6. Appointment, giving very small shares to some of the objects; set aside, as illusory. *Spencer v. Spencer*, 5 Ves. 362.

7. Under a power to appoint among several objects, each must have a share, and, by the rule in equity, as to illusory appointments, a substantial share; unless a good reason appears; as another provision by the person executing the power, not from any other quarter. Under such a power an appointment of a fund, nearly 1900*l.* among three children, the objects, 1. to one, 50*l.* to another, and the remainder to the third, all having other provisions *aliunde*, was set aside as illusory. *Kemp v. Kemp*, 5 Ves. 849.

8. A. having a power of appointment of 2000*l.* amongst younger children, his eldest son being an idiot, and the second son having attained a part of the surplus profits of the estate during the idiot's life: A. appoints 1999*l.* to the daughter, and 20*s.* only to the second son. This appointment illusory. *Lysaght v. Rose*, 2 Sch. & Lef. 151.

9. Appointment of 200*l.* stock, though a very unequal proportion of the fund; held not illusory. *Butcher v. Butcher*, 9 Ves. 382.

10. Appointment of 100*l.* South-sea annuities to one child, and 2400*l.*, the residue of the fund, to the other; those being the only objects of the power, not illusory. *Bax v. Whitbread*, 10 Ves. 31.

11. Appointment of 200*l.* stock, though a very unequal proportion of the fund; held not illusory. *Butcher v. Butcher*, 1 Ves. & Beam. 79.

12. Appointment of 100*l.* out of 2500*l.*, viz. to two children, one-third each; the remaining third to the children of another child (the power extending to their issue); and 2400*l.* equally to two children, the only other objects, established; the court refusing to go farther against an appointment, as illusory, than actual decision. *Mocatta v. Lousada*, 12 Ves. 123.

13. Appointment of 5500*l.* to one child, 1100*l.* to another, and 500*l.* among the others, seven in number, held not illusory: the court refusing to go farther upon that subject than actual decision. *Dyke v. Sylvester*, 52 Ves. 126.

16. Though at law, there is no execution that is illusory.

A power to appoint among several objects, well executed at law, by giving each a share, however small. 5 Ves. 861.

17. And in equity, an execution *quasi* illusory, is good, under circumstances of advancement, or otherwise.

1. An illusory share may be accounted for by circumstances. *Boyle v. Bishop of Peterborough*, 1 Ves. 299.

2. In equity, an appointment of a very small share is not illusory, if justified by circumstances; as, where that object is otherwise provided for. 4 Ves. 785.

3. The rule as to illusory appointments not to be applied where a sufficient reason appears upon the face of the appointment: perhaps not, between parent and child, if clearly proved. 5 Ves. 368.

4. An appointment by a father not illusory, where he gives other provisions to the object excluded. *Long v. Long*, 5 Ves. 445.

5. Testator under a power to appoint among children, appointed to the husband of a daughter for life, and if she survived him, to her for life; and

having advanced her in marriage, recited that as a reason for giving her a small share; this is not illusory. *Bristow v. Warde*, 2 Ves. 336.

6. Execution of a power of appointment among children and grandchildren, by giving 100*l.* to one, and 2400*l.*, the residue of the fund, to the only other object, established under the circumstances: the former being at the time of appointment an uncertificated bankrupt, and other interests being given to him and his family by the instruments creating and executing the power. *Bax v. Whitbread*, 16 Ves. 15.

#### 18. Must not be fraudulent.

Vide 1 Mer. 644, 645.

#### 19. Who are appointees.

Vide 5 Ves. 744.

#### 20. Who an appointee, under the execution of a leasing power of renewal.

1. By the death of her appointee, therefore, in her life, a resulting trust by lapse for the representative of the author of the power. *Brockman v. Hales*, 2 Ves. & Beam 45.

2. Renewal of a college lease by tenant for life, with a power of appointment, in her own name, and at her expence, has not the effect of an appointment in her own favour. *Ibid.*

#### 21. Effect of the appointee's releasing the fund.

Appointment by will, among children under a power to the father. A share, lapsed by the death of one in his life, goes among all, as in default of appointment, notwithstanding a direction, that each receiving a share should release the fund. No presumption of satisfaction or purchase from another provision, being expressly in satisfaction of a different interest. *Burges v. Mawbey*, 10 Ves. 319.

#### 22. Revocation of.

1. An appointment under a power, by will, is revocable by a subsequent appointment by deed, though no power of revocation is reserved in the will. *Lisle v. Lisle*, 1 B. C. C. 533.

2. A codicil revoking a legacy of 40,000*l.* The legacy was but 30,000*l.*; the other 10,000*l.* was an appointment under a power: this is a revocation of the appointment. *Pitt v. Jackson*, 2 B. C. C. 51.

3. Charge well created by settlement, though for a volunteer, not revoked by general revocation of the uses under a power for the mere purpose of partition of joint estate, and resettling to the same uses the separate part to be taken on partition. *Earl of Uxbridge v. Bayly*, 1 Ves. 500.

#### 23. Under a power to appoint among children.

Vide 1 Ves. 150.

#### 24. Of a power to change uses.

Vide 11 Ves. 475.

#### 25. By a *feme covert* of her sole interest.

The question was, whether a *feme covert*, having a power of appointing property vested in trustees by her marriage settlement, and to which the baron was a party, must appoint from time to time, or might assign her whole interest. Held, that she might do the latter. *Ellis v. Atkinson*, Dick. 759.

#### 26. By a *feme covert* in the lifetime of her husband.

A *feme covert* having a power, under her marriage settlement, to create a term, and to raise money after the death of her husband, being in distress, executes that power in the lifetime of her husband, and assigns her interest for

trifling consideration. The judges, upon a case sent to them, were of opinion, it was a good execution of the power ; and so this court held it, on the judge's certificate ; but gave the plaintiff liberty to redeem, on payment of the money really and *bond fide* advanced, with interest, by a given day, or the plaintiff to be foreclosed. Countess of Sutherland v. Northmorth, Dick. 56.

#### 27. Notwithstanding a covenant in restraint.

There being a power in the marriage settlement to husband and wife to raise a sum of money, and dispose of it by joint appointment, and a power to husband to dispose of a second legacy by his sole appointment, upon an application of the first sum, the husband covenants not to exercise his sole power during the wife's life, or whilst the legacy is unpaid, without her consent ; she being dead, he disposes of the other sum, (the first being undischarged :) the appointment is good, the intent of the covenant being only for the wife's benefit in case of survivorship. Uxbridge, Earl of, v. Bailey, 4 B. C. C. 13.

#### 28. Priority.

Arrangement of charges as to priority. A power, when executed, takes place according to the original deed creating it. Mosley v. Mosley, 5 Ves. 248.

### VIII. Defective execution.

#### 1. Defined.

Non-execution of a power is, where nothing is done. Defective execution is where there has been an intention to execute, and that intention sufficiently declared ; but the act declaring the intention is not an execution in the form prescribed : a contract to execute such power, is a sufficient declaration of intent. 1 Sch. & Lef. 63.

#### 2. The consequences.

Vide 2 Ves. 336.

#### 3. Whether aided at law.

Lease, under a power, by a person, having only a particular estate, if not conformable to the power, is not good at law : but, where the persons granting the lease, have at law the inheritance, with directions only how they are to execute leases, the legal estate passes. 13 Ves. 580.

#### 4. Whether aided in equity.

Vide *infra*, X.

#### 5. Favour of children.

Vide 2 B. C. C. 51.

#### 6. Whether void for excess only.

1. Where a power is exceeded in the execution, in order to reject the excess and let the appointment stand ; the court must see distinctly what the person executing the power had in view, and be satisfied that if he had rightly understood the extent of his power, he would have executed it. 2 Sch. & Lef. 315.

2. Excess in the execution of a power, if capable of separation, will be corrected. Palmer v. Wheeler, 2 B. & B. 28.

3. Where a will gave more to the objects of the power than was warranted by it ; the excess reformed to effectuate the general intention, manifested in the articles, creating the power. Dillon v. Dillon, 1 Ball & Beatty, 77.

4. Power to husband and wife to charge a term of years in lands, with such sum or sums of money not exceeding 200*l.* for their two daughters A. & B., as the husband and wife should appoint ; and in failure of their joint appointment, as the survivors should appoint, with interest from such time as the term of years should commence in possession, and not before. The term was

was not to commence in possession, until after the death of the survivor. Husband and wife in execution of the power, direct the 200*l.* to be equally divided between the two daughters six months after the decease of the father and mother; and if either of them died before payment, or the money become due, then the share of her so dying, to be laid out for the benefit of her executors. One of the daughters died after the appointment and before the time of payment. This is a good appointment to the daughters themselves, and the appointment to executors is void; but as one of the appointees died before time of payment, her share sinks into estate. The joint appointment having appointed the whole, the share of the daughter who died, is not the subject of any further appointment. *Brown v. Nisbett*, 1 Cox, 13.

## IX. Non-execution.

Defined.

Vide 1 S. &amp; L. 63.

## X. Whether equity will aid a defective or non-execution.

1. Distinction in this respect between equity and law.

1. Vide 18 Ves. 395.

2. Whether aided in equity. Vide *infra*.

2. The grounds upon which equity supplies defects in the execution of powers.

1. Power partakes of the nature and qualities of a trust; so, that if not executed by the party, this court will, to a certain extent, execute it. 8 Ves. 570.

2. Particular jurisdiction of a court of equity to supply defects in the execution of a power. 9 Ves. 394.

3. Pursuant to the intent.

Power of appointment among three persons, executed by a transfer of one-third to one under an order on petition; stating, that the person having the power was desirous, that the fund might be equally divided; that person dying without any farther execution, the court gave the two remaining thirds respectively to another of the objects, and to the administratrix of the third, who was dead, but had survived the person executing the power. *Fortescue v. Gregor*, 5 Ves. 553.

4. Whether by accelerating valid limitations.

1. Preceding limitations under an appointment being void, subsequent limitations though within the power, cannot be accelerated, and are void also; though the objects of the prior limitations never come *in esse*. *Routledge v. Dorril*, 2 Ves. 357.

2. The doctrine of *cy pres* does not apply to personal; therefore, where under a power to appoint personal to children or issue, an appointment is made to a son for life, then among all his children; if none, to him, his executors, &c.; the limitation to his children being void, because not restrained within the legal bounds, cannot be made good *cy pres*. *Ibid*.

5. Whether in favour of children.

1. A defective execution of a power decreed. *Wilkie v. Holme*, Dick. 165.

2. As to the reason of supplying a defective execution of a power, or the want of a surrender of copyhold estate, for a child, *quære*. 15 Ves. 51.

3. Where real estate is under a power of appointment, limited in strict settlement, if the children cannot take as purchasers, the intention shall be executed *cy pres*, by construing it an estate tail. 2 Ves. 364.

4. Power was given to husband and wife, by deed, and to the survivor,

by will, duly executed, to charge settled lands for payment of debts, or for younger children. The wife surviving, charged the estate, by will executed in the presence of two witnesses only. Lord Hardwicke held, that though the will was not duly executed within the meaning of the power, the court ought to aid the defective execution in favour of the creditors and younger children. *Wilkie v. Holmes*, 1 Sch. & Lef. 60.

5. Defective execution of a power, refused to be supplied in favour of a natural son, against persons claiming under a subsequent valid execution of it. *Bramhall v. Hall*, 2 Eden, 220. ; Amb. 467.

6. Whether in favour of a husband.

Vide 1 Mad. 516.

7. Whether in favour of creditors.

Vide Dick. 165. ; 12 Ves. 213. ; 1 Sch. & Lef. 60.

8. Whether in favour of purchasers for value.

Vide 1 Sch. & Lef. 52. 64. 72.

9. Whether to fulfil a testator's intention.

Vide 1 Sch. & Lef. 189.

10. Whether against a remainder-man.

Equity will not direct a lease void under a power ; as it would not bind the inheritance, and might embarrass the remainder-man. 1 Ball & Beatty, 251.

11. Whether, where to aid it, would support a fraud.

1. Tenant for life with leasing power, enters into a parol agreement to make a lease pursuant to his power, which is part performed : whether this shall bind the remainder-man, *quære*? 1 Sch. & Lef. 72.

2. Tenant under a power to make leases without fine, and at the best improved yearly rent that can be had, covenants to lay out 200*l.* in improvements. This is not necessarily a fraud on the remainder-man, provided the rent be the best that can be got : but if it be colourable at the beginning, or be afterwards used fraudulently, a court of equity will take care that it shall not prejudice. *Shannon v. Bradstreet*, 1 Sch. & Lef. 72.

12. Whether it will supply the want of execution.

1. Though the rule is settled, perhaps with some violation of principle, but with no practical inconvenience, that equity will aid a defective execution of a power ; the want of execution cannot be supplied. *Holmes v. Coghill*, 7 Ves. 499.

2. Though equity will in certain cases aid a defective execution of a power, the want of execution cannot be supplied even for creditors, *Holmes v. Coghill*, 12 Ves. 206.

3. Power considered as distinguished from trust. This court cannot execute a mere power ; but will execute a trust, which fails by the death of the trustee, or accident. 8 Ves. 570.

## XI. Extinguishment and discharge of power.

1. By complete execution.

Vide 1 B. C. C. 533.

2. By partial execution.

Where there was a joint power to husband and wife of appointing a sum of money among children, with power in default thereof for the survivor to appoint ; a partial execution by both of the original power, was held to prevent the execution of the secondary power by the wife, who survived. *Simpson v. Paul*, 2 Eden, 34.

3. By

## 3. By merger.

A person having a power by marriage articles, to charge an estate of which he was tenant for life, with intermediate remainder, with a contingent fee to himself; executes the power by will; the contingent fee afterwards comes to him: though by the accession of the fee, the power is gone; yet the provision made by the will, shall be served out of his estate in fee. *Cross v. Hudson*, 3 B. C. C. 30.

## 4. By satisfaction.

Vide 2 Ves. 698.

## 5. By the death of an appointor.

A power of sale given to three trustees, held not to be well executed by two surviving trustees. *Townshend v. Wilson*, 3 Mad. 261.

## 6. By the death of an appointee.

Power to divide a fund among all and every the children, to be vested at twenty-one; and in default of or part execution, the whole or the part unappointed, to go to all; there were two children, a son and daughter; a partial provision is made for the son, who died, (having attained twenty-one,) unmarried and without issue. A subsequent appointment of the whole residue to the daughter, is a good execution of the power. *Boyle v. Bishop of Peterborough*, 3 B. C. C. 243.

## PRINCIPAL AND AGENT.

## I. Of an agent's duty in the administration or disposition of his principal's property or credits.

1. Bill for a general account lies against a solicitor and agent, taking a security without a settlement of accounts.
2. A case in which an agent employed to sell estates, took them for himself under colour of a fictitious purchase, and sold part.
3. Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt.
4. The consequence of an agent's confounding the principal's property with his own.

## II. When an agent shall account for the profits of a transaction.

1. A factor buying goods which he ought to furnish as factor, taking the profits, and dealing with his constituent as a merchant.
2. An agent, with no emolument beyond his salary, making a clandestine sale to his principal on his own account.

## III. When an agent shall account notwithstanding lapse of time.

1. The course with agents is, to render accounts periodically.
2. Steward bound to account periodically, though not called on.
3. Account given against a confidential agent, in possession of estates since 1780.



**IV. Of opening an account settled between a principal and his agent.**

Account opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud.

**V. Of falsifying an account settled between a principal and his agent.**

Where it was settled from loose papers, the agent having kept no regular books.

**VI. Of falsifying a discharge given by a principal to his agent.**

On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full.

**VII. When an agent shall be entitled to commission.**

Country bankers on discounting bills, though sent to them by a London resident.

**VIII. When an agent shall not be reimbursed his expences.**

1. Where he neglected to keep regular accounts, and to preserve the vouchers against himself, though he preserved those in his favour.
2. Where, from the agent's conduct in undertaking the business without authority, they could not be ascertained.

**IX. Where an agent shall be indemnified.**

Where he indorses, in order to discount the principal's bill.

**X. An agent is seldom permitted to purchase his principal's property.**

1. A case in which he was permitted.
2. Cases in which he was refused.

**XI. When the act of the agent shall enure for the principal.**

Payment by the agent, is payment by the principal.

**XII. When notice to the agent shall be notice to the principal.**

1. The agent must be one empowered to treat, not barely to carry proposals.
2. The notice must be in the same transaction.
3. A miscellaneous case.

**XIII. When the act of the agent shall bind the principal.**

1. General rule.
2. Distinction between the powers of a general and a special agent.
3. Payment to the agent is payment to the principal.
4. The act of concealing or suppressing deeds.
5. A colonel allowed by government to appoint his own agent, is answerable for him.

6. Contracts by a broker are binding on both parties.
7. Vendor bound by the signature of the agent's clerk, upon evidence of assent.

**XIV. When the act of the agent shall not bind the principal.**

1. Distinction between the powers of a general and a special agent.
2. In general, clerks of agents have not authority to bind the principal.
3. The act of an agent, authorised to make agreements for leases for lives or years, making an agreement not mentioning any term.
4. Purchaser, under a particular giving a false description, not bound by any act of his agent.
5. In the case of accounts settled between two agents, without vouchers, upon confidence.

**XV. When the acts or declarations of the agent shall be evidence against the principal.**

1. Declarations, in regard to an agreement.
2. Letters, in relation to an agreement.
3. Whether a receipt by an agent for goods directed to be delivered to him, is evidence against the principal.

**XVI. When an agent may depute his authority.**

An authority to A. to draw bills in the name of B., may be exercised by the clerks of A.

**XVII. Of the revocation of an agent's authority.**

By the owner of the estate under management, coming of age.

**XVIII. Of the rights of third persons.**

1. Agent not responsible, if he names his principal as the responsible party.
2. Where a person is acting *ex mandato*, those dealing with him must look to his authority.

**XIX. In relation to Irish statutes.**

1. Stat. 29 Geo. 2. c. 16.
2. Stat. 33 Geo. 2. c. 14.

**I. Of an agent's duty in the administration or disposition of his principal's property or credits.**

1. Bill for a general account lies against a solicitor and agent, taking a security without a settlement of accounts.

Bill for a general account lies against a solicitor and agent, taking a security without a settlement of accounts. 7 Ves. 584.

2. A case in which an agent employed to sell estates, took them for himself under colour of a fictitious purchase, and sold part.

Agent employed to sell estates, took them for himself under colour of a fictitious purchase, and sold part; after his death an inquiry was directed to ascertain the real value, according to which his estate was to be charged; the

the principal having an option to take what remained unsold, and the agent having fraudulently prevailed on his principal to execute a lease under the real value, the agent's estate was charged with the loss arising from that. *Lord Hardwick v. Vernon*, 4 Ves. 411.

3. Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt.

Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. *De Bouchout v. Goldsmid*, 7 Ves. 211.

4. The consequence of an agent's confounding the principal's property with his own.

Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and in this instance, the case of a breach of the terms, upon which the court dissolved an injunction, the inquiry was directed with costs. The court refused in such a case of prospective direction to admit books, not legal evidence; usual in a fair case; as, where for want of notice of an adverse claim, a strict account cannot be given; merely giving liberty to apply upon any question of evidence. *Lupton v. White*, 15 Ves. 432.

## II. When an agent shall account for the profits of a transaction.

1. A factor buying goods which he ought to furnish as factor, taking the profits, and dealing with his constituent as a merchant.

Factor buying goods which he ought to furnish as factor, taking the profits, and dealing with his constituent as a merchant instead of taking factorage duty, or a stipulated salary, must account: so must a manufacturer, who obtained by collusion an unfair price. 1 Ves. 289.

2. An agent, with no emolument beyond his salary, making a clandestine sale to his principal on his own account.

An agent, who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his own account. *Massey v. Davies*, 2 Ves. 317.

## III. When an agent shall account notwithstanding lapse of time.

1. The course with agents are, to render accounts periodically.  
Accounts by agents are rendered regularly. 1 Ball & Beatty, 383.
2. Steward bound to account periodically, though not called on.  
Steward bound to account periodically, though not called on. 13 Ves. 53.
3. Account given against a confidential agent, in possession of estates since 1780.

Account against a confidential agent, in possession of estates since 1780, without giving any account to his principal residing in Ireland; and an inquiry into the circumstances of a lease granted under his direction, and in which he took an interest. *Lady Ormond v. Hutchinson*, 13 Ves. 47.

## IV. Of opening an account settled between a principal and his agent.

Account opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud.

1. Accounts opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud. The character of the

the defendant, as agent, accompanying him in his situation as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the neglect of the plaintiff in not bringing forward the demand at an earlier period. *Beaumont v. Boulton*, 5 Ves. 485. Affirmed on re-hearing.

2. Accounts opened, and a general account decreed, against an agent, who was also tenant to his principal, in respect of fraud. The character of agent accompanying him in his situation as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the laches of the plaintiff in not bringing forward the demand at an earlier period. The decree affirmed on a re-hearing. *Beaumont v. Boulton*, 7 Ves. 599.

**V. Of falsifying an account settled between a principal and his agent.**

Where it was settled from loose papers, the agent having kept no regular books.

Account between principal and agent settled from loose papers, the agent having kept no regular books. After his death liberty was given to surcharge and falsify, upon allegation of errors since discovered. *Lord Hardwicke v. Vernon*, 4 Ves. 411.

**VI. Of falsifying a discharge given by a principal to his agent.**

On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full.

On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full; which was allowed only as proof of the particular payment, not of a general release or discharge on an account stated; though under circumstances it might have that effect; as upon proof, that the principal never would give any vouchers, and an account kept by the steward. *Middleditch v. Sharland*, 5 Ves. 87.

**VII. When an agent shall be entitled to commission.**

Country bankers on discounting bills, though sent to them by a London resident.

Country bankers entitled to a commission on the discount of bills, although sent to them from London by a person resident there. *Ex parte Jones*, 1 Rose, 29.; 17 Ves. 332.

**VIII. When an agent shall not be reimbursed his expences.**

1. Where he neglected to keep regular accounts, and to preserve the vouchers against himself, though he preserved those in his favour.

A confidential agent, in that character bound to keep regular accounts; having neglected to do so, and to preserve vouchers against himself, though he had preserved those in his own favour, was on the ground of gross neglect of duty not allowed a charge in respect of bills of costs for business done as a solicitor. *White v. Lady Lincoln*, 8 Ves. 363.

2. Where, from the agent's conduct in undertaking the business without authority, they could not be ascertained.

See 5 Ves. 485.; *Ibid.* 7. 599. Claims by the agent for expences on account of the principal, which from the conduct of the agent, undertaking the business without authority or agreement, could not be ascertained, disallowed. Interest not carried farther than the time the bill was filed, on the ground of acquiescence. *Beaumont v. Boulton*, 11 Ves. 558.

**IX. Where an agent shall be indemnified.**

Where he indorses, in order to discount the principal's bill.

A. employs B. to get bills which he had not indorsed, discounted for him; B., in order to effect the discounting, indorses them. Held, that A.'s estate must relieve B. from the liability incurred by the indorsements. *Ex parte Robinson*; *in re Nunn*, Buck. 113.

**X. An agent is seldom permitted to purchase his principal's property.****1. A case in which he was permitted.**

Purchase of a share in the colliery in trust for the agent and manager, confirmed under particular circumstances, but with reluctance. *Wren v. Kirton*, 8 Ves. 502.

**2. Cases in which he was refused.**

1. A valuable picture, deposited by an executor with a dealer in pictures, and claimed to be retained by him as purchased at a very low price: issue directed to ascertain, whether there was a sale, or the possession was as agent, and trustee for sale; who therefore could not purchase without full communication. An objection that the transaction not being in the usual course of administering assets, could not protect a purchaser from the executor, was therefore not determined. *Lowther v. Lord Lowther*, 13 Ves. 95.

2. An agent, employed by a young man, to sell a reversionary legacy, shall not be permitted to be purchaser thereof himself, at an undervalue. And nothing shall amount to a confirmation of such a transaction, until the vendor be fully apprised that he might be relieved against the original transaction, if he chose to impeach it. *Crowe v. Ballard*, 2 Cox, 253.

3. Valuable leases, and agreements for leases, obtained by an agent from his principal; the principal reposing confidence in his agent, and the agent availing himself of the inexperience, negligence, and extravagance of the principal; set aside, or held as securities only for money advanced. *Watt v. Grove*; *Grove v. Watt*, 2 Sch. & Lef. 492.

**XI. When the act of the agent shall enure for the principal.**

Payment by the agent, is payment by the principal.

Payment by the agent, is payment by the principal. 9 Ves. 221.

**XII. When notice to the agent shall be notice to the principal.****1. The agent must be one empowered to treat, not barely to carry proposals.**

Notice to an agent, in order to affect the principal, must be to an agent empowered to treat; not barely to carry proposals from one party to another. *Shelburne v. Inchiquin*, 1 B. C. C. 338.

**2. The notice must be in the same transaction.**

Notice to an agent, in order to bind his principal, must be in the same transaction; and this, though the agent acted as attorney for the vendor and vendee. *Mountford v. Scott*, 3 Mad. 34.

**3. A miscellaneous case.**

Notice to agent held to affect principals. *Sheldon v. Cox*, 2 Eden, 224.

**XIII. When the act of the agent shall bind the principal.****1. General rule.**

Whatever the duty of an agent requires him to do in the business of his employer,

**APPENDIX.] When the act of the agent shall not bind the principal. 861.**

employers, must be presumed so to be done, with their knowledge and direction. *Ex parte Machel*, 1 Rose, 447.

**2. Distinction between the powers of a general and a special agent.**

Distinction between a general and special agent as to their powers to bind the principal. 1 Ves. & Beam. 209.

**3. Payment to the agent, is payment to the principal.**

Payment to an agent, is payment to the principal: *Thomson v. Thomson*, 7 Ves. 470.

**4. The act of concealing or suppressing deeds.**

A principal is answerable for the act of his agent in concealing or suppressing of deeds, though not done with the knowledge of the principal. *Bowles v. Stewart*, 1 Sch. & Lef. 209. 222.

**5. A colonel allowed by government to appoint his own agent, is answerable for him.**

Government allowing the colonel of a regiment to appoint his own agent, the colonel is answerable for such agent, not by virtue of any security which he gives to government, but by operation of law. *Antrobus v. Davidson*, 3 Mer. 578.

**6. Contracts by a broker are binding on both parties.**

Contracts by a broker binding on both parties. 19 Ves. 473.

**7. Vendor bound by the signature of the agent's clerk, upon evidence of assent.**

Vendor bound by the signature of the agent's clerk, thus: "Witness Evan Phillips for Mr. Smith, agent for the seller," upon evidence of assent; but clerks of agents in general have no authority to bind the principal. *Coles v. Trecothick*, 9 Ves. 234.

**XIV. When the act of the agent shall not bind the principal.**

**1. Distinction between the powers of a general and a special agent.**

Vide 1 V. & B. 209.

**2. In general, clerks of agents have not authority to bind the principal.**

Vide 9 Ves. 234.

**3. The act of an agent, authorised to make agreements for leases for lives or years, making an agreement not mentioning any term.**

Agent authorised to make agreements for leases for lives or years, makes an agreement in which the term of the proposed lease is not mentioned. This is an agreement not pursuant to his authority, and not binding on his principal. 1 Sch. & Lef. 33.

**4. Purchaser, under a particular giving a false description, not bound by any act of his agent.**

Purchaser, under a particular giving a false description, not bound at law or in equity, nor by any act of his agent, without a fresh authority or subsequent approbation: a different agreement requiring a fresh authority. 18 Ves. jun. 509.

**5. In the case of accounts settled between two agents, without vouchers, upon confidence.**

Accounts settled between two agents, without vouchers, upon confidence, not to be considered settled against their principal, without liberty to surcharge and falsify. 7 Ves. 617.

**XV. When**

**XV. When the acts or declarations of the agent shall be evidence against the principal.**

**1. Declarations, in regard to an agreement.**

Though an agent may, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts; evidence of his declarations is confined to what is, either by the statement itself, or as tending to determine the quality of cotemporary acts, the foundation of, or inducement to, the agreement. In this instance, the agency was not made out. *Fairlie v. Hastings*, 10 Ves. 123.

**2. Letters, in relation to an agreement.**

Letter by an agent, is not evidence against the principal of a pre-existing agreement; though it may of an agreement contained in that letter. 10 Ves. 128.

**3. Whether a receipt by an agent for goods directed to be delivered to him, is evidence against the principal.**

Whether a receipt, given by an agent for goods directed to be delivered to him, is evidence against the principal, *quære*. 10 Ves. 128.

**XVI. When an agent may depute his authority.**

An authority to A. to draw bills in the name of B., may be exercised by the clerks of A.

An authority given to A. to draw bills in the name of B., may be exercised by the clerks of A.. *Ex parte Sutton*, 2 Cox, 84.

**XVII. Of the revocation of an agent's authority.**

By the owner of the estate under management, coming of age.

Plaintiff being entitled upon coming of age, to the produce of a West India estate, bills of lading of consignments previously made, were decreed to be delivered up to him. 4 Ves. 609.

**XVIII. Of the rights of third persons.**

**1. Agent not responsible, if he names his principal, as the responsible party.**

Agent not responsible, if he names his principal, as the person to be responsible. 12 Ves. 352.

**2. Where a person is acting *ex mandato*, those dealing with him must look to his authority.**

By the civil law, as well as by the law of England, if a person is acting *ex mandato*, those dealing with him must look to his authority. 5 Ves. 215.

**XIX. In relation to Irish statutes.**

**1. Stat. 29 Geo. 2. c. 16.**

Bill, by banker, for an account of shares held in trust for him in a mercantile establishment, dismissed; the trust being in contravention of the stat. 29 Geo. 2. c. 16., which prohibits bankers from being traders. *Odey v. Browne*, 1 Ball & Beatty, 360.

**2. Stat. 33 Geo. 2. c. 14.**

The banker's act, 33 Geo. 2. c. 14. s. 4., is not applicable to cases of mutual dealings between a banker and his customer. 1 Ball & Beatty, 249.

## PRINCIPAL AND SURETY.

**I. Of the creditor's rights against the surety.**

1. The surety cannot be called upon before the creditor is damaged.
2. He may be sued in the first instance.
3. The creditor cannot compel payment by distress or unfair means.

**II. Of the extent to which the surety shall be chargeable.**

1. Whether his liability shall be lessened by securities previously deposited with the creditor.
2. Whether beyond the penalty of an annuity bond.

**III. How far the surety may be considered as the principal debtor.**

He may be sued in the first instance.

**IV. What acts, by the creditor, shall discharge the surety.**

1. Forbearance of the principal.
2. And forbearance of the principal, the grantee of an annuity, exonerates the surety from past as well as future arrears.
3. Stay of execution, in a suit against the principal, instituted by direction of the surety.
4. Settlement, though erroneous, with the principal.
5. Discharge of the principal debtor, without reserving the remedy against the surety.

**V. What acts, by the creditor, shall not discharge the surety.**

1. Composition with reserve of the remedy against the surety.
2. The discharge of a co-surety.

**VI. Of the surety's rights against the creditor.**

On depositing the money, and indemnifying against expence, he may compel the creditor to go against the principal.

**VII. Of the surety's rights against the principal.**

1. A surety may in equity, compel his principal to relieve him of his liability by payment of his debt.
2. Against the separate estate of his wife, under the circumstances.
3. Whether a surety, paying off a specialty debt, is to be considered a specialty creditor of his principal.

**VIII. A surety, upon payment, is entitled to the creditor's rights.**

1. Even against bail.
2. Whether a surety, paying off a specialty debt, is to be considered a specialty creditor of his principal.

**IX. Of the form of an instrument of suretyship.**

1. An ordinary money bond does not distinguish between principal and surety.

2. Evidence



2. Evidence is admissible to show who is the principal; who the surety.

#### X. Of contribution between co-sureties.

1. The right depends rather upon a principle of equity than contract.
2. Right to contribution, whether by the same or different instruments, whether privy or not, and whatever their number.
3. The jurisdiction in this respect assumed by courts of law, attended with difficulty.

#### I. Of the creditor's rights against the surety.

1. The surety cannot be called upon before the creditor is damaged.

Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, &c. to which he may become liable by their default; the agents having afterwards become bankrupt, and government having given notice to the representatives of the colonel (deceased) of a demand upon the colonel's estate by virtue of an unliquidated account; a bill by the representatives of the colonel, against the representatives of the surety to pay the balance due to government, and also to set aside a sufficient sum out of their testator's estate, to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*, dismissed with costs. *Antrobus v. Davidson*, 3 Mer. 569.

2. He may be sued in the first instance.

A surety may be sued in the first instance: but if the creditor sues the principal first, and gives time, the surety is discharged. 6 Ves. 734.

3. The creditor cannot compel payment by distress or unfair means.

The East India company having compelled payment from a surety in India, by their power over him, as one of their servants, without an account or proceeding against the principal, (though solvent,) and otherwise under harsh circumstances, he was restored to the same situation by a decree for re-payment with interest at 5 per cent. upon giving security for re-payment, in case in a future suit by the company, he should be held liable. The court would not upon the circumstances give Indian interest. *Law v. the East India Company*, 4 Ves. 824.

#### II. Of the extent to which the surety shall be chargeable.

1. Whether his liability shall be lessened by securities previously deposited with the creditor.

A. being indebted to B., lodges several securities for money with him, as collateral securities for that debt. A. afterwards borrows a further sum of money of B., for which C. becomes his surety. A. becomes bankrupt, and B. calls upon C. to pay the second debt. The securities in the hands of B. being more than sufficient to pay the first debt, C. shall have the benefit of the surplus in the reduction of the second debt. *Praed v. Gardner*, 2 Cox, 86.

2. Whether beyond the penalty of an annuity bond.

Annuity bond, forfeited, when the grantor was discharged under an insolvent act; which provided, that future estate should not be discharged; the penalty, being less than the subsequent arrears, was allowed as the debt, and not

not only in favor of the purchaser of an annuity, but also of a co-obligor, as surety; having compounded with the purchaser, and obtained possession of the securities, by repaying the money advanced with the arrears; then due; being at that time less than the penalty. *Butcher v. Churchill*, 14 Ves. 567.

**III. How far the surety may be considered as the principal debtor.**

He may be sued in the first instance.

Surety, depositing the money, and indemnifying against expence, &c. may compel the creditor to go against the principal, and even to prove, under a commission of bankruptcy, for the benefit of the surety. 6 Ves. 734.

**IV. What acts, by the creditor, shall discharge the surety.**

**1. Forbearance of the principal.**

1. Oblige in a bond with a surety, without communication with the surety, takes notice from the principal, and gives farther time; the surety is discharged. *Rees v. Berrington*, 2 Ves. 540.

2. Creditor, having among other securities, a bond with a surety, taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by warrant, &c.; without prejudice to any security he now holds, injunction granted against suing the surety. *Boulton v. Stubbs*, 18 Ves. jun. 20.

2. And forbearance of the principal, the grantee of an annuity, exonerates the surety from past as well as future arrears.

Giving time to the principal, the grantee of an annuity exonerates the surety from past as well as future arrears. *Eyre v. Barthrop*, 3 Mad. 221.

3. Stay of execution, in a suit against the principal, instituted by direction of the surety.

Creditor sues the principal by direction of the surety, but without his privity agrees to stay execution; the surety is discharged. 2 Ves. 544.

**4. Settlement, though erroneous, with the principal.**

A surety to the East India company discharged, by payment of a balance to the principal under an erroneous settlement by the officers of the company, without their authority or knowledge. *Law v. the East India Company*, 4 Ves. 824.

**5. Discharge of the principal debtor, without reserving the remedy against the surety.**

Grounds of the decision, that a discharge of the principal debtor, without a reserve of the remedy against the surety, discharges the surety. 6 Ves. 807.

**V. What acts, by the creditor, shall not discharge the surety.**

**1. Composition, with reserve of the remedy against the surety.**

Composition, with reserve of the remedy against sureties, valid; but must plainly appear. 18 Ves. jun. 22.

**2. The discharge of a co-surety.**

The discharge of a surety by the creditor, has not the effect of a discharge of the principal, without reserve: and therefore, a co-surety is not discharged. When it is ascertained, what each of the co-sureties has paid beyond his proportion, the equity, as between them, is arranged upon the principle of contribution for the excess. *Ex parte Gifford*, 6 Ves. 805.

**VI. Of the surety's rights against the creditor.**

On depositing the money, and indemnifying against expence, he may compel the creditor to go against the principal,

Vide 6 Ves. 734.

**VII. Of the surety's rights against the principal.**

1. A surety may in equity, compel his principal to relieve him of his liability by payment of his debt.

A surety may, in equity, compel his principal to relieve him of his liability by payment of the debt. *Antrobus v. Davidson*, 3 Mer. 579.

2. Against the separate estate of his wife, under the circumstances.

Settlement by husband, of money in trust, to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by the wife's assignment of the interest to become due, and of the principal sum in the event of there being no children of the marriage. Held, the surety not entitled to any remedy in equity, under the assignment, in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement; a charge of fraudulent concealment not being sufficiently established. And even if fraud had been fully made out against the wife, it seems that it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor. *Jackson v. Hobhouse*, 2 Mer. 483.

3. Whether a surety, paying off a specialty debt, is to be considered a specialty creditor of his principal.

*Seem*, a surety who pays off a specialty debt, is to be considered as a specialty creditor of his principal. *Robinson v. Wilson*, 2 Mad. 434.

**VIII. A surety, upon payment, is entitled to the creditor's rights.**

1. Even against bail.

Surety entitled to the same right as the creditor, even against bail. 11 Ves. 22.

2. Whether a surety, paying off a specialty debt, is to be considered a specialty creditor of his principal.

Vide 2 Mad. 434.

**IX. Of the form of an instrument of suretyship.**

1. An ordinary money-bond does not distinguish between principal and surety.

In the case of an ordinary money-bond, there is no distinction, upon the face of it, between principal and surety. *Sees*. in the case of an indemnity bond, where the surety expressly stipulates for the act of the principal. *Antrobus v. Davidson*, 3 Mer. 578.

2. Evidence is admissible to show who is the principal; who the surety.

Evidence admitted to show who is principal, and who surety. 14 Ves. 170.

**X. Of contribution between co-sureties.**

1. The right depends rather upon a principle of equity than contract.

Right to contribution, as between co-sureties; whether by the same or several instruments, whether privity, or not, and whatever their number: depending rather upon a principle of equity than contract, except as upon the implied knowledge of that principle. Modern jurisdiction of the courts of law attended with difficulty, where the sureties are numerous; especially since the decision, that separate actions may be brought against different sureties for their respective proportions. 14 Ves. 164.

2. Right to contribution, whether by the same or different instruments, whether privity or not, and whatever their number.

No difference in the relation of sureties, that one is so by a separate instrument. 14 Ves. 31.

3. The jurisdiction in this respect assumed by courts of law, attended with difficulty.

Vide 14 Ves. 164.

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**PRIZE.**

- I. **The rights of claimants to prize.**

They are upon a footing with other rights.

- II. **The period ascertained when the interest in prize vests.**

None completely vests before condemnation; but then by relation from the capture.

- III. **In relation to captures by unauthorised vessels.**

The property is in the crown.

- IV. **Of the foundation of the municipal jurisdiction in matters of prize.**

It is not founded upon consent of nations.

- V. **Of the prize acts.**

They do not extend the admiralty jurisdiction beyond its natural extent.

- VI. **Extent of the prize jurisdiction.**

Over the question, whether the receiver of the property received it as consignee or prize agent.

- VII. **Of the jurisdiction of courts of equity in matters of prize.**

Where a trust exists, or may be implied.

- VIII. **Proceedings in suits in equity relative to prize.**

Motion to bring into court the shares of claimants abroad.

- IX. **Rights of an appellant from an admiralty condemnation.**

To follow the property or the proceeds in the hands of an agent.

**I. The rights of claimants to prize.**

They are upon a footing with other rights.

The crown in prize-grants puts what is strictly bounty upon the footing of right; considering the claim as transmissible to the legal representatives of the claimant, deceased before the grant, subject to his will, &c.; as his other property. *Stevens v. Bagwell*, 15 Ves. 139.

**II. The period ascertained when the interest in prize vests.**

None completely vests before condemnation; but then by relation from the capture.

No interest completely vested in prize before condemnation; but upon condemnation it is considered the property of the captor from the time of the capture. *Stevens v. Bagwell*, 15 Ves. 139.

**III. In relation to captures by unauthorised vessels.**

The property is in the crown.

Sentence in the court of admiralty, upon a prize to a privateer, as a *droit* to the crown, for want of a letter of marque. The property is in the crown. Motion, to restrain the parties from receiving, and the register of the court of admiralty from paying, the proceeds under a treasury warrant issued with costs. *Nicol v. Goodhall*, 10 Ves. 155.

**IV. Of the foundation of the municipal jurisdiction in matters of prize.**

It is not founded upon consent of nations.

Prize causes determined in municipal courts, not by consent of nations; for it is a just cause of war, if their decisions are not agreed to. 1 Ves. 391.

**V. Of the prize acts.**

They do not extend the admiralty jurisdiction beyond its natural extent.

Statutes of prize do not extend the admiralty jurisdiction beyond its natural extent. 1 Ves. 391.

**VI. Extent of the prize jurisdiction.**

Over the question, whether the receiver of the property received it as consignee or prize agent.

The appellant from a decision of condemnation by the admiralty court, is not bound to adhere to the security given; but may follow the property or the proceeds in the hands of an agent. The prize jurisdiction extends to the question, whether a person, who received and sold the property, received it as consignee for valuable consideration, or as prize agent. A prohibition therefore against a monition to bring the property or the proceeds was refused. *Case of the ship Noyasomhed*, 7 Ves. 593.

**VII. Of the jurisdiction of courts of equity in matters of prize.**

Where a trust exists, or may be implied.

Jurisdiction of a court of equity upon a bill by officers of the navy and the East India company, on behalf of themselves and all others, &c. for an account of prize-money received beyond the due proportion, and for a distribution according to the king's grant and usage; considering the defendants as trustees. But upon the construction of the grant, as not creating a trust, a demurrer was allowed. *Brown v. Harris*, 13 Ves. 552.

**VIII. Of**

**VIII. Proceedings in suits in equity relative to prize.**

Motion to bring into court the shares of claimants abroad.

Motion to bring into court the shares of prize-money belonging to claimants abroad, who had not come in under the decree in the cause, refused. *Good v. Blewitt, Cooper, 197.*

**IX. Rights of an appellant from an admiralty condemnation.**

To follow the property or the proceeds in the hands of an agent.

Vide 7 Ves. 593.

**PROHIBITION.****I. In what cases a prohibition to the prize court will be refused.**

1. For proceeding in a case involving a question of prize.
2. For proceeding after a treaty of peace.

**II. What proceedings shall not be stayed by a prohibition.**

A proceeding upon a bail-bond in the marshalsea court, assigned to one of the officers.

**III. Of the court to which the application for a prohibition must be made.**

1. Chancery will not, in term time, entertain a motion for a prohibition.
2. Chancery may grant a prohibition in vacation.

**IV. Of the mode of obtaining a prohibition.**

1. The motion must be founded on an affidavit.
2. The form of the affidavit to be altered in future.
3. A defendant must plead before he applies for the writ.

**V. Of superseding the writ.**

Where a prohibition has issued upon an irregular application it must be superseded, since any proceeding against it is a contempt.

**I. In what cases a prohibition to the prize court will be refused.**

1. For proceeding in a case involving a question of prize.

Prohibition refused to judge of the prize court, to enjoin him from proceeding in a case involving a question of prize. *Ex parte Lynch, 1 Madd 15.*

2. For proceeding after a treaty of peace.

Prohibition to the prize court for proceeding after treaty of peace with America, refused. *Case of the ship Harmony, Cooper, 325.*

**II. What proceedings shall not be stayed by a prohibition.**

A proceeding upon a bail-bond in the marshalsea court, assigned to one of the officers.

A proceeding upon a bail-bond in the marshalsea court, assigned according

ing to the practice of that court to one of the officers, is not a proceeding against a prohibition restraining the original action, so as to incur a contempt. *Iveson v. Harris*, 7 Ves. 254.

## III. Of the court to which the application for a prohibition must be made.

1. Chancery will not, in term time, entertain a motion for a prohibition.

This court will not entertain a motion for prohibition in term. *Montgomery v. Blair*, 2 Sch. & Lef. 136.

2. Chancery may grant a prohibition in vacation.

The court of chancery always open; and therefore can issue a prohibition in the vacation. 7 Ves. 257.

## IV. Of the mode of obtaining a prohibition.

1. The motion must be founded on an affidavit.

Motions for prohibitions to be grounded on affidavit. *Worcester Corporation v. Bennet*, Dick. 143.

2. The form of the affidavit to be altered in future.

Whether a prohibition issued from the court of chancery, without application in court, upon an affidavit, stating merely, that the cause of action arose out of the jurisdiction, not adding, that foreign plea was tendered, and refused, is regular, *quære*. But if it is irregular, any proceeding against it is a contempt. The party ought to apply to the court to supersede it. The form of the affidavit to be altered in future. *Iveson v. Harris*, 7 Ves. 254.

3. A defendant must plead before he applies for the writ.

A prohibition issues of course upon a proper affidavit, but the defendant must plead before he applies for a prohibition. *Walker v. Fanderheide*, Dick. 336.

## V. Of superseding the writ,

Where a prohibition has issued upon an irregular application, it must be superseded, since any proceeding against it is a contempt.

1. Vide 7 Ves. 254.

2. Case by the old law of a wilful mixture by owner of corn or flour with that of another: the value being unequal, and therefore not to be distinguished, the other took the whole. 15 Ves. 442.

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## PROPERTY TAX ACT.

### I. What property is subject to the provisions of the act.

Pin-money.

### II. Its provisions; how far retrospective.

The provision declaring void, covenants to pay the tax.

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### I. What property is subject to the provisions of the act.

Pin-money.

Pin-money subject to the property tax; not to a deduction for alimony; as it is clear of maintenance. *Ball v. Coutts*, 1 Ves. & Beam. 292.

II. 3<sup>rd</sup>

**II. Its provisions; how far retrospective.**

The provision declaring void, covenants to pay the tax.

The property tax act, 46 Geo. 3. c. 65. s. 112. & 116., in declaring covenants to pay the same, void, has a retrospective operation; therefore covenants entered into before the act passed, are void. *Buxton v. Monkhouse, Cooper, 41.*

**PUBLIC AUCTION.****I. Relative to the sale.**

Puffing.

**II. Relative to the auctioneer.**

1. He may limit his general power of agency by suitable notification.
2. Will be ordered to pay a deposit into court, minus his charges and expences.

**I. Relative to the sale.**

Puffing.

1. At an auction one person only bid for the vendor to 75*l.* an acre, upon a private notice to the auctioneer; then, after a contest with real bidders, the estate was bought at 101*l.* 17*s.* an acre, and the purchaser some days afterwards paid the duty, he was decreed to perform the contract, with costs. *Bramley v. Alt, 3 Ves. 620.*

2. Where all the bidders at an auction, except the buyer, are bidding for the vendor, without notice, and the buyer is thereby induced to give more than the value, neither courts of law nor equity will support it. *Ibid. 624.*

3. No objection to a sale by auction, that persons were employed by the vendor to bid for him, without public notice. *Ibid. 627.*

4. Whether bidding at an auction upon the part of the vendor, for the purpose of enhancing the price, vitiates the sale, and prevents a specific performance, *quære.* *Smith v. Clarke, 12 Ves. 477.*

5. The circumstance, that a person bid at an auction under the private direction of the vendors, for the purpose of preventing a sale under a sum specified as the value, is no objection to a specific performance; especially in a case where the vendors were assignees under a commission of bankruptcy; and the purchaser was not present; but purchased by an agent. *Smith v. Clarke, Ibid.*

**II. Relative to the auctioneer.**

1. He may limit his general power of agency by suitable notification.

Auctioneer may limit his general power of agency; but only by declaration equivalent in legal effect to the general authority. Upon that principle, evidence of loose declarations at the sale not admitted. *1 Ves. & Beam. 210.*

2. Will be ordered to pay a deposit into court, minus his charges and expences.

Auctioneer, on motion of vendor, ordered to pay a deposit into court, minus his charges and expences; and vendee restrained by injunction from proceeding



proceeding in his judgment, obtained in an action against the auctioneer for the deposit. *Annesley v. Muggridge*, 1 Mad. 593.

## PUBLIC TRUSTEE.

Responsibility of public trustees for acts not according to their authority.

Commissioners under inclosure acts.

Vide 17 Ves. 216.

## RECEIVER.

### I. When a receiver shall be appointed.

1. To an undivided estate.
2. To two-fifths of an estate.
3. Against the legal title, upon suspicion of fraud.
4. Against the legal title, upon suspicion of abused confidence.
5. Against a defendant, absconding to avoid a subpoena to answer.
6. Where a tenant in common in possession refuses to give security, to account for a moiety.
7. Upon an executor's misconducting himself.
8. Upon the bankruptcy of an executor, unless known to testator.
9. Upon the insolvency of an administrator, under the circumstances.
10. Against a tenant for life of premises subject to a term, decreed to be sold, under the circumstances.
11. Against mortgagee in possession, not able to ascertain his debt.
12. Upon application of creditors, where mortgagee is not in possession.
13. For a second mortgagee, though opposed by a purchaser of part of his interest, and in possession.
14. Mortgagee allowed the expence of a receiver, under the circumstances.
15. In a cause for an account of a partnership, both parties being dead.
16. For one partner against another, where defendant is in contempt, and does not appear.
17. Where satisfaction is sought out of the real assets descended to an infant heir, so that the parol may demur.
18. To secure the residue of purchase-money, under the circumstances.
19. Upon refusal by purchaser of legal estate to pay an equitable rent charge.

### II. When a receiver shall not be appointed.

1. Against the legal estate, upon evidence in a cause not brought to hearing.

2. Against

2. Against a tenant in common in possession, unless excluding his companion.
3. For simple-contract creditors of a deceased, who had been, but ceased to be, a trader.
4. Upon the single ground of an executor's being in mean circumstances.
5. Pending a question of lien; the devisees consenting to pay the rents into court.
6. On behalf of a second mortgagee, living the mortgagor, without the consent of the first mortgagee.
7. In a cause for an account of a partnership, where any of the partners are living.
8. Where there is a trustee, with power of entry and distress.
9. Upon the single ground of two wills being in controversy in the spiritual court.

### III. Of appointing a receiver to property abroad.

An estate in India.

### IV. Who may be a receiver.

1. A practising barrister.
2. One residing at a distance from the estate, and in parliament.

### V. Who cannot be a receiver.

1. The next friend of infant petitioners.
2. A peer.
3. The receiver-general of a county.
4. The solicitor in the cause.
5. The solicitor under a commission of lunacy.
6. The trustee.
7. The trustee, whether he be sole trustee or joined with others.
8. The trustee; unless in a special case, and without emolument.

### VI. On whose application a receiver may be appointed.

A stranger cannot propose a receiver.

### VII. Of the necessary parties to the application for a receiver.

Where a mortgage appears upon the face of the pleadings.

### VIII. At what time a receiver may be appointed.

1. Before subpoena to appear served, in case of an infant's estate.
2. Before answer, under the circumstances.
3. In the first instance, where the answer shows that the real estate must be responsible.

### IX. Of the duty of a receiver to pay in proceeds periodically.

Retaining money beyond the year, he shall pay interest.

### X. Of the mode in which a receiver may be compelled to account.

He is compellable to account by petition or motion.

**XI. A receiver shall derive no advantage from his office beyond the regular allowance.**

Therefore the receiver of a public trust with a salary, making interest of the monies, shall account for it.

**XII. When a receiver shall be reimbursed his expenses.**

1. Expenditure upon the estate, without an order.
2. Expenditure by West India manager during his absence.

**XIII. When a receiver shall lose his allowance.**

1. Upon not passing his accounts regularly, and paying in the balance.
2. A West India manager cannot, during his absence, charge commission.

**XIV. When a receiver shall not be compensated for his trouble.**

Attending, without an order, a survey of the estate.

**XV. When a receiver shall answer for a loss.**

Where the remittance was to his own credit and use, and the banker failed.

**XVI. When a receiver shall not answer for a loss.**

Where the deposit was made, on his going to London to pass his accounts, with testator's banker, who failed.

**XVII. What acts a receiver may do per se.**

It seems he may distrain without an order.

**XVIII. What acts a receiver cannot do per se.**

1. Lease, even for one year.
2. Proceed in ejectment.

**XIX. Of motions that a receiver may distrain.**

1. Whether necessary.
2. After order to elect to proceed at law or in equity.
3. Ordered to distrain in the names of trustees.
4. Ordered to distrain on one of several tenants.

**XX. Of motions that a receiver may institute a suit.**

An ejectment.

**XXI. Whether a receiver is liable to a suit.**

An ejectment against a receiver in possession, cannot be brought without leave.

**XXII. Of motions that a receiver may defend a suit.**

Preliminary reference, whether beneficial.

**XXIII. The consequences of appointing a receiver.**

Whether the estate is discharged from loss arising from his failure or misconduct.

**XXIV. Of motions to discharge a receiver.**

Consent of incumbrancers, necessary.

**XXV. &c**

**XXV. Of process of contempt against a receiver.**

1. Disobeying an order for paying in money, he shall be committed.
2. A preliminary alternative order necessary to found a commitment for disobeying an order to pay in money.

**XXVI. Of orders relative to receivers.**

Relative to their accounting and accounts.

**XXVII. In relation to the master's appointment of a receiver.**

1. He need not state his reasons.
2. The court interferes with the master's appointment with reluctance.
3. Exception is the course for reviewing it.
4. But the exceptions must show the person appointed to be improper.
5. To maintain an exception, a strong case of disqualification is necessary.
6. In this case the exception was disallowed.
7. His nomination re-considered on an intermediate grant of administration.
8. The course where parties neglect to propose a receiver.
9. On parties accounting for their neglect, the master will be ordered to receive their proposals.

**XXVIII. Nature of the security required of a receiver.**

1. A receiver in England.
2. A receiver abroad.
3. Receivers were appointed upon their own recognizances.

**XXIX. In relation to the sureties of a receiver.**

Their rights against the receiver.

**I. When a receiver shall be appointed.**

1. To an undivided estate.

Receiver appointed of an undivided estate. *Evelyn v. Evelyn*, Dick. 800.

2. To two-fifths of an estate.

A receiver appointed of two-fifths of an estate. *Calvert v. Adams*, Dick. 478.

3. Against the legal title, upon suspicion of fraud.

A receiver may be appointed against the legal title, in a strong case of fraud, upon affidavits; but under the circumstances of this case, an application, after answer, for that purpose, an injunction against committing waste, and disposing of the estate, was refused. *Lloyd v. Passingham*, 16 Ves. 59.

4. Against the legal title, upon suspicion of abused confidence.

Receiver, upon motion against the legal estate under a conveyance, upon a strong suspicion of abused confidence, arising upon the answer. *Huguenin v. Baseley*, 13 Ves. 105.

5. Against a defendant, absconding to avoid a subpoena to answer.

A receiver appointed over the estate of a defendant, who had absconded to

to avoid being served with a subpoena to answer. *Maguire v. Allen*, 1 Ball & Beatty, 75.

6. Where a tenant in common in possession refuses to give security, to account for a moiety.

A tenant in common in possession shall give security, to account for a proportion of the rents to his co-tenant, or a receiver shall be appointed. *Street v. Anderson*, 4 B. C. C. 414.

7. Upon an executor's misconducting himself.

Though this court will appoint a receiver, upon misconduct of the executor, it will not upon the single ground, that he is in mean circumstances. *Anon.* 12 Ves. 4.

8. Upon the bankruptcy of an executor, unless known to testator.

If an executor become a bankrupt, a receiver will be appointed; ~~and~~ *quære* if the testator knew that the executor was a bankrupt when he constituted him executor, whether a receiver would be appointed. *Gladden v. Stoneman*, 1 Mad. 143. n.

9. Upon the insolvency of an administrator, under the circumstances.

The court will appoint a receiver of an intestate's personal estate, when the administrator is sworn to be insolvent, before his answer be put in; although the fact of his being abroad (stated also in the plaintiff's affidavit,) be denied by an affidavit filed in answer thereto. *Scott v. Becker*, 4 Price, 346.

10. Against a tenant for life of premises subject to a term decreed to be sold, under the circumstances.

Limitation of a term for 500 years, to raise portions for younger children, and afterwards estate limited to T. M. for life, with remainders over; and a decree made, to sell the term for raising the portions. T. M., the tenant for life, refusing to produce the title deeds before the master, and obstructing the decree, an order was made for a receiver of the rents and profits of the estate. *Brigstocke v. Mansel*, 3 Mad. 47.

11. Against mortgagee in possession, not able to ascertain his debt.

Receiver, upon a mortgagee in possession, who cannot ascertain the debt due to him. *Codrington v. Parker*, 16 Ves. 469.

12. Upon application of creditors, where mortgagee is not in possession.

When a mortgagee is not in possession, the court will, upon application of creditors, appoint a receiver of the mortgaged premises, but without prejudice to the right of the mortgagee to obtain possession. *Bryant v. Cornick*, 1 Cox, 422.

13. For a second mortgagee, though opposed by a purchase of part of his interest, and in possession.

A second mortgagee, the plaintiff, applied for a receiver: this was opposed by a defendant who had purchased from the plaintiff part of his mortgage, and was in possession as tenant of a part of the estate of which the rent was equal to the interest of his share of the mortgage. The order was granted. *Archdeacon v. Bowes*, 3 Anst. 753.

14. Mortgagee allowed the expence of a receiver, under the circumstances.

Mortgagee allowed the expence of a receiver, the mortgaged property consisting of small houses at small rents, and the mortgagee living at a distance. *Davis v. Dendy*, 3 Mad. 170.

15. In a cause for an account of a partnership, both parties being dead.

In a cause for an account of a partnership, both parties being dead, a receiver shall be appointed; *secus*, if one be surviving. *Phillips v. Atkinson*, 2 B. C. C. 272.

16. For one partner against another, where defendant is in contempt, and does not appear.

Receiver granted for one partner against another, where the defendant is in contempt and does not appear. *Read v. Bowers*, 4 B. C. C. 441.

17. Where satisfaction is sought out of the real assets descended to an infant heir, so that the parol may demur.

1. Where satisfaction is sought out of real assets descended to an infant heir, so that the parol may demur; the court will appoint a receiver of the real estate descended. *Sweet v. Partridge*, Dick. 696.

2. Bill for sale of real estate for payment of debts. The heir at law being an infant, the parol demurred. The court will appoint a receiver as in other cases. *Sweet v. Partridge*, 1 Cox, 433.

18. To secure the residue of purchase-money, under the circumstances.

Receiver appointed after answer, of a purchaser upon the mutual lien, for the remainder of the purchase-money, or the deposit, a mixed possession, his admitted insolvency, and intention to sell and convey. *Hall v. Jenkinson*, 2 Ves. & Beam. 125.

19. Upon refusal by purchaser of legal estate, to pay an equitable rent-charge.

If a purchaser of the legal estate in lands, which are subject to an equitable rent charge, refuse to pay the rent-charge, a receiver will be appointed. *Pritchard v. Fleetwood*, 1 Mer. 54.

## II. *When a receiver shall not be appointed.*

1. Against the legal estate, upon evidence in a cause not brought to hearing.

Motion for a receiver against the legal estate, upon evidence in a cause which had not been heard, refused. *Lloyd v. Passingham*, 3 Mer. 697.

2. Against a tenant in common in possession, unless excluding his companion.

Motion by tenant in common, for a receiver against his co-tenant in possession, refused; not amounting to a case of exclusion. *Milbank v. Revett*, 2 Mer. 405.

3. For simple-contract creditors of a deceased, who had been, but ceased to be, a trader.

Motion by simple-contract creditors of one who had been a trader, but ceased to be so, and was not a trader at the time of his death, for a receiver, upon affidavit before answer, refused; not being within the statute 47 Geo. 3. sess. 2. c. 74. *Keene v. Riley*, 3 Mer. 436.

4. Upon the single ground of an executor's being in mean circumstances.

A receiver will not be appointed merely because an executrix is poor. *Howard v. Papera*, 1 Mad. 142.

5. Pending a question of lien, the devisees consenting to pay the rents into court.

Pending a question, whether estates devised were subject to a bond executed

executed by the testator for making a settlement on his wife and children, the court refused to appoint a receiver, the devisee in trust consenting to pay the rents into court. *Prebble v. Boghurst*, Swanst. 313.

6. On behalf of a second mortgagee, living the mortgagor, without the consent of the first mortgagee.

A second mortgagee cannot have a receiver, the mortgagor living, without the consent of the first mortgagee; because the court cannot prevent the first mortgagee from bringing an ejectment against the receiver as soon as he is appointed. *Phipps v. Bishop of Bath and Wells*, Dick. 608.

7. In a cause for an account of a partnership, where any of the parties are living.

Vide 2 B. C. C. 272.

8. Where there is a trustee, with power of entry and distress.

Receiver ought to be appointed where there is a trustee, with power of entry and distress. *Buxton v. Monkhouse*, Cooper, 41.

9. Upon the single ground of two wills being in controversy in the spiritual court.

The court of chancery will not interfere, by appointing a receiver, upon the mere ground, that two wills are in controversy in the spiritual court; and no special case; as that the property is in danger, and cannot be secured by administration *pendente lite*. *Richards v. Chave*, 12 Ves. 462.

### III. Of appointing a receiver to property abroad.

An estate in India.

Appointment of a receiver of an estate in India. The receiver to be in England; acting by an agent. Inquiry directed, what should be the term, beyond which he should not be permitted to let. — *v. Lindsey*, 15 Ves 91.

### IV. Who may be a receiver.

1. A practising barrister.

It is no objection to a receiver, that he is a practising barrister; but the solicitor in the cause cannot be receiver. *Garland v. Garland*, 2 Ves. 137.

2. One residing at a distance from the estate, and in parliament.

Petition to change a receiver. The master's judgment not absolutely conclusive; but the court interferes with reluctance. The recommendation of the testator, and the respect due to a considerable family, are to be attended to in the appointment. The circumstances of the person proposed (in this instance, a relation of the family,) a residence, distant from the estate, being in parliament, and a practising barrister in town, though no absolute disqualification, are to be considerably regarded. Distinction, with reference to such circumstances, between the auditor and a receiver, with powers to let, and manage, &c. *Wynne v. Lord Newborough*, 15 Ves. 283.

### V. Who cannot be a receiver.

1. The next friend of infant petitioners.

The next friend of infant petitioners not permitted to act as receiver. *Stone v. Wishart*, 2 Mad. 64.

2. A peer.

A peer not to be a receiver. *Attorney-general v. Gee*, 2 Ves. & Beam. 208.

3. The

3. The receiver-general of a county.

Receiver-general of a county cannot be appointed a receiver. *Attorney-general v. Day*, 2 Mad. 254.

4. The solicitor in the cause.

Vide 2 Ves. 137.

5. The solicitor under a commission of lunacy.

Solicitor under a commission of lunacy, not to be appointed receiver of the estates of the lunatic. *Es parte Pincke*, 2 Mer. 452.

6. The trustee.

The trustee cannot be receiver. *Anonymous*, 3 Ves. 515.

7. The trustee, whether he be sole trustee, or joined with others.

A trustee cannot be receiver; whether he is sole trustee, or jointly with others. *\_\_\_\_\_ v. Jolland*, 8 Ves. 72.

8. The trustee; unless in a special case, and without emolument.

1. Trustee (not to be receiver: unless a special case, and without emolument. *Sykes v. Hastings*, 11 Ves. 363.

2. General rule, that a trustee shall not be the receiver, with emolument. *Sutton v. Jones*, 15 Ves. 584.

VI. ~~On whose~~ application a receiver may be appointed.

A stranger cannot propose a receiver.

A stranger cannot propose a receiver. *Attorney-general v. Day*, 2 Mad. 246.

VII. ~~Of the necessary parties to the~~ application for a receiver.

Where a mortgagee appears upon the face of the pleadings.

A receiver cannot be appointed without mortgagee's being before the court, if a mortgage appears upon the face of the pleadings. *Price v. Williams, Cooper*, 31.

VIII. ~~At what time~~ a receiver may be appointed.

1. Before subpoena to appear served, in case of an infant's estate.

A receiver of an infant's estate ordered, upon filing the bill, and before a subpoena to appear, had been served. *Pitcher v. Helliar, Dick*. 680.

2. Before answer, under the circumstances.

1. Motion for a receiver granted before answer. 2 B. C. C. 158.

2. Receiver appointed before answer upon affidavit of misapplication and danger to the property in the hands of an executor: the co-executors consenting to the order. A strong case necessary against an executor. *Midleton v. Dodswell*, 13 Ves. 266.

3. Receiver on affidavits before answer. *Duckworth v. Trafford*, 18 Ves. jun. 283.

4. Receiver granted before answer, upon the bill of a purchaser *pendente lite*; viz. a suit instituted by the wife of the vendor; claiming under a settlement, voluntary, as being after marriage. *Metcalf v. Pulvertoft*, 1 Ves. & Beam. 180.

5. Receiver appointed before answer, in the case of a devise to four trustees, of whom two declined to act; all parties being before the court, and consenting. *Brodie v. Barrige*, 3 Mer. 695.



3. In the first instance, where the answer shows that the real estate must be responsible.

Where it appears by the answer, that the real estate must be responsible, as, that there is no personal estate, to be first applied to debts, a receiver will be granted in the first instance. *Jones v. Pugh*, 8 Ves. 71.

**IX. Of the duty of a receiver to pay in proceeds periodically.**

Retaining money beyond the year, he shall pay interest.

1. Receiver ought not to keep money arising from receipts in his hands; if he does, he or his executors shall account for it. *Earl of Lonsdale v. Church*, 3 B. C. C. 41.

2. Receiver must pay in his money yearly; and must pay nothing out without an order. He shall pay interest for money kept in his hands, even a quarter of a year after it ought to have been paid in. Inquiry directed as to that, though he had passed his accounts, and all parties declared themselves satisfied. *Fletcher v. Dodd*, 1 Ves. 85.

**X. Of the mode in which a receiver to pay in proceeds periodically.**

He is compellable to appoint by petition or motion.

Receivers, being bound by recognizance to account regularly, or when called on, are considered as officers of the court, and are obliged to account on application, by petition or motion. 1 Ball & Beatty, 74.

**XI. A receiver shall derive no advantage from his office beyond the regular allowance.**

Therefore the receiver of a public trust with a salary, making interest of the monies, shall account for it.

Receiver of a public trust (having a salary) making interest of the monies, shall account for it. *Earl of Lonsdale v. Church*, 3 B. C. C. 41.

**XII. When a receiver shall be reimbursed his expences.**

1. Expenditure upon the estate, without an order.

1. Receiver here gives security duly to account; not for faithful management. He cannot set and let, or make expenditures without application to court: manager in West Indies may. 1 Ves. 139.

2. Receivers and committees not to apply the trust fund in repairs to any considerable extent, without a previous application. *Attorney-general v. Vigor*, 11 Ves. 563.

3. Receiver not permitted to lay out more than a very small sum at his discretion. 15 Ves. 26.

4. A receiver is not to lay out money in repairs at his own discretion: but under circumstances an inquiry was directed; and the report stating, that the expenditure was for the lasting benefit of the estate, and by the direction of the trustees, the order for the allowance was made. *Blunt v. Clitherow*, 6 Ves. 799.

5. Upon a receiver's application to be allowed for repairs done, an inquiry was directed, whether the repairs were reasonable. *Attorney-general v. Vigor*, 11 Ves. 563.

6. Formerly a receiver was not entitled to any allowance for sums of money laid out by him on the estate, without a previous order. But according to the present practice, a reference is directed to the master to inquire whether the transaction is for the benefit of the parties interested. *Tempest v. Ord*, 2 Mer. 55.

## 2. Expenditure by West India manager during his absence.

Manager of a West India estate, although not entitled during his absence from the island to charge commission, yet is entitled to be allowed all such sums as he has reasonably paid to others to whom he has entrusted the management. *Forrest v. Elwes*, 2 Mer. 72.

XIII. *When a receiver shall lose his allowance.*

## 1. Upon not passing his accounts regularly, and paying in the balance.

1. Receiver who does not pass his accounts regularly, not to be allowed poundage. 8 Ves. 371.

2. General order, that receivers shall annually pass their accounts; and pay in their balances; or lose their salaries: and be charged with interest at *per cent.* 15 Ves. 278.

3. Receiver of the personal estate of the testator, not passing his accounts, and paying in the balances, deprived of his salary; and charged with interest; not upon each sum from the time it was received, according to the *statute*, applicable to a receiver of annual rents and profits: but, as an executor would be charged. *Potts v. Leighton*, 15 Ves. 273.

## 2. A West India manager cannot, during his absence, charge commission.

*Vide* 2 Mer. 72.

XIV. *When a receiver shall not be compensated for his trouble.*

Attending, without an order, a survey of the estate.

A receiver is not entitled to any compensation for his trouble, in attending a survey of the minor's estate, there being no order made for his attendance. *Ex parte Ormsby*, 1 Ball & Beatty, 189.

XV. *When a receiver shall answer for a loss.*

Where the remittance was to his own credit and use, and the banker failed.

Receiver charged with a loss by the failure of the banker; having made the remittances to his own credit and use; and not to a separate account for the trust. *Wren v. Kirton*, 11 Ves. 377.

XVI. *When a receiver shall not answer for a loss.*

Where the deposit was made, on his going to London to pass his accounts, with testator's banker, who failed.

Receiver not liable by the failure of the testator's banker at Bristol; with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it. 3 Ves. 566.

XVII. *What acts a receiver may do per se.*

It seems he may distrain without an order.

Motion for receiver to distrain. *Hughes v. Hughes*, 1 Ves. 161.

XVIII. *What acts a receiver cannot do per se.*

## 1. Lease, even for one year.

Receiver is to let the estate to the best advantage: but he cannot raise the rents upon slight grounds: nor turn out tenants; nor let even for one year without application to the master. 1 Ves. 165.

## 2. Proceed in ejectment.

Receiver cannot proceed in ejectment. *Wynn v. Lord Newborough*, 3 B. C. C. 88.

## XIX. Of motions that a receiver may distrain.

## 1. Whether necessary.

Receiver permitted, on motion, to distrain. *Hughes v. Hughes*, 3 B. C. C. 87.

## 2. After order to elect, to proceed at law or in equity.

After order to elect, to proceed at law or in equity, a receiver appointed by this court, cannot distrain for rent, without undertaking to proceed in equity only. *Mills v. Fry, Cooper*, 107.

## 3. Ordered to distrain in the names of trustees.

Order, that a receiver might distrain in the names of trustees. *Shelly v. Pelham*, Dick. 120.

## 4. Ordered to distrain on one of several tenants.

Tenants directed to pay their rents in a given time, on the first application, or to stand committed; and the receiver to be at liberty to distrain on one tenant. *Mitchel v. Duke of Manchester*, Dick. 787.

## XX. Of motions, that a receiver may institute a suit.

An ejectment.

Vide 3 B. C. C. 88.

## XXI. Whether a receiver is liable to a suit.

An ejectment against a receiver in possession, cannot be brought without leave.

Where a receiver is in possession, an ejectment cannot be brought without leave of the court. *Angel v. Smith*, 9 Ves. 339.

## XXII. Of motions, that a receiver may defend a suit.

Preliminary reference, whether beneficial.

Upon a motion, that a receiver may be at liberty to defend an ejectment, the parties interested being adult, and consenting, a reference was made, whether it was for their benefit. *Anonymous*, 6 Ves. 287.

## XXIII. The consequences of appointing a receiver.

Whether the estate is discharged from loss arising from his failure or misconduct.

1. When a loss arises from the default of a receiver, appointed by the court, the estate must bear it. *Hutchinson v. Lord Massareene*, 2 B. & B. 55.

2. Where a receiver is appointed, upon application of a mortgagee, and embezzles the rents, the loss must fall on the mortgagor. *Rigge v. Bowater*, 3 B. C. C. 365.

3. The appointment of a trustee by creditors to receive rents for the payment of debts, discharges the estate from any loss arising from the failure of the trustee. *Hutchinson v. Lord Massareene*, 2 B. & B. 49.

4. The receiver of the profits of a colliery, paying a creditor on the colliery with a bill, which was not honoured, the colliery remains liable to the payment of the original debts, and the receiver being about to pass his accounts, in which accounts he took credit for the receipt given by the creditor on the payment by bill, and a balance being due on such account

to the receiver, who had become a bankrupt, the creditor, on giving up the bill, directed to be paid out of the balance payable to the receiver. *Tempes v. Ord*, 1 Mad. 90.

#### XXIV. *Of motions, to discharge a receiver.*

Consent of incumbrancers, necessary.

1. Bill filed by a creditor on behalf of himself and other creditors, and a receiver appointed; the receiver shall not be discharged upon the consent of the plaintiff, against the consent of any incumbrancer, who is a party defendant. *Largan v. Bower*, 1 Sch. & Lef. 296.

2. So although an incumbrancer were not a party, nor had proceeded in the suit, and were obliged to file a new bill, yet *semble*, the court would not discharge the receiver, and would direct that such bill should be taken as filed at the same time with the former. *Ibid*.

#### XXV. *Of process of contempt against a receiver.*

1. Disobeying an order for paying in money, he shall be committed.

Receiver not paying in a balance under an order, may be proceeded against personally by commitment. A previous order, in the alternative, that by a certain day he shall pay or stand committed, is necessary; though he was under an order for payment by a certain day upon his appearance by counsel, praying time. *Davies v. Cartwright*, 14 Ves. 143.

2. A preliminary alternative order necessary to found a commitment for disobeying an order to pay in money.

*Ibid*.

#### XXVI. *Of orders relative to receivers.*

Relative to their accounting and accounts.

1. General orders as to receivers' accounts. 4 B. C. C. 157.

2. General order, that the master shall annually, at the second seal after trinity term, certify to the court the state of the several receivers' accounts in their respective offices. 2 Ves. 39.

#### XXVII. *In relation to the master's appointment of a receiver.*

1. He need not state his reasons.

Appointment of receiver is in the discretion of the master; who need not state his reasons. To support an exception there must be a substantial objection. *Thomas v. Dawkin*, 1 Ves. 452.

2. The court interferes with the master's appointment with reluctance.

Vide 15 Ves. 283.

3. Exception is the course for reviewing it.

The proper way to bring a report appointing a receiver, before the court, is by exception to it. *Creuze v. Bishop of London*, Dick. 687.

4. But the exceptions must show the person appointed to be improper.

1. The master's report of his approbation of a receiver must stand till the person is impeached as improper. *Creuze v. Bishop of London*, 2 B. C. C. 253.

2. Exceptions will not lie to a master's report of the appointment of a receiver, without showing the person appointed is improper. *Thomas v. Dawkins*, 3 B. C. C. 508.

3. The master's judgment is conclusive in appointing a receiver, unless some substantial objection is shown. *Garland v. Garland*, 2 Ves. 197.

4. The court will not control the officer's appointment of a receiver without a special case. *Anonymous*, 3 Ves. 515.

5. To maintain an exception, a strong case of disqualification is necessary.

To maintain an exception to the master's appointment of a receiver, a strong case of disqualification is necessary. *Tharpe v. Tharpe*, 12 Ves. 217.

6. In this case the exception was disallowed.

Exception to the master's appointment of a receiver, disallowed. *Wilkins v. Williams*, 3 Ves. 588.

7. His nomination reconsidered on an intermediate grant of administration.

A receiver having been appointed, the executor being out of the jurisdiction; on administration afterwards taken out, it was referred to the master to reconsider the appointment of a receiver; regard being had to the administration granted. *Faith v. Dunbar, Cooper*, 200.

8. The course where parties neglect to propose a receiver.

The neglect of parties to propose a receiver being accounted for, the master was directed to review his report, and receive their proposal of a receiver. *Attorney-general v. Day*, 2 Mad. 246.

9. On parties accounting for their neglect, the master will be ordered to receive their proposals.

When parties neglect to propose a receiver before the master, *quære* whether the master can propose one, or whether an application ought not to be made to the court. *Attorney-general v. Day*, 2 Mad. 246.

### XXVIII. Nature of the security required of a receiver.

1. A receiver in England.

Vide 1 Ves. 139.

2. A receiver abroad.

*Ibid.*

3. Receivers were appointed upon their own recognizances.

Receivers appointed on their own recognizances. *Ridout v. Earl of Plymouth, Dick*, 68.

### XXIX. In relation to the sureties of a receiver.

Their rights against the receiver.

1. Surety for a receiver, indemnified out of the balance due to him. *Glas-sup v. Harrison*, 3 Ves. & Beam. 134.; *Cooper*, 61.

2. The recognizance of a surety for a receiver being estreated, and an action brought against such surety, an application was made by him for a reference to see what was due, and for an order for payment by instalments, and for an injunction to stay proceedings at law. An order, by consent, was made accordingly, on paying the costs of the application, and of proceedings consequent on the order. *Walker v. Wild*, 1 Mad. 528.

## RECORD.

### Of impugning a record.

A record may be affected by fraud: a fine for instance; as if the appearance of the woman was the effect of previous compulsion. 3 Ves. & Beam. 42.

## RECOVERY.

## RECOVERY.

I. *Of legal recoveries.*

A case to which the statute 14 Geo. 2. c. 20. s. 5. was held applicable.

II. *Of equitable recoveries.*

1. Analogy between legal and equitable recoveries.
2. When valid — no analogy between legal and equitable recovery, with reference to possession with, or adverse to, the title.
3. When valid — though the tenant in tail was not at the time in actual receipt of the rents.
4. When valid — a legal estate in the equitable tenant to the præcipe, no objection to an equitable recovery.
5. When valid — by *feme covert*, equitable tenant for life of a separate estate.
6. Their operation — equitable recovery will not bar a legal estate.
7. Their operation — equitable recovery bars equitable estates, if there is an equitable tenant to the præcipe.
8. Their operation — equitable recovery bars equitable estates in remainder, though united with the legal fee in trust to secure the limitations.
9. Their operation — where nothing but equitable interests are interposed between the legal estate and the ulterior equitable interests.

III. *What parcels or estates are comprised by a recovery.*

Miscellaneous cases.

I. *Of legal recoveries.*

A case to which the statute 14 Geo. 2. c. 20. s. 5. was held applicable.

Where a lease and release were made to create a tenant to the præcipe in a recovery, and the lease was lost, it was held to be a case to which the relief given by the statute 14 Geo. 2. c. 20. s. 5. applies. *Holmes v. Ailsbie*, 1 Mad. 551.

II. *Of equitable recoveries.*

1. Analogy between legal and equitable recoveries.

Analogy between legal and equitable recoveries. 3 Ves. 276.

2. When valid — no analogy between legal and equitable recovery, with reference to possession with, or adverse to, the title.

No analogy between legal and equitable recovery, with reference to possession with, or adverse to, the title. To make a legal tenant to the præcipe, possession by seisin, in fact or law, is absolutely necessary: otherwise no legal freehold is acquired; but in the other case, as it is not the object, nor can ever be the effect, of the conveyance to transfer the possession, but only to pass the equitable interest, if he has a sufficient equitable interest, viz. an equitable estate tail, the recovery is well suffered. 16 Ves. 290.

3. When valid — though the tenant in tail was not at the time in actual receipt of the rents.

Equitable recovery valid ; though the tenant in tail was not at the time in actual receipt of the rents ; which the trustees paid over to others under a decree, afterwards reversed. *Lord Grenville v. Blyth*, 16 Ves. 224.

4. When valid — a legal estate in the equitable tenant to the præcipe, no objection to an equitable recovery.

A legal estate in the equitable tenant to the præcipe, is no objection to an equitable recovery. 3 Ves. 126.

5. When valid — by *feme covert*, equitable tenant for life of a separate estate.

Devise to trustees and their heirs, in trust, to receive and pay over rents and profits to A., a *feme covert*, for life, for her separate use ; and after her decease, to convey to her daughters, as tenants in common in tail ; remainder over : A. takes an equitable estate for life ; and may, by lease and release, make a tenant to the præcipe for an equitable recovery : each daughter takes a vested estate, when she comes *in esse* ; subject to be divested as the number increases : the conveyance in execution of the trust need not wait the death of A. *Burnaby v. Griffin*, 3 Ves. 266.

6. Their operation — equitable recovery will not bar a legal estate.

An equitable recovery will not bar a legal estate. 3 Ves. 125.

7. Their operation — equitable recovery bars equitable estates, if there is an equitable tenant to the præcipe.

Equitable estates barred by equitable recovery, if there is an equitable tenant to the præcipe. 18 Ves. jun. 418.

8. Their operation — equitable recovery bars equitable estates in remainder, though united with the legal fee in trust to secure the limitations.

Equitable estate in remainder, though united with the legal fee in trust to secure the limitations, barred by an equitable recovery. 18 Ves. jun. 418.

9. Their operation — where nothing but equitable interests are interposed between the legal estate and the ulterior equitable interests.

Equitable recovery, when nothing but equitable interests interposed between the legal estate and the ulterior equitable interests. 18 Ves. jun. 419.

### III. What parcels or estates are comprised by a recovery.

#### Miscellaneous cases.

1. On a question, whether a particular estate *nominatim*, not mentioned in a recovery ; or the deed leading the uses of it, passed by the recovery ; held, it did not. *Thomas v. Davis*, Dick. 301.

2. Estates comprised in a recovery : the words being sufficiently comprehensive, notwithstanding an inference against the possession of the party, and his intention to exclude them from acts done under a misconception of his title. *Pigott v. Waller*, 7 Ves. 98.

## REGISTER'S OFFICE.

**Of the office of the register of the court of chancery.**

1. Whether assignable.
2. It descends to the heirs general of the duke of St. Albans, and does not follow the title.

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**Of the office of the register of the court of chancery.**

1. Whether assignable.

Whether the office of register of the court of chancery is assignable?  
3 Ves. 33.

2. It descends to the heirs general of the duke of St. Albans, and does not follow the title.

The grant of the office of register of the court of chancery for lives, in trust for the duke of St. Albans, his heirs, and assigns, descends to the heirs general; and does not follow the title; and being assignable, the claim of the mortgagee was established, but not to the by-gone profits. (See 3 Ves. 25.) The duke being trustee, but having obtained possession without title, as heir; the court, though the plaintiff was an infant, inclined not to carry the account farther back than the time of filing the bill, if the profits had not been paid into court at an earlier date in the suit instituted by the mortgagee. *Drummond v. the Duke of St. Albans*, 5 Ves. 433.

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REGISTRY ACTS.

**I. In what cases the registry acts have no operation.**

1. Between the party taking the conveyance, and him who conveyed, or his general assignees.
2. Mortgages.
3. Notice.

**II. Of the notice necessary to invalidate the effect of registration.**

It must amount to actual fraud.

**III. Of the form of registration.**

1. Necessary implication equivalent to direct expression.
2. With reference to the Irish registry act, 6 Anne, c. 2.

**IV. Of the Irish registry acts.**

6 Anne, c. 2.

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**I. In what cases the registry acts have no operation.**

1. Between the party taking the conveyance, and him who conveyed, or his general assignees.

The object of the registry acts is only to protect subsequent purchasers. They have no effect therefore to vitiate the conveyance for want of registration



tration, as between the party taking the conveyance, and him who conveyed, or his assignees, under a commission of bankruptcy. *Jones v. Gibbons*, 9 Ves. 407.

## 2. Mortgages.

The register of a mortgage will not by itself affect a subsequent encumbrancer without notice. *Cator v. Cooley*, 1 Cox, 182.

## 3. Notice.

The registry of a deed gives priority, but does not affect a party with notice. *Pentland v. Stokes*, 2 B. & B. 75.

## II. Of the notice necessary to invalidate the effect of registration.

It must amount to actual fraud.

A registered conveyance of premises in Middlesex, for valuable consideration established, against a prior devise not registered: the evidence of notice, which ought to amount to actual fraud, not being sufficient. *Jolland v. Stainbridge*, 3 Ves. 478.

## III. Of the form of registration.

### 1. Necessary implication equivalent to direct expression.

A memorial of registry, containing the substance of a covenant in a lease, though not expressly setting forth a proviso in it, is a good registration, the proviso being implied in it. *M'Alpine v. Swift*, 1 Ball & Beatty, 285.

### 2. With reference to the Irish registry act.

Whether, in order to constitute such a registration as would, under the registry act (6 Ann. c. 2.) give a deed priority, a certificate of the deed having been produced to the officer at the time of the registry, should be endorsed then, or at a subsequent period, *quare*. *Eyre v. Dolphin*, 2 B. & B. 290.

## IV. Of the Irish registry acts.

6 Anne, c. 2.

1. A mortgagee is prevented by the operation of the registry act (6 Ann. c. 2.) from tacking so as to gain a priority against *mesne* registered incumbrances. *Latouche v. Dunsany*, 1 Sch. & Lef. 137. 157.

2. And for the purpose of adjusting the priorities between deeds under this act, judgments also obtained priorities, although not generally within the contemplation of the act. Sch. & Lef. 137. 160.

## RELEASE.

### I. What circumstances are implied by a release.

Knowledge in the releasor of what he releases.

### II. Of the operation of a release.

1. Force of the general terms.
2. In relation to the fact of intention.
3. In miscellaneous cases.

### III. Proof of a release.

Circumstances were held not sufficient evidence of the release of a bond debt.

**IV. Of the jurisdiction of courts of equity to set aside releases improperly obtained.****General rule.****I. What circumstances are implied by a release.****Knowledge in the releasor of what he releases.**

A release *ex vi termini* imports a knowledge in the releasor of what he releases; and, therefore, where executors (who had taken the opinion of counsel, which they had not communicated,) obtained a release of the orphanage share from the husband of a freeman's daughter, they were decreed to account; that the parties might elect the length of time, and alleged loss of vouchers, being no sufficient bar to such account. *Salkeld v. Vernon*, 1 Eden, 64.

**II. Of the operation of a release.****1. Force of the general terms.**

Release of a debt. A reversion not included by the general terms. *Lord Braybrooke v. Inskip*, 8 Ves. 417.

**2. In relation to the fact of intention.**

Tenant for life, with remainder to his son in tail, with remainder to himself in fee, devises "all his estate" to his daughters. The surviving daughter executes a general release to her brother (the tenant in tail) in words sufficient to pass the reversion in fee. A bill being filed by her to set aside this release, upon the ground that it was meant only for a particular purpose; lord chancellor King at first decreed in favour of the plaintiff; and afterwards, on a rehearing, directed issues to try, 1st, whether, at the time of the execution of the deed, she knew, or was apprized of, her title under the will: 2dly, whether she intended by the release to pass that reversion. And, on appeal, the decree was affirmed. *Farewell v. Coker*, 2 Mer. 354.

**3. In miscellaneous cases.**

1. A tenant for life, with remainder to B. in tail, commits a forfeiture. B., in consideration of annuity for the life of A., releases. The release is not good against the heir of the body of B., and B. is therefore bound to make a good conveyance for the life of A. *Lewis v. Rogers*, 2 Anst. 579.

2. Under a settlement on marriage, of a female ward of court, the husband having, in consideration of receiving a certain part of her fortune, (the value of which was taken by estimation,) released all right and interest in the residue, was thereby deprived of all farther interest; and not permitted therefore on suggestion, that the estimation was not fair, to attend the account, directed against the executors. *Pearce v. Crutchfield*, 16 Ves. 48.

**III. Proof of a release.**

Circumstances were held not sufficient evidence of the release of a bond-debt.

Circumstances not sufficient evidence of a release of a bond-debt. *Reeves v. Brymer*, 6 Ves. 516.

**IV. Of the jurisdiction of courts of equity to set aside releases improperly obtained.****General rule.**

Where a release of a legal demand has been improperly obtained, a court of equity will set aside the release; but will not decree payment of the legal demand. *Pascoe v. Pascoe*, 2 Cox. 109.

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## REMAINDER.

**I. In relation to contingent remainders in the case of copyholds.**

The freehold in the lord will support them.

**II. In relation to contingent remainders in the case of trusts.**

The estate in the trustees will support them.

**III. In relation to cross remainders.**

Implication of.

**IV. In relation to the particular estate.**

It is considered to be given for the sake of limitation over.

**V. In relation to the remainder-men.**

1. Their right to have leases by the tenant for life, set aside.

2. Their right to restrain a receiver from evicting tenants.

**VI. Of barring remainders.**

In the case of a tenant for life of an estate *pur autre vie*, and a trust by will.

**I. In relation to contingent remainders in the case of copyholds.**

The freehold in the lord will support them.

The freehold in the lord will support a contingent remainder. 4 B. C. C. 353.

**II. In relation to contingent remainders in the case of trusts.**

The estate in the trustees will support them.

In case of a trust, the estate in the trustees will support contingent remainders. 2 Ves. 234.

**III. In relation to cross remainders.**

Implication of.

1. Cross remainders implied. *Burnaby v. Griffin*, 3 Ves. 266.

2. The reasoning in the implication of cross remainders, upon the expression "all the premises," &c.; not satisfactory. 17 Ves. jun. 75.

**IV. In relation to the particular estate.**

It is considered to be given for the sake of limitation over.

Particular estate considered to be given for the sake of limitation over. 1 Ves. 151.

**V. In relation to the remainder-men.**

1. Their right to have leases by the tenant for life, set aside.

A bill will not lie at the suit of a remainder-man, to set aside a lease by tenant for life, on the ground of its being accompanied with a loan of money: there being no privity between them, and the remedy being at law. *Corbet v. Segrave*, 2 B. & B. 98.

2. Their

## 2. Their right to restrain a receiver from evicting tenants.

Motion by a remote remainder-man and tenants, to restrain receiver from ejecting tenants, refused with costs; their interest not being sufficient. *Wynne v. Lord Newborough*, 1 Ves. 164.

## VI. Of barring remainders.

In the case of a tenant for life of an estate *pur autre vie*, and a trust by will.

A tenant for life of an estate *pur autre vie*, and trustee in the will, can, by deed, jointly with the remainder-man in tail, bar the remainders over. *Osborne v. Bury*, 1 Ball & Beatty, 53.

## RENT AND ANNUITY.

## I. What shall be considered an annuity — what a rent-charge : what a sale — what a legacy.

1. An annuity charged upon the post office, until a sum should be paid, to be laid out in land, is a mere personal annuity.
2. A case in which a transaction was held to be an annuity, not a sale.
3. Distinction between an annuity by will, and a legacy.
4. Rights of an annuitant to be considered a legatee under a residuary bequest.

## II. In relation to a rent-charge.

1. At what time of the day it becomes due.
2. Miscellaneous.

## III. Apportionment of rent.

1. Between the representative of tenant in tail, who died without issue, and the remainder-man in tail.
2. Between rectors.
3. By analogy to st. 11 Geo. 2. c. 19.

## IV. At what period an annuity, by will, shall commence.

At the end of the year.

## V. In relation to the payment of an annuity out of a fund in court.

In a miscellaneous case.

## VI. In relation to the valuation of an annuity.

1. The market price is the only criterion of value.
2. In the case of an annuity bond, forfeited at the time of the grantor's discharge as an insolvent.

## VII. In relation to the sale of an annuity before the master.

It takes effect from the confirmation of the report.

VIII. At what period an annuity *pur autre vie*, shall determine.

It shall not determine by the death of the annuitant.

## IX. In relation to annuity bonds.

1. Whether a security beyond the penalty.
2. Execution thereon.

X. ~~same~~

**X. With reference to the old annuity act.**

1. The meaning of the word "such" in s. 1. ascertained.
2. What securities must be enrolled.
3. What securities need not be enrolled.
4. What memorial shall be sufficient.
5. What memorial shall not be sufficient.
6. Whether a defective memorial can be supplied by a new one.
7. The summary jurisdiction over property, is unconstitutional.
8. Its operation upon existing securities.
9. Jurisdiction at law — over void instruments.
10. Jurisdiction in equity — upon objections to the memorial.
11. Jurisdiction in equity — over void instruments.
12. Jurisdiction in equity — over void instruments, after the grantor has failed at law.
13. Whether a defective annuity deed can be made available by destroying it.

**XI. Of the right to recover the consideration, or otherwise, where the grant of an annuity is, or becomes, void.**

1. Consideration.
2. Costs and expenses.

**XII. Jurisdiction of courts of equity, distinct from the annuity act, to set annuities aside.**

1. Upon legal objections.
2. Upon inadequacy of value.

**XIII. Consequences of the failure of a summary application to set aside an annuity.**

The same ground may be taken again upon an attempt to enforce it.

**I. What shall be considered an annuity — what a rent charge : what a sale, — what a legacy.**

1. An annuity charged upon the post-office, until a sum should be paid to be laid out in land, is a mere personal annuity.

An annuity charged upon the post-office, until a sum should be paid to be laid out in land, is a mere personal annuity, and passes by grant or transfer. *Holderness v. Carmarthen*, 1 B. C. C. 377.

2. A case in which a transaction was held to be an annuity, not a sale.

Deed reciting an agreement for sale of a life-interest in stock : a memorial being registered under the annuity act, and there being a covenant to pay any deficiency beyond the produce to the extent of the annual sum specified, and a proportionable share in case of death between the days of payment : this is an annuity, not a sale. *Hood v. Barton*, 2 Ves. 29.

3. Distinction between an annuity by will, and a legacy.

Distinction between an annuity and a legacy ; the former commences from the death ; and the first payment is due at the end of the year : a legacy, generally, does not begin to carry interest till the end of the year. 7 Ves. 96.

**4. Rights**

**4. Rights of an annuitant to be considered a legatee under a residuary bequest.**

An annuitant falls under the general character of legatee, unless distinguished by the testator; entitled therefore under a residuary bequest in favor of legatees. *Sibley v. Perry*, 7 Ves. 522.

**II. In relation to a rent-charge.****1. At what time of the day it becomes due.**

Tenant for life died at nine o'clock at night on the 29th of September; and held, that he was not entitled to a quarter's rent due on that day. *Norris v. Harrison*, 2 Mad. 268.

**2. Miscellaneous.**

Devisee for life of a rent-charge out of an estate devised in strict settlement, assigned it to creditors as a collateral security. Tenant for life, with intent to redeem it for the annuitant, gave bonds to the creditors, on condition of giving up their securities to annuitant to be cancelled. Executors of obligor paid all the bonds but one, which they disputed, because, though delivered by obligor to a third person for creditor, when he should agree, it was not accepted till after death of obligor. This bond was recovered upon at law. Annuitant entitled as against the executors to the annuity disencumbered, but not to arrears incurred in life of obligor; and as against tenant of the estate to arrears since the death of obligor; but future payments left to agreement, as, heir at law of deviser of the annuity, not being party, execution of the trusts of the will could not be decreed: *Graham v. Graham*, 1 Ves. 272.

**III. Apportionment of rent.****1. Between the representative of tenant in tail, who died without issue, and the remainder man in tail.**

Rent apportioned between the representative of tenant in tail, who died without issue, and the remainder man in tail. *Vernon v. Vernon*, 2 B. C. C. 659.

**2. Between rectorors.**

Lease for years by a rector, having ceased by his death, the succeeding incumbent received from the lessee a sum of money as the rent due for the whole year, in the course of which the lessor died. The executor is entitled to an apportionment; and a demurrer to his bill was overruled. *Hawkins v. Kelly*, 8 Ves. 308.

**3. By analogy to statute 2 Geo. 2. c. 19.**

Apportionment of rent under the statute 11 Geo. 2. c. 19., and by analogy to it, with reference to time. 2 Ves. & Beam. 334.

**IV. At what period an annuity, by will, shall commence.**

At the end of the year.

The first payment of an annuity at the end of a year. 9 Ves. 553.

**V. In relation to the payment of an annuity out of a fund in court.**

In a miscellaneous case.

Annuity, secured by bond, payable quarterly, and by will, charged on the real estate in aid of the personal estate, ordered to be paid out of a fund in court half yearly, at Midsummer and Christmas. The annuitant having died between Lady-day and Midsummer, her representative obtained  
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an order for payment of the quarter to Lady-day. *Webb v. Lord Shaftesbury*, 11 Ves. 361.

#### VI. In relation to the valuation of an annuity.

1. The market price is the only criterion of value.

In enquiring into the value of an annuity, the market price is the only criterion. *Barnard v. Flint*, 3 Anst. 734. n.

2. In the case of an annuity bond, forfeited at the time of the grantor's discharge as an insolvent.

What is the debt, and how to be ascertained, upon an annuity bond, forfeited at the time of the grantor's discharge by an act of insolvency, *quære*. 14 Ves. 574.

#### VII. In relation to the sale of an annuity before the master.

It takes effect from the confirmation of the report.

Sale of an annuity before the master takes effect from the confirmation of the report; and, the sale being on the 11th of August, and the report confirmed in Michaelmas term, interest was given upon the purchase-money from the first day on which the report could have been confirmed: viz. the first *scal* before the term. *Twigg v. Fifield*, 13 Ves. 517.

#### VIII. At what period an annuity *pur auter vie* shall determine.

It shall not determine by the death of the annuitant.

A personal annuity *pur auter vie*, not determined by the death of the annuitant. *Savery v. Dyer*, Dick. 162.

#### IX. In relation to annuity bonds.

1. Whether a security beyond the penalty.

Arrears of an annuity secured by bond, not allowed beyond the penalty. *Mackworth v. Thomas*, 5 Ves. 329.

2. Execution thereon.

No execution for the penalty of a bond securing an annuity; but only *toties quoties* for the accruing payments. 5 Ves. 239.

#### X. With reference to the old annuity act.

1. The meaning of the word "such" in s. 1. ascertained.

The word "such" in the first section of the annuity act, means every deed, &c. by which an annuity is granted, and does not refer merely to the instrument defectively stated in the memorial. 2 Ves. 154.

2. What securities must be enrolled.

1. A grant of a certain sum out of dividends, to which a *feme covert* is entitled to her separate use, is an annuity within the act, and must be enrolled. *Hood v. Burlton*, 4 B. C. C. 121.

2. The warrant of attorney to confess judgment, is an assurance within the annuity act 17 Geo. 3.; therefore, if the memorial enrolled does not recite it, the memorial, and all subsequent proceedings, are void. *Davidson v. Foley*, 3 B. C. C. 598.

3. Deeds to secure annuities are within the annuity act, as well as deeds granting them. *Hood v. Burlton*, 2 Ves. 29.

4. Annuity secured on dividends of stock standing in trust, among other things, for the grantor for life, not within the exception in the annuity act. *Dupuis v. Edwards*, 18 Ves. jun. 358.

5. As-

5. Assignment of an annuity is within the annuity act; and if void, the assignee has no right to stand in the place of the original grantee, whom he has paid, for want of a good assignment; nor will the court direct an assignment, if the twenty days for enrolling the memorial are elapsed; for it would be void at law. *Duke of Bolton v. Williams*, 2 Ves. 139.

6. Stock vested in trustees to the uses of the settlement. An annuity granted by the husband out of the dividends, to which he was entitled for life, the trustees giving a power of attorney to receive the dividends, and covenanting not to revoke it, and to execute any other, &c. requires a memorial; not being an actual transfer within the eighth section of the annuity act. The annuity set aside upon objections to the memorial; particularly in not stating the covenant by the trustees. As to the objection to payment by a draft on a banker, *quære*. Distinction, whether the draft is drawn by the party or a third person. No costs: the grantor not taking the objection, till the consideration was repaid, and the chance turned against him. *Duff v. Atkinson*, 8 Ves. 577.

3. What securities need not be enrolled.

1. A *bonâ fide* sale of dividends of stock is not within the annuity act. *Browne v. Like*, 14 Ves. 302.

2. Annuity granted in consideration of a reversionary interest in stock, need not be enrolled under st. 17 Geo. 3. c. 26. *Brown v. Douthwaite*, 1 Mad. 446.

3. Tenant in tail in equity, is within the exception in the annuity act 17 Geo. 3. as to the annuity being registered. *Shrapnel v. Vernon*, 2 B. C. C. 268.

4. A memorial of a contract to give good and sufficient landed security, for payment of an annuity, as a consideration for the conveyance of a real estate, need not be enrolled. *Jackson v. Lever*, 3 B. C. C. 605.

5. An equity of redemption is within the exception in the annuity act, stat. 17 Geo. 3. c. 26. s. 8. *Tucker v. Thurston*, 17 Ves. 131.

6. A. granted an annuity to B., secured by bond and warrant of attorney. Two years after he deposited a lease with B., as a further security for the payment of the annuity. B. became bankrupt. Held, that the subsequent security need not be memorialized, and the usual order was made for the sale of the lease, valuation of the annuity, &c. *Ex parte Price*, 3 Mad. 132.

4. What memorial shall be sufficient.

1. The memorials of grants of annuity must set out all the securities, and the whole transaction. *Duke of Bolton v. Williams*, 4 B. C. C. 297.

2. Not necessary under the statute 17 Geo. 3. c. 26. to insert, in the memorial of an annuity, a covenant for payment, or any particular remedy, except as creating a trust within the act; and as to the necessity of stating the trusts, *quære*. *Dupuis v. Edwards*, 18 Ves. jun. 358.

3. An annuity being duly registered according to the statute, 17 Geo. 3. c. 26.; held, that it was not necessary that an equitable mortgage, taken as a further security at a subsequent period, should be registered. *Ex parte Price*, 1 Buck. 221.

4. Bill under the annuity act to set aside an annuity, dismissed: the objections not prevailing: viz. 1st, That the memorial expressed the consideration to have been paid at the date and execution of the deeds; one of the grantors only having executed on the day of the date, the other some days afterwards, occasioned merely by the residence of the one in Wales, the other in London. 2dly, That 30*l.* was, immediately after payment of the consideration, paid by the grantor to the attorney for the expence of the transaction; not by way of a colourable reduction of the consideration. 3dly, That the consideration was paid by an agent; that fact, though not stated in the body of the deed, appearing by the receipt indorsed, and being stated.



stated in the memorial. Whether it is necessary to state, not only, with whose money the payment is made, but also the hand, by which it is made, *quære*. *Philipps v. Crawford*, 9 Ves. 214.; 13 Ves. 475.

5. What memorial shall not be sufficient.

1. All the instruments securing an annuity make but one assurance; and if the memorial is defective as to one, that vitiates the whole. *Duke of Bolton v. Williams*, 2 Ves. 138.

2. Annuity void; the real amount, the consideration and mode of payment, not being truly stated in the memorial, and the bond and warrant of attorney being only generally mentioned, without the dates and names of the parties. *Duke of Bolton v. Williams*, *Ibid*.

3. Omission in the memorial of an annuity under the statute 17 Geo. 3. c. 26. of a proviso for stay of execution under a judgment, one of the securities, until twenty days after default, was fatal. *Dupuis v. Edwards*, 18 Ves. jun. 358.

4. Assignment of stock in trust to pay two annuities of 50*l*. each to different persons, for separate considerations of 400*l*. each; the memorial was for one annuity of 100*l*. to the trustee in trust to pay 50*l*. to each *cestui que* trust for the sum of 800*l*., and omitted a contingent interest; the annuities are void, the memorial not being sufficient within the annuity act, as not containing a true description of the annuities, not stating all the interests. *Hood v. Burlton*, 2 Ves. 29.

6. Whether a defective memorial can be supplied by a new one.

The court will not suffer the cause to stand over to enrol a new memorial. *Davidson v. Foley*, 3 B. C. C. 598.

7. The summary jurisdiction over property is unconstitutional.

Questionable, whether the summary jurisdiction over property given by the annuity act, is not unconstitutional. *Bromley v. Holland*, *Cooper*, 9.

8. Its operation upon existing securities.

*Vide* 5 Ves. 235.

9. Jurisdiction at law — over void instruments.

Courts of common law, which will, on their general jurisdiction, enter into the validity of the warrant of attorney or judgment on motion, in the particular application under the annuity act, will only set aside the judgment, or execution, or warrant, but cannot order the bond to be delivered up. 2 Ves. 154.

10. Jurisdiction in equity — upon objections to the memorial.

Jurisdiction of a court of equity, upon objections to the memorial of an annuity. *Dupuis v. Edwards*, 18 Ves. jun. 358.

11. Jurisdiction in equity — over void instruments.

Jurisdiction in equity to order instruments, void under the annuity act, to be delivered up. Several objections put in a course of trial at law. *Underhill v. Horwood*, 10 Ves. 209.

12. Jurisdiction in equity — over void instruments, after the grantor has failed at law.

The court of chancery has jurisdiction, even after the grantor of an annuity has twice failed at law in his attempts to set aside the annuity, to declare it void, and order the securities to be delivered up, and the payments of the annuity from the date of it, to be deducted from the consideration paid for it. The price paid by the grantee, and not that by the assignee, is to be taken in the account. The decree at the rolls, directing the account  
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of payments made by the grantor, only from the bill filed, was reversed. *Bromley v. Holland, Cooper, 9.*

13. Whether a defective annuity deed can be made available by destroying it.

If grantee of an annuity voluntarily destroys his deeds to conceal their defects, and sues upon the memorial at law, a court of equity will take cognizance of the case. *Bromley v. Holland, Cooper, 21.*

XI. *Of the right to recover the consideration, or otherwise, where the grant of an annuity is, or becomes void.*

1. Consideration.

1. Annuity void under the act: at law the balance of the consideration may be recovered, deducting the payments under the annuity. 7 Ves. 23.

2. Where an annuity is set aside, the purchase money may be recovered at law. 8 Ves. 136.

3. Effects of the decisions, that the consideration for an annuity void under the act, may be recovered with interest. 9 Ves. 492.

4. Annuity void under the act: upon an account of the consideration and the payments under the annuity, if the balance is against the grantee, it has been decided in equity, that it cannot be recovered. 7 Ves. 24.

5. Where an annuity is set aside, and an action brought for the money, an account is always taken of all money received under the annuity. 5 Ves. 608.

6. An annuity secured by a bond and a term for years being void, the memorial not taking notice of the term, and the clause of redemption, and stating the payment of the consideration in money, though it was paid by draft, a general account was decreed of the consideration with interest and costs, and of all money received under the annuity: the balance to be paid to the defendant (if any), the securities delivered up, and a conveyance. *Byne v. Vivian, Ibid. 604.*

7. Bill to set aside an annuity, secured by a term for years and a bond, upon objections to the memorial for not containing a clause of redemption, for not stating the consideration truly, and other defects. The defendant admitting he had received more than was due to him for principal and interest, the securities were decreed to be delivered up to be cancelled. *Byne v. Potter, Ibid. 609.*

8. Annuity void, the memorial not containing the clause of redemption, not stating the consideration truly, and being otherwise defective, was set aside by the decree; but the plaintiff having failed in two applications to the court of king's bench, upon some of the objections, and having in the interval been a party to the assignment to the defendant, the account was confined to the filing of the bill. The defendant was held entitled to the original consideration, though exceeding the sum paid on the assignment. *Bromley v. Holland, Ibid. 610.*

9. Annuity secured by bond, and a trust of rents and dividends, being void, the memorial omitting a clause of redemption, and the trust, and stating the consideration untruly; a general account was decreed of the purchase money from the actual payment, which was subsequent to the date of the deeds, and of the premiums paid by the grantee for insuring the grantor's life, and an account of all sums received under the annuity; with interest respectively: on payment of the balance and the costs by the plaintiff, the securities to be delivered up, &c.; the bill offering to pay principal and interest and any other fair and reasonable demands. A letter from the grantor, written prior to the grant, in the course of another negotiation between the parties, which did not take place, was admitted in evidence,

but no farther than that he had upon that occasion proposed the insurance of his life as a reasonable term. *Hoffman v. Cooke*, 5 Ves. 623.

10. Upon the plaintiff's appeal from the decree at the rolls, the decree was reversed; and an account was directed of the consideration paid by the original grantee of the annuity, with interest at 5 per cent.; and of the payments of the annuity to the grantee, or any persons claiming under him, by assignment or otherwise: to be applied in discharge of the interest and principal of the consideration; and if the consideration with interest shall appear fully repaid, or, if not, upon payment by the plaintiff of what shall be remaining due from him, the securities to be delivered up, &c. without costs: the lord chancellor's opinion being in favour of the jurisdiction; that the principle of the relief is not redemption, but the invalidity of the grant; and that the assignee, unless under special circumstances, is in the situation of the grantee. *Bromley v. Holland*, 7 Ves. 3.

11. Decree setting aside an annuity for want of a memorial registered, an account of the consideration, with interest and costs, and of all the annual payments; the balance on either side to be paid; the securities to be delivered up; and a reconveyance. *Holbrook v. Sharpey*, 19 Ves. 131.

12. Upon an annuity secured by a rent charge, which was settled in trust for a married woman, being set aside, the annuitant is not entitled to recover the consideration given by him for the annuity out of the arrears of the rent charge paid into court, under a decree made upon a bill of interpleader, filed by the owner of the estate, subject to the rent charge. *Angell v. Hadden*, 2 Mer. 169.

13. Court would not return purchase money for annuities not duly enrolled, out of arrears in court. *Duke of Bolton v. Williams*, 4 B. C. C. 297.

## 2. Costs and expences.

1. An annuity being void, the memorial not containing a clause of re-purchase, the grantee was not allowed, in the account, the premiums of insurance of the life of the grantor, and costs incurred in supporting the annuity. *Ex parte Shaw*, 5 Ves. 620.

2. Vide *Ibid*. 623.

## XII. Jurisdiction of courts of equity distinct from the annuity act, to set annuities aside.

### 1. Upon legal objections.

Jurisdiction in equity to set aside an annuity upon legal objections. 8 Ves. 135.

### 2. Upon inadequacy of value.

1. An annuity cannot be set aside upon mere inadequacy of price; which can be applied only as evidence of fraud. The notion of a market price, ascertained in the usual way upon the principle of calculation at an insurance office, is not a just criterion of the value. Therefore, a bill to set aside an annuity, the circumstances not amounting to fraud, was dismissed with costs. *Low v. Barchard*, 8 Ves. 133.

2. Mere inadequacy of value given, is not a sufficient ground to set aside an annuity. *Sheed v. Philips*, 3 Anst. 732.; *Barnard v. Flint*, *Id.* 733. n.

## XIII. Consequences of the failure of a summary application to set aside an annuity.

The same ground may be taken again upon an attempt to enforce it.

The refusal of a summary application to set aside an annuity is no objection to the same ground being taken again upon an attempt to enforce it. 5 Ves. 617.

REPLEVIN.

## REPLEVIN.

### I. ~~When~~ replevin lies.

1. Where a fair legal title is to be tried.
2. Therefore, upon any dispossession, whether as a distress or otherwise.
3. To determine the right of stoppage *in transitu*.
4. On a distress by commissioners to levy rates for local purposes.

### II. ~~When~~ replevin does not lie.

Where there has not been a dispossession.

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#### I. ~~When~~ replevin lies.

1. Where a fair legal title is to be tried.

Where a fair legal title is to be tried, a writ of replevin does not improvidently issue. 1 Ball & Beatty, 330.

2. Therefore, upon any dispossession, whether as a distress or otherwise.

1. Writ of replevin lies only where there has been an actual taking out of the possession of the party suing it. Shannon v. Shannon, 1 Sch. & Lef. 324.

2. But it lies upon any taking, and not merely upon a distress. Sch. & Lef. 324. 327.

3. To determine the right of stoppage *in transitu*.

An application, to quash a writ of replevin, issued to try a right to stop goods *in transitu*, refused. Farrell v. Beresford, Ball & Beatty, 328.

4. On a distress by commissioners to levy rates for local purposes.

An action of replevin may be maintained for goods distrained under a warrant from commissioners authorised by act of parliament to levy rates for specific local purposes with power of distress. Attorney-general v. Brown, Swanst. 304.

#### II. ~~When~~ replevin does not lie.

Where there has not been a dispossession.

1. Writ of replevin does not lie, unless there has been a taking of the goods out of the possession of the person who sues it forth. *Ex parte Chamberlain*, 1 Sch. & Lef. 320.

2. The writ of replevin is merely meant to apply to the case where A. takes goods wrongfully from B., and B. applies to have them re-delivered to him, upon giving security, until it shall appear whether A. has taken them rightfully. But if A. be in possession of goods in which B. claims a property, this is not the proper writ to try that right. *In re Wilsons*, 1 Sch. & Lef. 321.

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## REPRESENTATIVE.

In relation to the conversion of estate.

Real and personal representatives being equally volunteers, must take what they find at the death of the person entitled for life in the condition in which they find it: there is no equity upon the subject. 2 Ves. 70.

## RIGHT, WRIT OF.

## When it does not lie.

For a devisee.

Writ of right does not lie for a devisee. *Saunders v. Lord Annesley*; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 104. 624.

## SATISFACTION.

## I. General rules and observations.

1. The doctrine is borrowed from the civil law.
2. But the doctrine is not supported by the reasons given.
3. The doctrine is founded in a presumed intention.
4. To raise a question of satisfaction, the intent must be clear.
5. The presumption is a presumption of law; therefore not triable by a jury.
6. Parol evidence of an intention to satisfy cannot be admitted originally, as it may where first introduced to repel a presumption.
7. The presumption may be rebutted by evidence of intent, that the provision in question shall be a subsisting benefit.
8. Distinction as to satisfaction between the case of double portions and performance of a covenant; in the former, small circumstances of difference are overlooked.
9. Land is not a satisfaction for money, nor money for land; not being *ejusdem generis*.

## II. What shall be a satisfaction of a covenant.

1. Distinction between satisfaction and performance.
2. A covenant is satisfied by suffering property to go so as to produce the same effect.
3. Permitting personalty to descend, so that an equal or greater sum would go according to the covenant.
4. A purchase of less, equal, or greater value, and the conveyance taken in fee, satisfies a covenant to purchase and settle upon the first and other sons in tail.
5. In the case of a covenant by husband to leave or pay, at his death, to a person otherwise legally entitled to a provision.
6. Vide div. "What shall be a satisfaction of a settlement."
7. Vide div. "What shall be a satisfaction of a portion."

## III. What shall not be a satisfaction of a covenant.

1. Thirds, under an intestacy, under the circumstances.
2. Vide div. "What shall not be a satisfaction of a portion."
3. Vide div. "What shall not be a satisfaction of a settlement."

## IV. What shall be a satisfaction of a debt.

1. A portion.
2. A legacy, under the circumstances.

**V. What shall not be a satisfaction of a debt.**

1. Nothing shall be presumed in favour of the rule, that a legacy satisfies a debt.
2. Slight circumstances are laid hold of to get rid of the rule, that a legacy extinguishes a debt.
3. Circumstances of difference, as that the legacy is contingent, are laid hold of, to prevent the application of the rule, that a legacy satisfies a debt.
4. There is no distinction between the cases of parent and child and of strangers, as to the presumed satisfaction of a debt by a legacy.
5. Parol evidence admitted, and prevailed, against the presumption that a debt is satisfied by a legacy.
6. A legacy; the debt being a negotiable bill of exchange.
7. A legacy, though of larger amount, under the circumstances.

**VI. What shall be a satisfaction of a settlement.**

Thirds, under an intestacy, under the circumstances.

**VII. What shall not be a satisfaction of a settlement.**

1. A legacy, under the circumstances.
2. A residuary bequest.
3. Share under an intestacy, by the custom of London.
4. Advancement from the husband's club society.

**VIII. What shall be a satisfaction of a portion.**

1. In the case of double provisions by father for child, slight circumstances of difference shall not be regarded.
2. A legacy — general rule.
3. A case of exception to the rule, that a legacy to be a satisfaction of a portion, must be of the same nature, and equally certain.
4. A legacy left subject to the mother's life-interest.
5. A legacy left subject to the mother's life-interest and appointment.
6. A legacy, under the circumstances.
7. A residuary bequest.
8. A residuary bequest, under the circumstances.
9. An advancement, under the circumstances.

**IX. What shall not be a satisfaction of a portion.**

1. There must be some express evidence, or at least a strong presumption, that it was intended as such.
2. A legacy, under the circumstances.
3. A residuary bequest.
4. Share under an intestacy, under the circumstances.

**X. What shall be a satisfaction of a legacy.**

1. General rule.
2. A portion — general rule.
3. A portion, though with some circumstances of difference.

4. Admissibility of parol evidence to show that a father was the author of a portion.
5. A provision by deed, under the circumstances.
6. A legacy, under the circumstances.
7. In relation to natural children.

**XI. ~~What shall not be a satisfaction of a legacy.~~**

1. A portion — general rule.
2. A portion, under the circumstances.
3. A legacy, under the circumstances.
4. An advancement, under the circumstances.
5. Advancement, by a stranger.
6. The value of a beneficial lease, under the circumstances.

**XII. ~~What shall not be a satisfaction of a residuary bequest.~~  
A legacy.**

**XIII. ~~What shall not be a satisfaction of a real estate devised.~~**

A legacy.

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**I. General rules and observations.**

1. The doctrine is borrowed from the civil law.

The presumption is according to the civil law; but is not supported by the reasons given for it. 1 Ves. 105.

2. But the doctrine is not supported by the reasons given.

The presumption admitted; but the principal of it denied by the court. 1 Ves. 109.

3. The doctrine is founded in a presumed intention.

The presumption cannot be tried by a jury, because it is a presumption of law: may be rebutted by evidence of intent, that legacy shall still be a subsisting benefit. 1 Ves. 108.

4. To raise a question of satisfaction, the intent must be clear.

To raise a question of satisfaction or election, the intent must be clear: if it is, devisee cannot take under the will, and also in opposition to it; even his own property intended by testator, to go otherwise. *Finch v. Finch*, 1 Ves. 535.

5. The presumption is a presumption of law; therefore not triable by a jury.

Vide 1 Ves. 108.

6. Parol evidence of an intention to satisfy cannot be admitted originally, as it may where first introduced to repel a presumption.

Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter; and parol evidence of an intention to satisfy cannot be admitted originally, as it may, where first introduced to repel a presumption. *Freemantle v. Bankes*, 5 Ves. 79.

7. The presumption may be rebutted by evidence of intent, that the provision in question shall be a subsisting benefit.

Vide 1 Ves. 108.

8. Dis-

8. Distinction as to satisfaction between the case of double portions and performance of a covenant; in the former, small circumstances of difference are overlooked.

Distinction as to satisfaction between the case of double portions and performance of a covenant. In the former, small circumstances of difference are overlooked. 7 Ves. 515.

9. Land is not a satisfaction for money, nor money for land; not being *ejusdem generis*.

Land not a satisfaction for money, nor money for land; not being *ejusdem generis*. 15 Ves. 512.

## II. *What shall be a satisfaction of a covenant.*

1. Distinction between satisfaction and performance.

Distinction between satisfaction and performance. *Ex parte Goldsmid*, Swanst. 219.

2. A covenant is satisfied by suffering property to go so as to produce the same effect.

A covenant is satisfied by suffering property to go so as to produce the same effect: thus, lands suffered to descend are a satisfaction of a covenant to purchase. 2 Ves. 356.

3. Permitting personalty to descend, so that an equal or greater sum would go according to the covenant.

Covenant to leave a sum of money; which is not done; but personal is permitted to descend, so that an equal or greater sum would go according to the covenant: that is a performance. 2 Ves. 464.

4. A purchase of less, equal, or greater value, and the conveyance taken in fee, satisfies a covenant to purchase and settle upon the first and other sons in tail.

Covenant to purchase and settle upon the first and other sons in tail male: a purchase of less, equal, or greater value, and the conveyance taken in fee, held in performance and satisfaction. 10 Ves. 9.

5. In the case of a covenant by husband to leave or pay, at his death, to a person otherwise legally entitled to a provision.

Covenant by husband to leave or pay, at his death, to a person entitled by law to a provision, independent of that engagement: the construction is to be with reference to that; and the slight difference between leaving and paying, or, whether within three or six months, not attended to. 10 Ves. 13.

## III. *What shall not be a satisfaction of a covenant.*

Thirds, under an intestacy, under the circumstances.

Settlement previous to marriage, of the wife's fortune on herself, with a covenant by the husband in consideration of the marriage, &c. and for making some provision for the wife and her issue, to pay within three months after his death 6000*l.* to the trustees, in trust if the wife should survive him, and there should be no issue, (which was the event,) to pay 1500*l.* to the wife, her executors, &c. and to pay the interest of the remaining 4500*l.* to her for life. She is entitled to dower: and her share under the statute of distributions is not a satisfaction or performance of the covenant. *Couch v. Stratton*, 4 Ves. 391.



#### IV. ~~What~~ shall be a satisfaction of a debt.

##### 1. A portion.

Implied satisfaction of a debt from a father to his child by a marriage portion of a greater amount. *Chave v. Farrant*, 18 Ves. jun. 8.

##### 2. A legacy, under the circumstances.

1. A debt held to be satisfied by a legacy. *Gaynon v. Wood*, Dick. 331.

2. A son placed by his father in business, accounting to his father for all the profits, deducting only the expence of his board, having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death; or, if he had a demand, it was satisfied by a will, giving him a legacy to a greater amount, and other benefits. *Plume v. Plume*, 7 Ves. 258.

#### V. ~~What~~ shall not be a satisfaction of a debt.

##### 1. Nothing shall be presumed in favour of the rule, that a legacy satisfies a debt.

Nothing presumed in favour of the rule, that a debt is satisfied by a legacy equal or greater. 3 Ves. 564.

##### 2. Slight circumstances are laid hold of to get rid of the rule, that a legacy extinguishes a debt.

1. Slight circumstances are laid hold of to get rid of the rule, that a legacy to a creditor extinguishes the debt; but a little difference between a portion and a legacy to a child, as to the time of payment, shall not prevail against the presumption of satisfaction. 3 Ves. 466.

2. The court will lay hold of any circumstances to get out of the rule, that a debt is satisfied by an equal legacy. 3 Ves. 529.

##### 3. Circumstances of difference, as that the legacy is contingent, are laid hold of to prevent the application of the rule, that a legacy satisfies a debt.

As to a presumed satisfaction of a debt by a legacy, there is no distinction between the cases of parent and child and of strangers: therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of satisfaction. *Tolson v. Collins*, 4 Ves. 483.

##### 4. There is no distinction between the cases of parent and child and of strangers, as to the presumed satisfaction of a debt by a legacy.

*Ibid.*

##### 5. Parol evidence admitted, and prevailed, against the presumption that a debt is satisfied by a legacy.

Parol evidence admitted, and prevailed, against the presumption, that a debt is satisfied by a legacy of greater amount; the will also affording an inference in favour of that presumption. *Wallace v. Pomfret*, 11 Ves. 542.

##### 6. A legacy; the debt being a negotiable bill of exchange.

A negotiable bill of exchange not satisfied by a legacy. *Carr v. Eastbrooke*, 3 Ves. 561.

##### 7. A legacy, though of larger amount, under the circumstances.

A legacy, though greater than a debt due to the legatee, held not to be a satisfaction of the debt. *Field v. Mostin*, Dick. 543.

#### VI. ~~What~~

**VI. What shall be a satisfaction of a settlement.**

Thirds, under an intestacy, under the circumstances.

Covenant in marriage settlement by the husband in the event of his death, leaving his wife surviving, and children, within six months after his decease, to convey, pay, assign, &c. one full and clear moiety of all such real and personal estate as he shall be seised and possessed of, or entitled to, at his decease. Upon the principle of part-performance, the widow not entitled, in addition to the moiety under the covenant, to a third of the residue of the personal estate by the intestacy of her husband. The personal estate, upon which the covenant attaches, is the residue, subject to the debts. *Garthshore v. Chalie*, 10 Ves. 1.

**VII. What shall not be a satisfaction of a settlement.****1. A legacy, under the circumstances.**

1. Bond on marriage, to secure 300*l.*, the wife's fortune, to her within one month after the husband's decease: he, by will, gave her 500*l.*, payable in six months after his decease: this is not a satisfaction. *Haynes v. Mico*, 1 B. C. C. 129.

2. On marriage, the husband covenanted, that if the wife should survive him, and there should be no issue, his executors should, within nine months after his death pay to the wife 800*l.* for her own use; but if there should be issue, then the 800*l.* should be laid out by the trustees, and the interest paid to the wife, for life; and after her death, the principal divided amongst the children. There was no issue of the marriage. The husband, by his will, bequeathed one moiety of certain articles of his personal estate to his wife, which moiety greatly exceeded in value the sum of 800*l.* This bequest will not amount to a performance, or a satisfaction of the covenant contained in the marriage settlement. *Devese v. Pontet*, 1 Cox, 188.

3. Covenant in marriage articles by the husband to pay his wife, if she should survive, 200*l.* as a jointure, and 50*l.* to provide herself with a house, yearly, for life: afterwards, by will, he gave her for life an estate and house, above the value of 100*l.* a-year, with the household goods, &c., and an annuity of 100*l.*, commencing and payable at different times from those in the articles: held not a performance, nor intended as a satisfaction; no such intent being expressed. *Richardson v. Elphinstone*, 2 Ves. 463.

**2. A residuary bequest.**

The gift of a residue is never considered as a satisfaction of a certain provision made for a wife on marriage, although it may in the event turn out more beneficial. *Devese v. Pontet*, 1 Cox, 188.

**3. Share under an intestacy, by the custom of London.**

Proviso in a settlement, that the wife shall not be barred from any thing the husband shall give or leave: he dies intestate, and a freeman of London: her share, by the statute and custom, are not a satisfaction of the covenant. *Kirkman v. Kirkman*, 2 B. C. C. 95.

**4. Advancement from the husband's club society.**

Members of a society covenanted mutually, that their widows should receive annuities from the society; payment from the society is not a satisfaction for a covenant in the settlement by the husband to pay her an annuity in lieu of all claim on his personal. *Rhodes v. Rhodes*, 1 Ves. 96.

**VIII. What shall be a satisfaction of a portion.**

1. In the case of double provisions by father for child, slight circumstances of difference shall not be regarded.

1. In the case of double provisions by a father for a child, slight circumstances of difference not regarded. 17 Ves. jun. 191.

Rule,

Rule, as to satisfaction of a portion by a legacy, that there must be some express evidence, or at least a strong presumption, that it was intended as such. Slight variation in the time of payment between twenty-one and twenty-one or marriage, immaterial. 18 Ves. jun. 493.

2. A legacy — general rule.

1. Legacy to a child, deemed a portion; thence arises the presumption. 1 Ves. 107.

2. Portion by will, *prima facie* a satisfaction of a portion by settlement. 4 Ves. 491.

3. Portions for children by the will of the parent, presumed a satisfaction of a prior provision by settlement, unless clearly not so intended: the presumption is not rebutted by slight circumstances: accounts in the testator's hand-writing were admitted as evidence of the circumstances, under which he made his will; but not to explain the will. *Hinchcliffe v. Hinchcliffe*, 6 Ves. 516.

4. Though generally a satisfaction by will of a portion must be of the same nature, and equally certain, a bequest of a share in powder-works, to be made up in value 10,000*l.*, charged with an annuity of 20*l.* for a life, was held a satisfaction in a portion of 2000*l.* *Bengough v. Walker*, 15 Ves. 507.

3. A case of exception to the rule, that a legacy to be a satisfaction of a portion, must be of the same nature, and equally certain.

*Ibid.*

4. A legacy left subject to the mother's life-interest.

A sum of money left subject to the life-interest of the mother, shall go in satisfaction of a child's portion by settlement. *Rickman v. Morgan*, 1 B. C. C. 63. So shall the residue of the personal estate given to the child by will. S. C. *Ibid.*

5. A legacy left subject to the mother's life-interest and appointment.

Part of the wife's fortune being settled (after the decease of the husband and wife,) upon the children, according to her appointment: the husband left a larger provision to trustees, to the use of the wife for life, remainder to the children as she should appoint: this is a satisfaction for the portions. *Moulson v. Moulson*, 1 B. C. C. 82.

6. A legacy, under the circumstances.

1. By marriage settlement, 10,000*l.* were to be raised for younger children: the settlor, by will, gave the younger children 2000*l.* each. This is a part-satisfaction. *Warren v. Warren*, 1 B. C. C. 305.

2. Agreement between mother, tenant in fee and in tail, and her son, that she would convey to him the estate in fee, and that he should, when in possession of the estate tail at her death, pay his sister 20,000*l.* "for her fortune and portion:" the agreement was never executed; but the mother afterwards made a general devise in favour of her son, charged with a legacy of 20,000*l.* to her daughter, "for her portion, fortune, and advancement:" the legacy a satisfaction of her interest under the agreement. *Finch v. Finch*, 1 Ves. 534.

3. Portions for children by the will of the parent, held a satisfaction of a provision by settlement upon the intention: slight circumstances of difference, that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. *Sparkes v. Cator*, 3 Ves. 530.

4. Portion by settlement, vested at twenty-one, or marriage of daughters, to be paid at the death of the surviving parent; if the parents, or either, should, in their or either of their lifetime, settle, give, or advance money, lands, &c. in marriage or otherwise, such advancement to be taken as part or the

the whole of the portion, unless the contrary declared in writing. A legacy payable at twenty-one, a satisfaction *pro tanto*. *Onslow v. Mitchell*, 18 Ves. jun. 490.

7. A residuary bequest.

Vide 1 B. C. C. 63.

8. A residuary bequest, under the circumstances.

By marriage settlement of the father and mother, 8000*l.* was settled on younger children: there being but one younger son, the father, by his will, left him the residue (which amounted to a much larger sum): it is a satisfaction. *Rickman v. Morgan*, 2 B. C. C. 394.

9. An advancement, under the circumstances.

Portions by settlement for younger children, living at the death of the survivor of the parents; with a proviso, that advancements should be in satisfaction, unless the contrary declared. The father, by will, desiring the settlement, may be punctually complied with, made a residuary disposition of real and personal estates among the younger children, directing, that what they may have received in his life shall be brought into the account, so as to make all equal. Construction upon the whole, that advancement in marriage, or otherwise, though not the grammatical construction, is within the proviso; and equality being the object, an arrangement was made upon that principle. One of the younger children having become the eldest, and therefore owner of the estate, between the deaths of the parents, to be considered a younger child in the account. *Leake v. Leake*, 10 Ves. 477.

IX. ~~What shall not be a satisfaction of a portion.~~

1. There must be some express evidence, or at least a strong presumption, that it was intended as such.

Vide 18 Ves. 493.

2. A legacy, under the circumstances.

1. Legacies to the heir at law, not a satisfaction *pro tanto* for money to be raised by a trust term, which descended, the owners having made no appointment. *Cattle v. Morris*, 1 B. C. C. 133. n.

2. The testator gave a bond to trustees, conditioned that his executors should pay 5000*l.* to a natural son at twenty-one. By will, he gave 15,000*l.* to trustees, to pay to the son a maintenance until twenty-five, and then to pay the whole to him, with contingencies, on marriage. This is no satisfaction of the bond. *Jeacock v. Falkner*, 1 B. C. C. 295. 1 Cox, 37.

3. By settlement, daughters were to have 2000*l.* each: the father, by codicil to his will, gives them 20,000*l.*: this was held a cumulative provision, and not a satisfaction of the settlement. *Hanbury v. Hanbury*, 2 B. C. C. 352. 529.

4. By marriage settlement, the husband's estates were settled to the uses of the marriage, and (amongst others) a term was created for raising a sum of 10,000*l.* for the younger children, to be taken equally amongst them. The husband by his will, made four years after, made several dispositions, by which it appeared, that he had totally forgotten the existence of any marriage settlement, and then bequeathed to his younger child, if he should have but one, 5000*l.*, and if more than one, 2000*l.* a-piece, and subjected his personal estate to the payment thereof: but if the personal estate should not be sufficient, he directed the same to be raised by mortgage of the settled premises. There were two younger children of the marriage. The provisions made by the will, shall go in part-satisfaction of what was provided by the settlement; and only 10,000*l.* shall be raised. *Warren v. Warren*, 1 Cox, 41.

## 3. A residuary bequest.

1. As to satisfaction of a portion by a residue. 15 Ves. 513.

2. Whether a portion of 2000*l.* would not be satisfied by a bequest of so much of his residuary estate as should be of the value of 2000*l.*, *quære*. 15 Ves. 514.

## 4. Share under an intestacy, under the circumstances.

Trust term by the will of the grandfather, for raising portions; provided among other events, that if the children should be, by their father in his lifetime, advanced and preferred with portions as good or greater, to cease. Personal property under the intestacy of the father not a satisfaction. *Twisden v. Twisden*, 9 Ves. 413.

## X. What shall be a satisfaction of a legacy.

## 1. General rule.

Where a legacy is given for a particular purpose (as a portion), and another bounty is afterwards given for the same purpose, it is considered as implying an intention in the testator to satisfy the legacy. But this being only a presumption, may be rebutted by evidence showing a contrary intention. *Debeze v. Mann*, 1 Cox, 346.

## 2. A portion—general rule.

1. Leaning against double portions; effect in some cases, that a portion has been held to satisfy a legacy of much greater amount. 18 Ves. jun. 151.

2. Portion, a satisfaction of a legacy from the father to the same amount; the evidence not being sufficient to repel the presumption. *Ellison v. Cookson*, 1 Ves. 100.

3. Presumed satisfaction of a legacy by a portion: the evidence not being sufficient to rebut the presumption. *Trimmer v. Bayne*, 7 Ves. 508.

## 3. A portion, though with some circumstances of difference.

Satisfaction of a legacy by a parent to a child, by a portion of the same amount, though with some circumstances of difference. Whether parol evidence can be admitted originally by an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to shew, that the father was the author of the portion; viz. by stipulating or joining in the marriage settlement of his eldest son for a charge, and giving up interests in consideration of it. *Hartopp v. Hartopp*, 17 Ves. jun. 184.

## 4. Admissibility of parol evidence to show that a father was the author of a portion.

Vide 17 Ves. 184.

## 5. A provision by deed, under the circumstances.

As to a provision by one instrument being in satisfaction of a provision by another. *Williams v. Duke of Bolton*, Dick. 405.

## 6. A legacy, under the circumstances.

A. gave to lady S. and to I. C. legacies, after a special failure of issue of her brother: the brother afterwards by his will, gave the legatees equal legacies: held to be a satisfaction, though lady S.'s legacy (she being a *feme covert*) in the brother's will was to her separate use. *Attorney-general v. Hird*, 1 B. C. C. 170.

## 7. In relation to natural children.

1. The law does not acknowledge the relation of a natural child; who is, therefore,

therefore, considered as a stranger, within the rule of satisfaction of a legacy *primâ facie* by an advance of money. 18 Ves. jun. 147.

2. Distinction between legitimate and natural child, as to the presumed satisfaction of a legacy by a portion in the former case, not in the latter; which is considered the case of a stranger. 18 Ves. jun. 152.

### **XI. What shall not be a satisfaction of a legacy.**

#### **1. A portion — general rule.**

A portion given after a legacy, shall not be a satisfaction of it, where it is expressly given in satisfaction of a different claim, or where it is given absolutely, and the legacy under limitations. *Baugh v. Reed*, 3 B. C. C. 192.

#### **2. A portion, under the circumstances.**

1. The father of a putative daughter paying a portion on her marriage, accompanied with a declaration that she would have more at his death, is not a satisfaction. *Debeze v. Mann*, 2 B. C. C. 519.

2. On deficiency of assets, marriage portion no satisfaction of a legacy to the wife from her father: the portion being less than the legacy; and having been paid absolutely to the husband upon giving up a certain interest of his wife; the legacy being to the wife for life, remainder to her children and grandchildren, remainder over; and being expressly in satisfaction of another distinct interest of the wife: no ademption, the intent not being sufficiently plain. *Baugh v. Read*, 1 Ves. 257.

3. Gift of 500*l.* by a father to his daughter, not a satisfaction in part of a legacy of 1000*l.* by a previous will: the presumption against double portions in the case of parent and child being repelled by the circumstances: the gift not by way of portion; being after the marriage; and a particular motive appearing by declarations of the testator to his wife, proved by her. *Robinson v. Whitley*, 9 Ves. 577.

4. The presumption of intention to satisfy a legacy by a portion to a child, from a parent, or a person placing himself *in loco parentis*, not raised upon a legacy not described as a portion, the legatee reported to be the testator's natural daughter, described, not so, but as the daughter of another man. *Ex parte Pye and Dubost*, 18 Ves. jun. 140.

#### **3. A legacy, under the circumstances.**

Legacy at twenty-one, the interest for maintenance, not satisfied by advancements during minority for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of the executor: there being no positive relinquishment; though no demand for ten years. *Lee v. Brown*, 4 Ves. 362.

#### **4. An advancement, under the circumstances.**

A father makes his will, and gives a legacy of 500*l.* to his son; and afterwards takes his son into partnership, and gives him half the stock in trade to the amount of 15,000*l.* This advancement shall not be taken in satisfaction of the legacy. *Holmes v. Holmes*, 1 Cox, 39. 1 B. C. C. 555.

#### **5. Advancement, by a stranger.**

Such an advancement of a legatee, by a stranger, not a satisfaction or performance of the legacy. *Powel v. Cleaver*, 2 B. C. C. 499.

#### **6. The value of a beneficial lease, under the circumstances.**

The value of a beneficial lease granted to a natural son, held not to be a satisfaction of a legacy given by the putative father's will. *Gravé v. Salisbury*, 1 B. C. C. 425.

**XII. What shall not be a satisfaction of a residuary bequest.****A legacy.**

A legacy is a satisfaction of a portion, but not of the residue, or of a real estate devised. *Watson v. Lord Sondes*, 1 B. C. C. 65.

**XIII. What shall not be a satisfaction of a real estate devised.****A legacy.**

Vide 1 B. C. C. 65.

**SCOTLAND.**

*Semble*, that to complete a title by assignation, it is not necessary that the intimation should be notarial or formal. Ordinary notice, or circumstances of conduct from which a claim under the assignation is to be inferred, considered as equivalent to solemn intimation. *Selkrig v. Davis and another*, 2 Rose, 291.

**SECURITY.**

W. lends to B. 200*l.* on the bond of B. and V., bearing interest at 6*l.* per cent.; and at the same time purchases from B. a rent-charge for lives, of 50*l.* per annum for 300*l.*, with a covenant, that B. should be at liberty to re-purchase the rent-charge, on giving three months' notice, and paying 350*l.*, and all arrears of interest. V. and B. execute their joint and several bonds to W. in the penal sum of 700*l.* conditioned for the payment of the rent-charge. The assignment of the rent-charge held to be a security for the loan of 200*l.* and 300*l.* on the ground that W. was at all events secured by the bond for 700*l.* But neither the right of re-purchase nor the additional sum of 50*l.* to be paid thereupon, would have been sufficient to turn the transaction into a loan. *Verner v. Winstanley*, 2 Sch. & Lef. 393.

**SET-OFF.****I. When a set-off in equity shall be allowed.**

1. In cases of mutual credit.
2. In cases of fraud.
3. *Quare*, on a demand of rent.

**II. When a set-off in equity shall not be allowed.**

1. Where the subject may be set-off at law.
2. Where a party has neglected to plead a set-off to an action at law.

**III. In relation to joint and separate demands.**

1. At law there can be no set-off between joint and separate debts.
2. But may, in equity, under circumstances; as, where there is a clear series of transactions in which joint credit has been given.
3. Cases in which a set-off has been refused.

IV. *See*

**IV. In relation to bankruptcy.**Vide in tit. **BANKRUPT.****V. Whether excluded by the nature of the transaction, or contract of the parties.**

1. Set-off, where the money was borrowed under an express promise to repay it.
2. The case of a sale by a factor, with notice of an agreement between the principals.

**I. When a set-off in equity shall be allowed.**

1. In cases of mutual credit.

Equitable set-off upon mutual credit; though no mutual debts, upon which a set-off could be maintained at law. *James v. Kynnier*, 5 Ves. 108.

2. In cases of fraud.

Equitable set-off under circumstances; when there could be none at law; viz. bankers directed to lay out money in navy annuities; not doing so; but representing, that they had; making entries, and accounting for the dividends, accordingly; and taking a joint promissory note from the party, under that supposition, and her brother, to secure a debt from him to them; upon which the assignees under their bankruptcy sued him alone. Order for proof of the balance, setting-off the debt upon the note, an injunction, and the delivery of the note. *Ex parte Stephens*, 11 Ves. 24.

3. *Quære*, on a demand of rent.

*Quære*, whether equity can relieve by allowing an equitable set-off on a demand for rent. *Townson v. Benson*, 3 Mad. 203.

**II. When a set-off in equity shall not be allowed.**

1. Where the subject may be set-off at law.

1. Bill by an insurance broker for a discovery and account of money paid and received by him in that capacity on account of the defendants, and money due to him for commission, &c. and for promissory notes indorsed to him, and to restrain an action, as brought contrary to the universal custom of the business. Demurrer allowed: the subject being matter of set-off, and capable of proof at law. *Dinwiddie v. Bailey*, 6 Ves. 136.

2. Bill for an injunction to restrain proceedings at law for rent, on the ground of an agreement under which the landlord was indebted more than the amount of the rent. Held, on demurrer, that it was a legal set-off; and demurrer allowed. *Townson v. Benson*, 3 Mad. 203.

2. Where a party has neglected to plead to set-off to an action at law.

If a party neglect to plead a legal set-off to an action, he is not entitled to the assistance of a court of equity to give him the benefit of the set-off. *Ex parte Ross*. *In re Fisher*, 1 Buck. 125.

**III. In relation to joint and separate demands.**

1. At law there can be no set-off between joint and separate debts.

1. At law there can be no set-off between joint and separate debts. 3 Ves. 248.

2. Joint



2. Joint and separate debts cannot be set-off against each other at law. 11 Ves. 519.
3. A joint debt cannot be set-off against a separate debt at law; but may in equity, under particular circumstances; as, where there is a clear series of transactions in which joint credit has been given. *Vulliamy v. Noble*, 3 Mer. 618.

2. But may, in equity, under circumstances; as, where there is a clear series of transactions in which joint credit has been given.

*Vide supra*, div. 1.

3. Cases in which a set-off has been refused.

1. Debtor by bond to the separate estate of a deceased partner, not allowed in equity to set-off his bond debt in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission. *Addes v. Knight*, 2 Mer. 117.

2. A. has a joint demand against B. and C., who are also creditors of A. B. by letter having made himself separately liable to A., on account of the demand originally joint, cannot either at law or in equity, set off the joint debt due from A. to himself and C. *Ex parte Ross*. *In re Fisher*, 1 Buck. 125.

#### IV. In relation to bankruptcy.

*Vide in tit.* BANKRUPT.

Separate commission of bankruptcy. Relief in the nature of set-off against a separate creditor of the bankrupt, indebted to the partnership to a greater amount, refused. *Ex parte Twogood*, 11 Ves. 517.

#### V. Whether excluded by the nature of the transaction, or contract of the parties.

1. Set-off, where the money was borrowed under an express promise to repay it.

Set-off, where a creditor had borrowed from the debtor under an express promise to pay. *Taylor v. Okey*, 13 Ves. 180.

2. The case of a sale by a factor, with notice of an agreement between the principals.

A. agreed to sell goods to B., to be accounted for in part of a debt to B.; C., with notice, agreed to sell the goods as factor: not allowed to retain for a debt to him from A. *Weymouth v. Boyer*, 1 Ves. 416.

#### SEWERS, COMMISSIONERS OF.

1. The court refused to entertain jurisdiction against commissioners of sewers, to restrain their removing a float or tumbling-bay upon a river, such removal being stated to be irreparable mischief. *Kerrison v. Sparrow* and others, Cooper, 305.

2. See tit. CHANCERY.

#### SHIP AND CARGO.

##### I. In relation to the owner.

1. Part-owners are tenants in common, not joint-tenants.

2. Pos-

2. Possession of some owners, the possession of all.
3. Whether liable for repairs.

## II. In relation to the master.

Revocation of his authority to receive payment, by notice.

## III. In relation to affranchisement.

A question arising out of a capture.

## IV. In relation to hypothecation.

1. Of the master's right to hypothecate the cargo.
2. What transactions presumptively are not such.

## V. In relation to lien, as distinct from hypothecation.

1. Rule of the civil law.
2. For repairs in this country.
3. For repairs in a foreign country.
4. For a loan, in a foreign country, to enable the ship to prosecute its voyage.
5. For contribution to general average.
6. Priority between different claimants.
7. Lien of one part-owner upon the share of another.
8. Whether lost with the loss of possession.

## VI. In relation to the registry acts.

1. Policy of the acts.
2. Consequences of the policy of the acts.
3. Agreements contrary to their policy, are void.
4. Their effect upon implied trusts.
5. Agreements for transfer are within them.
6. An assignment by one part-owner to another, is within them.
7. An assignment of freight alone, is not within them.
8. Instruments defective from non-compliance with the acts, cannot be reformed in equity.
9. But *quære*, where the defect arises from fraud.
10. Distinction between the registry acts and the annuity act.
11. Sale or mortgage of a ship at sea.
12. Warrant of attorney to comply with their forms, not revoked by bankruptcy.
13. The register of a ship, whether conclusive of property.
14. Liability of the registered owner for repairs.

## VII. Practice in relation to the seizure of vessels, as forfeited.

Restoration, upon security, refused, where a question of identity may be raised on the trial.

### I. In relation to the owner.

1. Part-owners are tenants in common, not joint tenants.

Part-owners of a ship are tenants in common, not joint tenants. *Ex parte Young*, 2 Ves. & Beam. 242.

2. Possession of some owners, the possession of all.

Possession of some owners, the possession of all. 2 Ves. & Beam. 217.

## 3. Whether liable for repairs.

For the repair of a ship, the creditor has the liability of the master who gives the order, and also of the owners, of whom the master is considered as the agent, unless such liability be excluded as to the one or the other of them by the express terms of the contract. *Ex parte Bland*, 2 Rose, 91.

## II. In relation to the master.

Revocation of his authority to receive payment, by notice.

Where the master of a ship, on behalf of the owners, lets the ship on charter, partly to A., and the owner becomes bankrupt, and his assignees give notice to A. not to pay any further sums of money on account thereof to the master, this notice affects A. as to all sums paid afterwards by him to the master, beyond what the master had actually paid or stood engaged for on account of the ship at the time of the notice; but will not defeat payments made to that extent. *Wilkins v. Mure*, 1 Cox, 150.

## III. In relation to affreightment.

A question arising out of a capture.

Charter party of affreightment between the owners of the ship M. and the commissioners of transports, "for and on behalf of his majesty." During her continuance in the transport service, the ship makes a capture, which is condemned; and upon petition to the treasury, two-thirds of a moiety of the proceeds arising from the capture, ordered by warrant from the crown, to be paid to the owners. These proceeds are entirely in the discretion of the crown; and upon motion for payment into court of a sum admitted by the commissioners of transports to be due for freight under the charter party, which motion was resisted on the ground that the commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant; payment was ordered accordingly, without prejudice to the question of ownership. *Thurgar v. Morley*, 3 Mer. 20.

## IV. In relation to hypothecation.

## 1. Of the master's right to hypothecate the cargo.

Power of the master to hypothecate the cargo, as well as the ship, for a reasonable purpose, only for the benefit of the ship and cargo. 13 Ves. 599.

## 2. What transactions presumptively are not such.

Bills of exchange drawn by the master upon the owner in favour of a person advancing money for the ship, and not purporting on the face of them to be drawn for the purposes of the ship, are *prima facie* evidence against an hypothecation. *Ex parte Halkett*, 2 Rose, 229.

## V. In relation to lien, as distinct from hypothecation.

## 1. Rule of the civil law.

By the civil law there is also a lien upon the ship; following her into the hands of purchasers, in different countries, for different periods. 13 Ves. 599.

## 2. For repairs in this country.

For repairs of a ship in *this country* the owners are personally liable; and the ship cannot be pledged without a special contract. 13 Ves. 598.

## 3. For repairs in a foreign country.

1. Lien of the master of a ship by bills drawn, and payments made, for necessary repairs, abroad, in the prosecution of the voyage; though no instrument of hypothecation. *Hussey v. Christie*, 13 Ves. 594.

2. The

2. The master may have a lien (for repairs, &c. abroad) without an instrument of hypothecation against a third person. 13 Ves. 600.

3. Distinction of the law of England requiring an express hypothecation for repairs of a ship in England, does not take place as to repairs abroad; and Ireland, Jersey, and Guernsey, are foreign countries for this purpose. 13 Ves. 599.

4. For a loan, in a foreign country, to enable the ship to prosecute its voyage.

*Semble*, that if in a foreign port a loan of money is necessary to enable the master of a ship to prosecute his voyage, a person making that advance is entitled to a lien on the ship, without an instrument of hypothecation. *Ex parte Halkett*, 2 Rose, 194.; 3 Ves. & Beam. 135.

5. For contribution to general average.

Lien for general contribution to individual loss by property thrown over board for the safety of the ship, under the right of the master to require security, not extended to an injunction against delivering the cargo, receiving the freight, and parting with any share of the ship. The mode of adjustment not confined by usage to arbitration. *Hallet v. Bousfield*, 18 Ves. jun. 187.

6. Priority between different claimants.

Equitable agreement by articles for security upon a share of a ship, then building; with a covenant for a future bill of sale, and, if the ship should be sold in the interval, for payment out of the purchase money, postponed to a subsequent bill of sale, with possession taken, as far as it could be, subject to the builder's possession and lien. *Daniel v. Russell*, 14 Ves. 393.

7. Lien of one part-owner upon the share of another.

No lien therefore on the share of one, a bankrupt, having been also managing owner, for outfit, freight, &c. due to the others. *Ex parte Young*, 2 Ves. & Beam. 242.

8. Whether lost with the loss of possession.

A ship, while the possession of it is retained, is specifically chargeable in respect of the expence incurred in repairing it; but the possession parted with, the lien is lost. *Ex parte Bland*, 2 Rose, 91.

## VI. In relation to the registry acts.

### 1. Policy of the acts.

1. Policy of the ship registry acts. 11 Ves. 625.

2. Policy of the registry acts. 15 Ves. 60.

3. Public policy of the ship registry acts. 11 Ves. 642.

### 2. Consequences of the policy of the acts.

The policy of the registry acts prevents a court from looking on one who has not strictly complied with their provisions, in the light of a purchaser. *Brewster v. Clarke*, 2 Mer. 78.

### 3. Agreements contrary to their policy, are void.

A., B., and C. agreed to purchase a ship, and that it should be registered in the name of A. and B. only, but the profits of the ship to be divided by the three. C. filed a bill against A. and B. for an account of the profits of the ship. A general demurrer was put in. On the ground of public policy, the agreement was held to be illegal, and the demurrer allowed. *Battersby v. Smyth*, 3 Mad. 110.

## 4. Their effect upon implied trusts.

Whether the ship registry acts 26 Geo. 3. & 34 Geo. 3. have any effect upon trusts implied or arising by operation of law, *quære*. 6 Ves. 746.

## 5. Agreements for transfer are within them.

Agreement for sale of a ship, void under the registry acts, for want of certificate of registry being duly recited in the memorandum of sale; although a copy of such certificate was thereto annexed. *Brewster v. Clarke*, 2 Mer. 78.

## 6. An assignment by one part-owner to another, is within them.

Transfer of a share in a ship to another part-owner, void, by not procuring the indorsement upon the certificate within the time prescribed by the registry acts after the arrival of the ship. *Speldt v. Lechmere*, 15 Ves. 588.

## 7. An assignment of freight alone, is not within them.

Assignment of freight alone, is not within the ship registry act. 11 Ves. 636.

## 8. Instruments defective from non-compliance with the acts, cannot be reformed in equity.

1. Sale of a ship without reciting the registry, is void. *Hibbert v. Rolleston*, 3 B. C. C. 571.

2. An assignment of a ship by way of mortgage, which is defective by not having complied with the registry act, cannot be made good in equity. *Ex parte Bulteel*, 1 Cox, 243.

2. Where the interest in a ship is derived under the party's own act and contract, not executed according to the registry act, it cannot be reformed in equity any more than an annuity deed; not according to the annuity act. 6 Ves. 745.

3. Transfer of a ship void to all intents and purposes if the registry acts are not complied with; and no relief in equity, as upon a defective conveyance. As to the case of fraud, *quære*. 13 Ves. 589.

4. If on the sale of a ship there is no bill of sale or indorsement of the certificate of registry, no relief can be given in equity on the ground of accident for fraud. *Thompson v. Leake*, 1 Mad. 39.

9. But *quære*, where the defect arises from fraud.

1. Whether, the legal title under an assignment of a share in a ship failing under the ship registry acts, 26 Geo. 3. c. 60. — 34 Geo. 3. c. 68. for want of the indorsement upon the certificate within ten days after the return of the ship to port; if that was prevented by fraud, relief can be had in equity, in what form, and whether it may not be had as to the freight, if not as to the ship, though both were comprised in the same bill of sale, *quære*. *Mestier v. Gillespie*, 11 Ves. 621.

2. Vide *supra*, div. 8.

## 10. Distinction between the registry acts and the annuity act.

Distinction between the ship registry acts and the annuity act, upon the public policy of the former. 11 Ves. 639.

## 11. Sale or mortgage of a ship at sea.

1. Sale of a ship at sea, valid; notwithstanding the bankruptcy of the vendor before her arrival in port, and therefore before the title is complete by the indorsement on the certificate of registry; if the other requisites of the ship registry act were previously complied with. 11 Ves. 637.

2. The bill of sale passes the absolute property in a ship at sea, subject only to be divested in case of the indorsement on the certificate of registry,

not being made within ten days after the return of the ship to port. *Dixon v. Ewart*, 3 Mer. 322.

3. A mortgage of a ship at sea (the forms required by the registry acts being observed), held to be valid; and injunction granted to prevent an improper indorsement on the certificate of registry. *Thompson v. Smith*, 1 Mad. 395.

12. Warrant of attorney to comply with their forms, not revoked by bankruptcy.

Power of attorney to sign an indorsement on the certificate, not revoked by bankruptcy of the vendor subsequent to the execution of the power, but previous to the indorsement; being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy, and for a valuable consideration. Therefore, in this case, the indorsement on the certificate being made within the ten days under a power of attorney, the grantor of which had since become bankrupt; held, a sufficient compliance with the terms of the registry act. *Dixon v. Ewart*, 3 Mer. 322.

13. The register of a ship, whether conclusive of property.

1. The registry of a ship is conclusive evidence of the property, upon the policy of the registry acts; even against the claim of creditors, upon a joint purchase and various acts of apparent ownership, within the bankrupt act, 21 Jam. 1. c. 19. s. 10, 11. Distinction between transfers by the act of the parties, and by operation of law. *Ex parte Yallop*, 15 Ves. 60.

2. The registry of a ship is conclusive evidence of the property even between creditors, excluding all trusts, created by act of the parties; as, by payment of money on a purchase in the name of another. Distinction, as to trusts, arising by operation of law, upon bankruptcy or death. *Ex parte Houghton and another*, 17 Ves. jun. 251.

14. Liability of the registered owner for repairs.

1. Liability to repairs of a ship upon the registered title; though without actual notice; as if registered under a general direction to an agent to take an effectual security. *Ex parte Mackell*, 2 Ves. & Beam. 216.

2. Mortgagees of a ship having their names inserted in the registry, and without which their security could not be effectual, are liable to creditors in respect of stores supplied for the use of the ship. The possession of one owner is the possession of all. *Ex parte Machel*, 1 Rose, 447.

## VII. Practice in relation to the seizure of vessels, as forfeited.

Restoration, upon security, refused, where a question of identity may be raised on trial.

The court of exchequer will not grant an order to restore a vessel seized on a charge of having broken the navigation laws, where a question of identity may be raised on the trial of the cause; although the defendant offer approved security for re-delivering her, if a verdict should be recovered against him. *Attorney-general v. Laragoity*, 2 Price, 166.

## SIMONY.

Validity of a contract of purchase under the impression of the immediate dissolution of the incumbent.

The purchaser of an advowson, knowing at the time of the purchase that the incumbent was on his death-bed, and who, in fact, died the next day; *quære* whether the contract was simoniacal and void. *Barret v. Glubb*, Dick. 516.

## SLAVE.

A slave on arrival in England becomes free.

Bill by the administrator of the deceased, for an account of personal estate given by her as a *donatio causæ mortis* to a negro, who had been brought to England as a slave, dismissed with costs. *Shanley v. Harvey*, 2 Eden, 126.

## SOLICITOR AND CLIENT.

I. In relation to the ~~rea~~ office of solicitor.

Compared with clerks in court, solicitors are of modern date.

## II. In relation to the individuality of client and solicitor.

The court will not, at the expence of farther delay, relieve a plaintiff from the consequences of his solicitor's neglect.

## III. Of nominating one solicitor for all parties.

1. The reason of the practice.
2. The practice of so doing allowed ; but disapproved of.
3. But the solicitor for one party cannot, without consent, afterwards become the solicitor for his adversary.
4. Though, under the circumstances, a solicitor for all the defendants was afterwards allowed to act for some against the others.

## IV. The course where a suitor refuses to name a solicitor.

In the case of an issue out of chancery.

## V. Of changing the solicitor in a cause.

1. The rule in equity.
2. The rule at law.
3. The former solicitor cannot stop the cause until paid his costs.

## VI. Of striking a solicitor off the roll.

At his own request.

## VII. What may be done by a solicitor by virtue of his general authority.

He may defend, but cannot institute a suit.

## VIII. In relation to a solicitor's bill.

1. The rules of taxation, as between attorney and client, do not apply where they appear in the court as party and party in a cause.
2. Of the different modes of procedure by persons parties, and persons not parties to the cause, to obtain a taxation.
3. A single taxable item renders the whole bill taxable.
4. Items taxable — agency business.
5. Items taxable — soliciting an appeal to the lords.
6. Items taxable — business done in bankruptcy.
7. Items taxable — business relating to bankruptcy, though previous to it.

8. Items

8. Items not taxable — agency business.
9. Items not taxable — soliciting an act of parliament.
10. Items not taxable — business done in courts in Wales.
11. Taxation, after payment.
12. Taxation after payment by a co-executor and trustee, unknown to the other.
13. Taxation, after security given for payment.
14. Taxation, after judgment thereon.
15. Effect of the solicitor's death, upon an order for taxing his bill.
16. When a solicitor shall be allowed costs of taxation.
17. When a solicitor shall pay costs of taxation.
18. An attorney, quitting his client before trial, loses his bill.

**IX. In relation to a solicitor's lien upon papers.**

1. The rule at law.
2. He has a lien for his costs upon papers in his possession.
3. The lien is general, and not limited to the occasion of delivery.
4. Whether it extends to the client's original will.
5. He has no lien against a remainder-man, on deeds put into his hands by tenant for life.
6. In a case where the commission of bankruptcy, which he solicited, was superseded for another.
7. It is lost by taking security.

**X. In relation to a solicitor's lien upon proceedings.**

1. Against an appropriation.
2. Cash in the bank in the cause, held liable.
3. In bankruptcy.
4. Reason of the rule at law, that the lien prevents compromise.
5. Its extent.
6. It is lost by his refusing to act.
7. It is not lost by an order in bankruptcy, directing payment to petitioner personally.

**XI. In relation to a solicitor's lien on being changed.**

He cannot stop the cause to enforce payment.

**XII. In relation to the obligation of a solicitor to produce papers.**

1. He is bound to produce his client's papers for the client's own purposes; or in case of bankruptcy, for the assignees.
2. He is obliged where the client himself would be bound to produce them.
3. The summary jurisdiction in this particular will be exercised, though there is no cause in court.
4. It seems that the summary jurisdiction in this particular extends to the representatives of a solicitor.
5. Declining his office, he cannot refuse inspection, to compel payment.
6. He is not bound to deliver up his client's papers without payment.
7. Nor is his executor.



8. A *subpoena duces tecum* to produce his client's papers, will not lie.

9. Motion that he may produce his client's papers, refused.

**XIII. In relation to confidential communications.**

A solicitor may refuse to disclose them.

**XIV. In relation to a solicitor's responsibility.**

1. For refusing to appear at the hearing pursuant to his undertaking.

2. For falsely representing that an injunction was granted.

3. For recommending bad security.

4. A solicitor grossly negligent, may be attached.

**XV. Relative to the validity or invalidity of purchases and other transactions between attorney and client.**

1. General rules.

2. Whether the same person can act as attorney and as scrivener in the same transaction.

3. The circumstance, that one residuary devisee was the attorney who drew the will; not decisive evidence of fraud.

4. Cases in which purchases have been upheld.

5. Cases in which purchases have been set aside.

6. Cases in which gifts have been upheld.

7. Cases in which gifts have been set aside.

8. Rule in relation to the settlement of accounts.

9. Cases in which accounts have been opened.

**XVI. Relative to a warrant of attorney.**

1. Payment of a legacy ordered under a general warrant.

2. Executed abroad.

3. It is revocable, unless given as a security.

4. It is revoked by the client's death.

5. It is not revoked by the client's bankruptcy, where given to indorse a sale upon a ship's register.

**XVII. Relative to a solicitor's agent.**

1. Extent of the client's responsibility to.

2. Taxation of his bill, upon the solicitor's application.

3. Of his lien upon papers.

**I. In relation to the era of the office of solicitor.**

Compared with clerks in court, solicitors are of modern date.

Solicitors are modern officers of the court, compared with clerks in court. 6 Ves. 687.

**II. In relation to the individuality of client and solicitor.**

The court will not, at the expence of farther delay, relieve a plaintiff from the consequences of his solicitor's neglect.

In a cause which has been much delayed, the court will not, at the expence of farther delay, relieve the plaintiff from the consequences of the gross neglect of his solicitor. *Ex parte Turner*, Swanst. 156.

### III. Of nominating one solicitor for all parties.

#### 1. The reason of the practice.

1. Practice for one solicitor and clerk in court to be concerned for all parties, admitted; but disapproved of by the lord chancellor. 3 Ves. & Beam. 177.

2. Reason of the practice, to prevent the interposition of each creditor or legatee; for which the leave of the court is necessary. Ibid.

2. The practice of so doing, allowed; but disapproved of. Ibid.

3. But the solicitor for one party cannot, without consent, afterwards become the solicitor of his adversary.

An attorney cannot give up his client, and act for the opposite party in any suits between them. Lord Cholmondeley v. Lord Clinton, 19 Ves. 261.; Cooper, 80.

4. Though, under the circumstances, a solicitor for all the defendants was afterwards allowed to act for some against the others.

An attorney who has appeared for parties, defendants in a suit in chancery, will not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves, against others of them, the solicitor making affidavit that he is not possessed of any secrets which might be used to the prejudice of such other defendants, or knowledge of any facts unknown to his clients. It appears to be necessary that a solicitor, in such a case, should be shown to be possessed of knowledge of matters which might give him undue advantage to found such a motion. Robinson v. Mullet, 4 Price, 353.

### IV. The course where a suitor refuses to name a solicitor.

In the case of an issue out of chancery.

A defendant neglecting to name an attorney for the purpose of trying an issue out of this court, was directed to do it in four days, or the issue to be taken as tried, and a verdict for the plaintiff. Wilson v. Ginger, Dick. 521.

### V. Of changing the solicitor in a cause.

#### 1. The rule in equity.

1. Party may discharge his solicitor, who has a lien for his costs upon papers in his possession; but cannot, except by retaining them, prevent the progress of the cause, until he is paid. Twost v. Dayrell, 13 Ves. 195.

2. Client may discharge his solicitor. 14 Ves. 272.

#### 2. The rule at law.

1. At law, the party cannot charge his attorney without a judge's order. 13 Ves. 196.

2. Attorney cannot be changed without leave of the court: whether he can relinquish the suit, though not paid, and as to the effect of taking security, *quære*. Effect of his notice to defendant not to pay over money under a decree or judgment without satisfying his costs. 16 Ves. 281.

3. The former solicitor cannot stop the cause until paid his costs.

Where plaintiff changes his solicitor, the former solicitor has no right to stop him from proceeding until his costs are paid. 1 Sch. & Lef. 315.

### VI. Of striking a solicitor off the roll.

At his own request.

1. The court will not strike a solicitor off the roll at his own request, without an affidavit that there is no other reason for the application. *Ex parte* Owen, 6 Ves. 11.

2. A

2. A solicitor not to be struck off the roll at his own request without an affidavit, that there is no other reason for the application. *Ex parte Foley*, 8 Ves. 33.

**VII. What may be done by a solicitor by virtue of his general authority.**

He may defend, but cannot institute a suit.

1. A solicitor may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for that purpose. *Wright v. Castle*, 3 Mer. 12.

2. Order to dismiss a bill, with costs to be paid by the plaintiff's solicitor, the bill having been filed without special authority from the plaintiff. *Wright v. Castle*, 3 Mer. 12.

**VIII. In relation to a solicitor's bill.**

1. The rules of taxation, as between attorney and client, do not apply where they appear in the court as party and party in a cause.

Bill against defendant, an attorney, praying that his bills of costs on the plaintiff might be taxed, and for an injunction in the mean time. The rules of taxation of costs, as between attorney and client, do not apply when they appear in this court as party and party in a cause; and the costs of the suit therefore must be taxed as between party and party. *Spelman v. Woodbine*, 1 Cox, 49.

2. Of the different modes of procedure by persons parties, and persons not parties to the cause, to obtain a taxation.

Order for taxing a bill of costs, entitled in the cause, if obtained by a party to the cause, regular under the general jurisdiction. But a person, not a party in the cause, must apply *ex parte* under the st. 2 Geo. 3. c. 23. s. 22. Such an irregularity would be waived by proceeding under the order. Whether a party having obtained such an order in a cause, may pursue it under the statute, *quære*. *Bignol v. Bignol*, 11 Ves. 328.

3. A single taxable item renders the whole bill taxable.

Where any part of a solicitor's bill relates to business done in chancery, the whole is subject to taxation. *Margerum v. Sandiford*, 3 B. C. C. 233.

4. Items taxable — agency business.

A bill of fees and disbursements for agency business ordered to be taxed. *Paget v. Nicholson*, Dick. 285.

5. Items taxable — soliciting an appeal to the lords.

Distinction between costs of an appeal before the house of lords, and of soliciting a bill which any one may do. 3 Ves. & Beam. 22.

6. Items taxable — business done in bankruptcy.

1. Order in bankruptcy for taxation of a solicitor's bill, for business done in bankruptcy, and otherwise. *Ex parte Arrowsmith*, 19 Ves. 124.

2. The rule as to taxation of a solicitor's bill adopted in bankruptcy; and applies to the bill taxed by the commissioners. *Ex parte Westall*, 3 Ves. & Beam. 141.

3. A bill of costs, by a solicitor, under a commission of bankruptcy, though approved by the commissioners, and stated and allowed in the accounts of the assignees, held to be taxable under 5 Geo. 2. c. 30. s. 46. *Ex parte Gregson*, 3 Mad. 49.

7. Items taxable — business relating to bankruptcy, though previous to it.

Order in bankruptcy under the act 2 Geo. 2. c. 23. s. 22. to tax a solicitor's

tor's bill for striking the docket, and a journey to get an affidavit of debt; being business relating to the bankruptcy, though previous to it. *Ex parte Smith*, 5 Ves. 706.

8. Items not taxable — agency business.

Agency business not within the statute, for taxing attorney's bills. *Brinsted v. Barefoot*, Dick. 112.

9. Items not taxable — soliciting an act of parliament.

1. No jurisdiction for taxing a solicitor's bill of costs, for obtaining an act of parliament. *Ex parte Wheeler*, 3 Ves. & Beam. 21.

2. Taxation of a solicitor's bill in the house of lords only through recognition. 3 Ves. & Beam. 22.

10. Items not taxable — business done in courts in Wales.

The court has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the court of great sessions in Wales, where there is no detention of title deeds, nor any other matter besides costs in dispute. *Ex parte Partridge*, 2 Mer. 500.

11. Taxation, after payment.

1. An attorney's bill of costs, settled and paid, or after judgment in an action, not to be referred for taxation of course; as it may upon a special case of fraud or improper charges, notwithstanding payment, a release, judgment, or other security. *Langstaffe v. Taylor*, 14 Ves. 262.

2. Though the court will open a solicitor's bill, and order taxation, after several years, and a security given, or even payment, upon gross errors, fraud, or undue pressure, where nothing appeared but a trifling inaccuracy, and under other favourable circumstances; the court would not restrain proceedings upon a security obtained while business was depending. *Cooke v. Settree*, 1 Ves. & Beam. 126.

3. Taxation of a solicitor's bill refused after a security given, payment, and acquiescence: some charges, though improper, not being so gross as to amount to fraud. *Plenderleath v. Fraser*, 3 Ves. & Beam. 174.

4. Solicitor's bill not taxed after payment and long acquiescence, unless very gross charges distinctly pointed out. 3 Ves. & Beam. 175.

5. Solicitor's bill of costs, where the charges were *prima facie* exorbitant, ordered to be taxed, after payment made, and after the death of the assignee who had paid it. *Ex parte Neale*, 1 Buck. 111.

12. Taxation after payment by a co-executor and trustee, unknown to the other.

Reference of a solicitor's bill of costs to be taxed upon the application of one of two trustees and executors, by whom he had been employed in the conduct of the cause, and in other matters relating to the executorship; the executor making the application not having acted, and his acting co-executor refusing to consent to the application; the bill having been long since paid, by the acting executor, but unknown to the parties beneficially interested; and no settlement of the executorship accounts having been made, notwithstanding repeated applications, until lately, and the *cestui que trusts* (one of them a married woman) having executed a release to the executors. — Motion on behalf of the solicitor, to discharge the order of reference, refused. The *cestui que trusts* having a right to use the name of his trustee, for the purpose of taxation; and the release to the executors not operating to prevent him from prosecuting against the solicitor, the remedy given him by statute. *Hayard v. Lane*, 3 Mer. 285.

13. Taxation, after security given for payment.

1. Solicitor's bill of costs referred to be taxed, after a bond and mortgage executed

executed for payment of the balance alleged to be due on the bills. *Aubrey v. Popkin*, Dick. 403.

2. An attorney cannot take a bond of his client for unliquidated costs, but though settled by bond and mortgage, they may be taxed. *Newman v. Payne*, 4 B. C. C. 350.

3. Generally, a bond taken by a solicitor, from the client, in the progress of a cause, subject to taxation. 3 Ves. & Beam. 175.

14. Taxation, after judgment thereon.

Vide 14 Ves. 262.

15. Effect of the solicitor's death, upon an order for taxing his bill.

After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before a report, and no measures having been taken for continuing the taxation, his administratrix proceeding at law against the client, was held not to have committed a contempt. *Ex parte Houlditch*, Swanst. 58.

16. When a solicitor shall be allowed costs of taxation.

1. Vide Dick. 96.

2. Solicitor allowed costs of taxation; the reduction of his bill being less than a sixth charged with costs of proceedings before the master, creating useless expence. *Yea v. Frere*, 14 Ves. 154.

17. When a solicitor shall pay costs of taxation.

1. Solicitor refused the costs of taxing his bill. *Ramsden v. Hilton*, Dick. 322.

2. On re-taxation by the master, being reduced above a sixth; costs against the solicitor. *Ex parte Westall*, 3 Ves. & Beam. 141.

3. One-sixth of a bill of costs in bankruptcy, delivered to the master to be taxed, being taken off, the solicitor ordered to pay the costs of the taxation. *Ex parte Hathaway*, 2 Mad. 329.

4. Held, that a solicitor must pay the costs of the taxation of his bill reduced by the taxation, more than one-sixth of the amount, which reduction arose from the master disallowing extra fees paid to the commissioner, for travelling expences. *Ex parte Inman*, 1 Buck. 129.

18. An attorney, quitting his client before trial, loses his bill.

Attorney quitting his client before trial, cannot bring an action for his bill. 14 Ves. 273.

### IX. In relation to a solicitor's lien upon papers.

1. The rule at law.

At law, lien of an attorney upon papers for his costs; but the plaintiff may discontinue his action, subject to the costs incurred. 13 Ves. 162.

2. He has a lien for his costs upon papers in his possession.

Lien for costs upon papers in the attorney's possession. 13 Ves. 162.

3. The lien is general, and not limited to the occasion of delivery.

1. Attorney's lien generally on papers in his possession: not limited to the occasion, on which they were delivered without special agreement. *Ex parte Sterling*, 16 Ves. 258.

2. A solicitor has a lien for his costs upon all papers that come into his hands for the purpose of business, though not papers in the cause in which he makes the demand. *Ex parte Nesbitt*, 2 Sch. & Lef. 279.

3. Deeds deposited with a solicitor for a particular purpose, and after that had failed, permitted to remain with him, subject to the general lien. *Ex parte Pemberton*, 18 Ves. jun. 282.

4. Whether

4. Whether it extends to the client's original will.

Whether an attorney's lien upon papers extends to the original will of his client, *quære*? Ordered to produce it before examiner, and for the hearing of the cause, without prejudice. *Georges v. Georges*, 18 Ves. jun. 294.

5. He has no lien against a remainder-man, on deeds put into his hands by tenant for life.

A solicitor has no lien against a remainder-man, on deeds put into his hands by tenant for life. 2 Sch. & Lef. 279.

6. In a case where the commission of bankruptcy, which he solicited, was superseded for another.

Upon an act of bankruptcy, by lying two months in prison, joint and separate commissions; the former being established, the latter superseded, the attorney employed by the bankrupt, and in sustaining the latter against the former, has no lien upon papers delivered to him by the bankrupt after the arrest; upon petition of the joint creditors, he was ordered to deliver them up. *Ex parte Lee*, 2 Ves. 285.

7. It is lost by taking security.

Solicitor's lien on papers superseded by taking security. *Cowell v. Simpson*, 16 Ves. 275.

**X. In relation to a solicitor's lien upon proceedings.**

1. Against an appropriation.

1. Attorney's lien for costs upon a fund of assets, appropriated, prevailed; though the appropriation was subject to a debt; in respect of which the testator, as surety, was creditor of the client to a greater amount. *Taylor v. Popham*, 13 Ves. 59.

2. The order, establishing the solicitor's lien for costs upon the fund of assets, appropriated to the client, subject to securing a debt, from him, and the testator as his surety, and afterwards paid by the estate of the latter, was reversed, as being inconsistent with the decrees. *Taylor v. Popham*, 15 Ves. 72.

2. Cash in the bank in the cause, held liable.

Cash in the bank in the cause, detained to answer solicitor's bill of fees and disbursements. *Fairland v. Enever*, Dick. 114.

3. In bankruptcy.

1. Solicitor's lien in bankruptcy; as in a cause, upon the debt and costs; viz. the clear result of the equity between the parties. Distinction between the practice of the courts of law: the common pleas, upon the same principle, not allowing the lien to interfere with a right of set-off, &c.; the king's bench holding the lien paramount any claim of the party. *Ex parte Castle*, 15 Ves. 539.

2. A solicitor has a lien upon costs ordered to be paid to his client upon a petition, in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Ex parte Bryant*, 2 Rose, 237.

4. Reason of the rule at law, that the lien prevents compromise.

As to the reason of some cases at law, in favour of the attorney's lien for costs, going the length of preventing compromise. *Taylor v. Popham*, 15 Ves. 72.

5. Its extent.

1. In equity, the costs are arranged according to the equities of the parties; and the solicitor's lien is only upon the balance under that arrangement. *Ibid.*

2. The

2. The lien of a solicitor for his costs is upon the balance between parties. *Shine v. Geugh*, 2 B. & B. 34.

6. It is lost by his refusing to act.

A solicitor having declined to act for his client, has no lien for his costs upon a fund in court. *Creswell v. Byron*, 14 Ves. 271.

7. It is not lost by an order in bankruptcy, directing payment to petitioner personally.

Though an order be made on a petition in bankruptcy, directing costs to be paid to the petitioner, personally, this does not take away the lien of the solicitor for his bill. *Ex parte Bryant*, 1 Mad. 49.

#### XI. In relation to a solicitor's lien on being changed.

He cannot stop the cause to enforce payment.

A party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands; but cannot otherwise stop the progress of the cause till he is paid. *Merryweather v. Mellich*, 13 Ves. 161.

#### XII. In relation to the obligation of a solicitor to produce papers.

1. He is bound to produce his client's papers, for the client's own purposes; or, in case of bankruptcy, for his assignees.

Solicitor bound to produce papers of his client for him, or, in case of his bankruptcy, for his assignees, though not employed by them in the case, for the purposes of which he received them; but not bound, without payment, to deliver them up, or produce them in any other business. *Ross v. Laughton*, 1 Ves. & Beam. 349.

2. He is obliged, where the client himself would be bound, to produce them.

1. Wherever a client is bound to produce a deed for the benefit of a third person, so also is his solicitor; though the latter may have a lien against it for costs against his client. *Furlong v. Howard*, 2 Sch. & Lef. 115.

2. Attorney submitting to produce title deeds of his client in his possession as the court shall direct, may be called upon to produce them, if the principal himself could not have been called upon to do so. *Fenwick v. Reed*, 1 Mer. 114.

3. The summary jurisdiction in this particular will be exercised, though there is no cause in court.

Order, without a cause in court, upon the general jurisdiction over a solicitor, that he shall deliver his bill, for the purpose of getting from him title deeds deposited with him for suffering recoveries. *Ex parte the Earl of Uxbridge*, 6 Ves. 425.

4. It seems that the summary jurisdiction in this particular extends to the representatives of a solicitor.

The court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill. It seems that the summary jurisdiction of the court extends to the representatives of a solicitor. *Redfearn v. Sowerby*; *Bolton v. Tate*, *Swanst.* 84.

5. Declining his office, he cannot refuse inspection to compel payment.

A solicitor declining to be farther concerned in a cause, is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers

papers in his hands, or such production of them before the court or the master, as may be necessary in the conduct of the cause. *Commerell v. Poynton*, Swanst. 1.

6. He is not bound to deliver up his client's papers without payment. Vide 1 V & B. 349.

7. Nor his executor.

Vide Swanst. 34,

8. A *subpoena duces tecum* to produce his client's papers will not lie.

No *subpoena duces tecum* upon an attorney to produce papers of his client. It has been sometimes seen in a criminal case; but the precedent is not followed. 6 Ves. 282.

9. Motion that he may produce his client's papers, refused.

Motion to compel an attorney to produce papers of his client, refused with costs. *Wright v. Mayer*, 6 Ves. 280.

### XIII. In relation to confidential communications.

A solicitor may refuse to disclose them.

A solicitor may, by his answer to a bill against him and his clients, refuse to discover any deeds or facts, confidentially communicated to him. Therefore exceptions to his answer for shortness, in not making such disclosure, and relying on such defence, were overruled. *Stratford and Hogan*, 2 B. & B. 164.

### XIV. In relation to a solicitor's responsibility.

1. For refusing to appear at the hearing, pursuant to his undertaking.

Solicitor ordered to pay all the costs, occasioned by his refusing to appear for defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook v. Broomhead*, 16 Ves. 133.

2. For falsely representing that an injunction was granted.

Solicitor, falsely representing that an injunction was granted; liable to damages, an indictment, and to be struck off the roll. 2 Ves. & Beam. 352.

3. For recommending bad security.

Bill to make attorney responsible for recommending bad security. *Brooks v. Day*, Dick. 572.

4. A solicitor, grossly negligent, may be attached.

Solicitor, grossly negligent, may be attached. *Lloyd v. Nangle*, Dick. 129.

### XV. Relative to the validity or invalidity of purchases and other transactions between attorney and client.

1. General rules.

1. A court of equity, upon general principles of policy, will set aside any gift made by a client to an attorney, during the time when the attorney has in his hands the transaction of the client's affairs, without any proof of actual fraud. *Welles v. Middleton*, 1 Cox, 112.

2. Attornies are officers of the court, and have several privileges as such; and there are summary proceedings both for and against them, and peculiar restraints upon them in their dealings with their clients, both at law and in equity: at law, a judgment obtained by an attorney from his client, would only stand as a security for what is actually due. 2 Ves. 201.

3. Independent of fraud, an attorney shall not take a gift from his client, while the relation subsists. 13 Ves. 138.

4. Attorney



4. Attorney cannot take any thing from his client for his own benefit pending the suit, but his demand; nor a guardian from his ward pending the guardianship nor at its close, nor until the relation and influence have ceased in either case. 18 Ves. jun. 127.

5. Principle of relief against transactions between attorney and client, with misrepresentation from knowledge, acquired in the client's transactions, or assumed, considered either as misconduct or negligence. 18 Ves. jun. 308.

6. An attorney shall not take a gift or reward from his client, while the connection subsists. It must, as in the instance of guardian and ward, be previously dissolved. 18 Ves. jun. 313.

7. An attorney is bound to apprise his client of his true interest, in transactions between them; and if he takes unfair advantage of his confidence, accounts settled for many years will be opened, although the vouchers have been delivered up. *Lewis v. Morgan*, 3 Anst. 769.

8. Equity will not permit an attorney to purchase from his client, while the relation subsists. 1 Ball & Beatty, 104.

9. All dealings between attorney and client are anxiously scrutinized in equity, in order to protect the client from his own acts, done under the influence, or ascendancy, which an attorney acquires over him. 1 Ball & Beatty, 107.

2. Whether the same person can act as an attorney and as scrivener in the same transaction.

Whether the same person can act as attorney and as scrivener in the same transaction, *quære*. 2 Ves. & Beam. 35.

3. The circumstance, that one residuary devisee was the attorney who drew the will, not decisive evidence of fraud.

The circumstance, that one residuary devisee was the attorney who drew the will, not decisive evidence of fraud. *Paine v. Hall*, 18 Ves. jun. 475.

4. Cases in which purchases have been upheld.

1. Purchase from his client by a solicitor, who was also trustee for the sale of the estate for payment of debts, confirmed upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, and of the purchase having been recognised and approved of by the *cestui que* trust. *Clarke v. Swaile*, 2 Eden, 134.

2. Grant of a leasehold interest from client to attorney, a near relation, in consideration of money secured by bond, afterwards released, and in consideration of being indemnified from all costs, &c. if the title should be impeached, the attorney re-demising to the client at a nominal rent, for the lives of the client and his wife. This is not such a dealing between attorney and client as can be impeached by the next of kin of the client, who acquiesced in it, and in an answer recognized it to be fair. *Bellew v. Russell*, 1 B. & B. 96.

3. Purchase of a reversionary interest by an attorney from his client, though in the event advantageous, without fraud, or any representation, the proposal coming from the client, and no confidence upon that subject, both ignorant of the value. The bill, charging fraud and misrepresentation, confidence, and knowledge on one side, with ignorance on the other, and not bringing forward the only incorrect circumstance, the receipt taken as for money paid, though the consideration was by deduction from a bill of costs, not then of that amount, dismissed without costs. *Montesquieu v. Sanders*, 18 Ves. jun. 304.

5. Cases in which purchases have been set aside.

1. Bill to set aside leases, obtained by an agent and attorney from his principal, dismissed as to voluntary leases; being pure gift; and no fraud, mis-

misrepresentation, &c. ; with costs as to some, intended as a provision upon, and inducement to, the marriage of the defendant : without costs as to others ; the relation of the parties, and the circumstances, upon general principles of public policy and utility, justifying inquiry. Another lease decreed to be delivered up ; the verdict in an issue establishing, that a full consideration was not paid. *Harris v. Tremenheere*, 15 Ves. 34.

2. Beneficial contracts and conveyances, obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, being also liable to the charge of champerty, decreed to stand as security only, for what was actually due ; and purchases by the attorney declared a trust. A subsequent deed, not a separate, independent, voluntary transaction, but under the same pressure, and called for under the covenant for farther assurance, no confirmation. *Wood v. Dow*, 18 Ves. jun. 120.

3. Whether a deficiency in value of one-third, with breach of duty as an attorney, &c. is not sufficient to set aside a purchase from his client, *quære*. 18 Ves. jun. 312.

#### 6. Cases in which gifts have been upheld.

Vide 15 Ves. 34.

#### 7. Cases in which gifts have been set aside.

1. Securities taken by an attorney from his client during the time of their connexion as such, for a present, the balances of accounts settled for money lent and laid out, costs and business done, and the price of a horse sold, void as to the present, and the plaintiff submitting to pay what should be actually due, the accounts were opened as to the whole : the horse having been sold soon after he was purchased from the attorney, for a price much less than was then stipulated, inquiry into his value directed. *Newman v. Payne*, 2 Ves. 199.

2. Relief against a deed of gift by a client to his attorney. 19 Ves. 52.

#### 8. Rule, in relation to the settlement of accounts.

1. Where an attorney uses his influence over his client to settle an unfair account between them, the court will open it at any time. *Lewis v. Morgan*, 3 Anst. 769.

2. In such a suit it is sufficient if upon the whole the court see an unfair account, although the particular objections raised by the bill are not made out in evidence. . *Ibid*.

3. If in such a suit the vouchers have been delivered up, and cannot be found, the oath of the party must be admitted as to their import. *Ibid*.

#### 9. Cases in which accounts have been opened.

1. *Ibid*.

2. Vide 2 Ves. 199.

### XVI. Relative to a warrant of attorney.

#### 1. Payment of a legacy ordered under a general warrant.

In this case a legacy of 100*l*. was ordered to be paid to a person having a general power of attorney from the legatee, without any power authorising him to receive this legacy specifically. *Carr v. Eastbrook*, 2 Cox, 390.

#### 2. Executed abroad.

Power of attorney executed in Paris in the presence of two witnesses, and authenticated by a notary of Paris, and an affidavit here, verifying the signature of the notary ; ordered to be acted upon by the accountant-general. *Lord Kinnaird v. Lady Saltoun*, 1 Mad. 227.

#### 3. It is revocable, unless given as a security.

Power of attorney revocable, and in ordinary cases would not found the jurisdiction for delivering up instruments ; but where executed for valuable consideration, this court would not permit it to be revoked. 7 Ves. 28.

## 4. It is revoked by the client's death.

1. Power of attorney to a creditor to receive a debt, not accompanying any assignment of it, nor making part of any security given; but with declarations that it was to enable the creditor to apply the money to his debt, not an appropriation; and therefore failed by the death of the debtor. *Lepard v. Vernon*, 2 Ves. & Beam. 51.

2. Power of attorney to a creditor to receive money, though made irrevocable, not effectual against the general creditors after death of the debtor. 2 Ves. & Beam. 53.

## 5. It is not revoked by the client's bankruptcy, where given to indorse a sale upon a ship's register.

A power of attorney to execute the indorsement of sale upon the register of a ship, when she returns home, is not revoked by the bankruptcy of the party giving the power. *Dixon v. Ewart*, 1 Buck. 94.

## XVII. Relative to a solicitor's agent.

## 1. Extent of the client's responsibility to.

A client not liable to the agent employed by his solicitor farther than what he may be indebted to his solicitor, for business done in the cause. *Anon. Dick*. 802.

## 2. Taxation of his bill, upon the solicitor's application.

Order, on the application of a solicitor to tax his own agent's bill. *Coeur v. Hake*, 2 Cox, 173.

## 3. Of his lien upon papers.

Lien of the agent in town upon the papers in his hands for what is due to him, as agent in the cause, from the solicitor in the country. 16 Ves. 164.

## SPOILIATION (OF DEEDS).

Question upon spoliation. *Bennet v. Hammond*, Dick. 589.

## STAMP.

## I. Of the nature of the duty payable.

An award does not require a deed stamp.

## II. In relation to the number of stamps.

A petition in bankruptcy, praying distinct orders under several commissions, requires several stamps.

## III. In relation to the time of stamping.

1. Where the instrument may be stamped, paying a penalty.

2. An original letter, by being stamped after production, is made evidence.

3. Bankrupt's certificate.

## IV. Of the admissibility in evidence of unstamped instruments.

Where a parol contract is reduced to writing, the writing must be stamped.

## V. In relation to the legacy duty.

1. What an appropriation within the statute 48 Geo. 3. c. 149.

2. Production of the legacy duty stamp, to enforce payment under a charge upon real in aid of personal.

#### VI. *In relation to proceedings abroad.*

Of stamping depositions taken in India.

#### VII. *Of the jurisdiction of courts of equity to relieve from the consequences of the want of stamps.*

In the case of bills and notes.

#### VIII. *In relation to including stamp duties in a taxation of costs.*

In the case of exceptions.

### I. *Of the nature of the duty payable.*

An award does not require a deed stamp.

Objection to an award to be ready to be delivered in writing, to the parties by a certain day, as not having a deed stamp, over-ruled. 17 Ves. jun. 232.

### II. *In relation to the number of stamps.*

A petition in bankruptcy, praying distinct orders under several commissions, requires several stamps.

A petition in bankruptcy, praying distinct orders under several commissions, requires several stamps. *Ex parte Wilson*, 18 Ves. jun. 439.

### III. *In relation to the time of stamping.*

1. Where the instrument may be stamped, paying a penalty.

Distinction between an agreement, that may be stamped, paying the penalty, which the party will be permitted to stamp pending the cause, and one, upon which no action can be brought, unless stamped. 11 Ves. 595.

2. An original letter, by being stamped after production, is made evidence.

An original letter, stamped after production, will make it evidence. 2 B. C. C. 32.

3. Bankrupt's certificate.

Bankrupt's certificate not requiring a stamp, until complete by allowance, an objection from alterations after it has been stamped, before allowance, over-ruled. *Ex parte Sawyer*, 17 Ves. jun. 244.

### IV. *Of the admissibility in evidence of unstamped instruments.*

Where a parol contract is reduced into writing, the writing must be stamped.

If the terms of a contract are reduced into writing, the paper must be stamped, in order to make it evidence. *Hearne v. James*, 2 B. C. C. 309.

### V. *In relation to the legacy duty.*

1. What an appropriation within the stat. 48 Geo. 3. c. 149.

3000*l.* given by will, to trustees upon trust, to invest and pay the interest to A. for life, and after her death to transfer the principal to B. Under a decree, this legacy is paid into court, and invested in stock in the name of

the accountant-general, previous to the imposition of the duty on legacies by 20 Geo. 3. c. 28. B. being then an infant, and therefore incapable of discharging the trustees. This is a sufficient *appropriation* of the legacy within the words of the st. 48 Geo. 3. c. 149. — “paid, retained, satisfied, or discharged, before the 10th Oct. 1808;” and, therefore, upon a question arising at the time of the principal becoming payable, it was determined that no legacy duty was chargeable in respect of it. *Hill v. Atkinson*, 2 Mer. 45.

2. Production of the legacy duty stamp, to enforce payment under a charge upon real in aid of personal.

Legacies not paid under a charge upon real estate in aid of the personal without production of the stamp under the legacy act, 36 Geo. 3. c. 52. s. 7. until it is ascertained, that there is no personal estate applicable. *Holme v. Stanley*, 8 Ves. 1.

#### VI. In relation to proceedings abroad.

Of stamping depositions taken in India.

Vide 2 Cox, 190.

#### VII. Of the jurisdiction of courts of equity to relieve from the consequences of the want of stamps.

In the case of bills and notes.

1. No relief in equity upon a promissory note void at law for want of a stamp. 5 Ves. 240.

2. Vide 1 Anst. 45.

#### VIII. In relation to including stamp duties in a taxation of costs.

In the case of exceptions.

1. Where a defendant submits to answer exceptions before an order of reference, plaintiff shall be entitled to the stamp duties in addition to usual costs. 1 Sch. & Lef. 241.

2. In case exceptions shall be referred to the master, he shall tax to the plaintiff the costs of the exceptions allowed; and to the defendant, the costs of the exceptions disallowed; and strike the balance. *Ibid*.

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### STATUTE.

#### I. In relation to statutes in general.

1. Their date has reference to the first day of the sitting, unless expressly excluded.
2. Distinction between acts denying legal effect to instruments, and acts declaring instruments void to all intents.

#### II. In relation to the construction of statutes.

1. Force of the preamble.
2. Force of general words.
3. Remedial statutes.
4. The words “*non sane memory*,” in stat. 7 Geo. 3. c. 14.

#### III. In relation to penal statutes.

Invalidity of acts done in contravention of their provisions.

IV, 3a

## IV. In relation to private statutes.

1. Force of the clause declaring them public, in relation to *ex officio* notice.
2. Their effect as conveyances.

## I. In relation to statutes in general.

1. Their date has reference to the first day of the sitting, unless expressly excluded.

Plea, justifying a trespass under a statute passed in the second year of James I. held to be bad; for although the parliament in which the act passed was continued to the second year of that reign, yet the reference to the first day of the sitting not being expressly excluded, determines the date of the act. *Bryant v. Withers*, 2 Rose, 8.

2. Distinction between acts denying legal effect to instruments, and acts declaring instruments void to all intents.

Distinction between acts of parliament, denying legal effect to instruments, as the act for inrolling bargains and sales, and the registry act, (7 Ann. c. 20.) and acts declaring instruments void to all intents; as the annuity and the ship registry acts. Notwithstanding the former, the party is bound in equity by the contract. 16 Ves. 428.

## II. In relation to the construction of statutes.

1. Force of the preamble.

1. If the enacting part of a statute will bear only one interpretation, the preamble will not confine it: if doubtful, the preamble may be applied to throw light upon it. 13 Ves. 36.

2. The preamble of an act of parliament, though it may assist ambiguous words, cannot control a clear and express enactment. *Lees v. Summersgill*, 17 Ves. jun. 508.

2. Force of general words.

General words in a statute must receive a general construction, unless there is, in the statute itself, some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment. 17 Ves. jun. 91.

3. Remedial statutes.

Liberal construction of a remedial statute. 13 Ves. 253.

4. The words "*non sane* memory," in stat. 7 Geo. 3. c. 14.

The words "*non sane* memory," in the stat. 7 Geo. 3. c. 14. include all persons of such description, whether idiots or lunatics. *Carew v. Johnston*, 2 Sch. & Lef. 304.

## III. In relation to penal statutes.

Invalidity of acts done in contravention of their provisions.

Where a penalty is annexed to an offence, against a statute, prohibiting a certain act, a trust in contravention of the provisions of it cannot be enforced. *Ottley v. Browne*, 1 Ball & Beatty, 360.

## IV. In relation to private statutes.

1. Force of the clause declaring them public, in relation to *ex officio* notice.

Court not bound to take notice of particular privileges under charters confirmed

confirmed by private statutes, notwithstanding a clause declaring them public acts. 1 Ves. 393.

2. Their effect as conveyances.

Effect of a private act of parliament, declaring an estate vested in trustees and their heirs in trust to sell, discharged from the trusts of a settlement; divesting the legal fee outstanding, under a prior settlement. *Bullock v. Flodgate*, 1 Ves. & Beam. 471.

## STOCK.

### I. Of the nature of particular classes of stock.

1. The three *per cents*.
2. The five *per cent*. annuities of 1797.

### II. How far the subject of equitable jurisdiction.

In favour of creditors. — Vide in tit. *CHOSE IN ACTION — PRACTICE*.

### III. Of the nature of the interest in stock.

It is nothing but a right to receive a perpetual annuity, subject to redemption.

### IV. In relation to the interest of tenant for life, with remainders over.

Where the stock is sold out just before a dividend, to which he would be entitled.

### V. Of the sale of stock.

Influence of the circumstance of a rise or fall.

### VI. Of a bequest of stock.

Whether subject to the directions of a will not duly attested.

### VII. Of a bond conditioned to replace stock.

Rights of the obligee upon a breach of the condition.

### VIII. Of transferring stock under stat. 36 Geo. 3. c. 90.

1. What is a refusal to transfer.
2. A case not within the act.

### I. Of the nature of particular classes of stock.

1. The three *per cents*.

The 3 *per cents*. are perpetual annuities granted for ever, redeemable by the public. The common expression, therefore, of "100*l*. stock," &c. is incorrect. 4 Ves. 751.

2. The five *per cent*. annuities.

The 5 *per cent*. annuities of 1797, created upon the subscription of the *Bank* for the public service, and in pursuance of a resolution of the *Bank* divided among the proprietors of the *Bank Stock pro ratâ*, are considered as an accretion to the capital; and therefore a person entitled for life can have the benefit of it by way of dividend only. *Brander v. Brander*, 4 Ves. 800.

**II. How far the subject of equitable jurisdiction.**

In favour of creditors.

As to the jurisdiction over stock in favour of creditors, *quære*. *Rider v. Kidder*, 10 Ves. 360.

**III. Of the nature of the interest in stock.**

It is nothing but a right to receive a perpetual annuity, subject to redemption.

The interest in stock nothing but a right to receive a perpetual annuity, subject to redemption. 9 Ves. 177.

**IV. In relation to the interest of tenant for life, with remainders over.**

Where the stock is sold out just before a dividend, to which he would be entitled.

Where stock in trust for A. for life, with remainders over, is sold out just before a dividend, to which A. would be entitled; he can have no allowance in the price for the dividend which would have become due if the stock had not been sold. *Bostock v. Blakeney*, 2 B. C. C. 653.

**V. Of the sale of stock.**

Influence of the circumstance of a rise or fall.

Direction for sale or transfer of stock, without attention to the rise or fall; the party must take it, as it happens at the time of appropriation. *Ex parte Pye and Dubost*, 18 Ves. jun. 140.

**VI. Of a bequest of stock.**

Whether subject to the directions of a will not duly attested.

Stock bequeathed by a will, without two witnesses, is subject in the hands of the executor to the directions of the will; even for the purpose of a residuary bequest. 7 Ves. 440.

**VII. Of a bond, conditioned to replace stock.**

Rights of the obligee upon a breach of the condition.

1. Transfer of stock by way of loan upon bond, with condition to replace the stock in six months after the date, and in the mean time to pay interest at 5 per cent. The stock not being replaced, and being depreciated, the obligee is entitled to the value of the stock at the time of the transfer with interest at 5 per cent. to the date of the report; credit being given for some payments on account of the principal. *Forrest v. Elwes*, 4 Ves. 492.

2. In an action recently after breach of an agreement to transfer stock, the rise, if any, would be given in damages. 4 Ves. 497.

**VIII. Of transferring stock under stat. 36 Geo. 3. c. 190.**

1. What is a refusal to transfer.

Order for a transfer of stock, within the stat. 36 G. 3 c. 90. as upon a refusal by a party, appearing by counsel, and admitting, that she had disobeyed an order to transfer. *Rider v. Kidder*, 13 Ves. 123.

2. A case not within the act.

Trustees, under a foreign will, dead; and no personal representation taken out in this country: not a case for relief by directing a transfer of stock within the statute 36 Geo. 3. c. 90. *Lee v. the Bank of England*, 8 Ves. 44.



## STOPPAGE IN TRANSITU.

I. *Foundation of the right.*

It is founded upon the notion of equitable lien, not of rescinding the contract.

II. *In what cases the right may be exercised.*

On the consignee's insolvency, the goods may be stopped at any time before they come to his hands.

III. *In what cases the right cannot be exercised.*

After delivery of part.

I. *Foundation of the right.*

It is founded upon the notion of equitable lien, not of rescinding the contract

Stoppage *in transitu* upon the ground of equitable lien, not of rescinding the contract, 12 Ves. 382.

II. *In what cases the right may be exercised.*

On the consignee's insolvency, the goods may be stopped at any time before they come to his hands.

Where consignee becomes insolvent, consignor has a right to stop the goods at any time before they come to his hands. *D' A Quila v. Lambert*, 2 Eden, 75.; *Amb.* 399.

III. *In what cases the right cannot be exercised.*

After delivery of part.

No stopping *in transitu* after delivery of part. 12 Ves. 383.

## TACKING.

I. *When a security may be tacked.*

1. Mortgagee may tack a subsequent judgment.
2. Two mortgages to the same person absolute at law; mortgagee may insist that both or neither shall be redeemed.
3. As against the heir, a bond may be tacked to a mortgage.
4. In relation to bankruptcy.

II. *When a security cannot be tacked.*

1. As against creditors or assignees for valuable consideration.
2. As against the mortgagor or creditors, a bond cannot be tacked to a mortgage.
3. A mere judgment-creditor cannot tack.
4. The case of a pledge of personal securities, and afterwards a mortgage.
5. A mortgage of the equity of redemption, coming to the first mortgagee as executor.
6. A. engaged with B. in one mortgage may redeem, though B. has pledged another estate to the same person.

7. Tacking

7. Tacking prevented by the registry act in Ireland.

8. In relation to bankruptcy.

### III. In relation to the extent of the right.

Tacking allowed up to a decree to settle priorities; not afterwards.

#### I. When a security may be tacked.

##### 1. Mortgagee may tack a subsequent judgment.

Mortgagee may tack a subsequent judgment; but a mere judgment-creditor cannot tack; not contracting for an interest in the land; though he has a lien. 11 Ves. 617.

##### 2. Two mortgages to the same person absolute at law; mortgagee may insist that both or neither shall be redeemed.

Two mortgages to the same person absolute at law: mortgagee may insist that both or neither shall be redeemed by the mortgagor or his assignee. 2 Ves. 376.

##### 3. As against the heir, a bond may be tacked to a mortgage.

Bond cannot be tacked to a mortgage against the mortgagor or creditors; but may against the heir, merely to prevent circuitry of action. 2 Ves. 376.

##### 4. In relation to bankruptcy.

1. The right to tack in equity, not affected by the relation to the act of bankruptcy. 11 Ves. 619.

2. Distinction as to tacking between a commission of bankruptcy and a decree to settle priorities. Ibid.

#### II. When a security cannot be tacked.

##### 1. As against creditors or assignees for valuable consideration.

No tacking against creditors or assignees for valuable consideration. *Adams v. Claxton*, 6 Ves. 226.

##### 2. As against the mortgagor or creditors, a bond cannot be tacked to a mortgage.

A. engaged with B. in one mortgage may redeem, though B. has pledged another estate to the same person. 2 Ves. 376.

##### 3. A mere judgment-creditor cannot tack.

*Vide supra*, I. 1.

##### 4. The case of a pledge of personal securities, and afterwards a mortgage.

Personal securities pledged for a specific debt; after a mortgage to the creditor, the same securities with others were pledged to him for the balance of an account: the transactions being distinct, redemption of the personal securities was decreed without discharging what was due on the mortgage. *Jones v. Smith*, 2 Ves. 372.

##### 5. A mortgage of the equity of redemption, coming to the first mortgagee as executor.

*Vide* 12 Ves. 130.

##### 6. A. engaged with B. in one mortgage may redeem, though B. has pledged another estate to the same person.

*Vide* 2 Ves. 376.

#### 7. Tacking

## 7. Tacking prevented by the registry act in Ireland.

Tacking prevented by the registry act in Ireland. 1 Sch. & Lef. 157.

## 8. In relation to bankruptcy.

1. The claim to tack by a third mortgagee, having taken in the first mortgage of the inheritance, but subject to a term outstanding, given up as against a mesne incumbrancer: as against the assignees under the bankruptcy of the mortgagor, *quære*: the commission being subsequent to the last mortgage; whether the act of bankruptcy was previous, doubtful. No objection, that the consideration for the last mortgage, was a debt originally by simple contract. *Ex parte* Knott, 11 Ves. 609.

2. Mortgagee not permitted to tack as against assignees in bankruptcy a mortgage subsequent to an act of bankruptcy, though without notice, and previous to the commission; and though he had the legal estate. *Ex parte* Herbert, 13 Ves. 183.

## III. In relation to the extent of the right.

Tacking allowed up to a decree to settle priorities; not afterwards.

Tacking allowed up to a decree to settle priorities; not afterwards. 11 Ves. 619.

## TAIL, ESTATE IN.

## I. In relation to its original nature.

It was a conditional fee.

## II. What estates may be limited in tail.

An estate *pur autre vie*.

## III. The tenant in tail considered as representing the inheritance.

Rule in equity.

## IV. Of the rights of a tenant in tail in remainder.

Against the tenant for life.

## V. Of the rights of the issue.

To appeal from a decree against the tenant in tail.

## VI. Of tenant in tail after possibility of issue extinct.

Instances.

## VII. Of barring an estate tail.

1. An equitable estate tail may be barred by a recovery.

2. A *quasi* entail of an estate for lives may be barred by release.

3. A *quasi* estate tail cannot be barred by will.

4. In the case of a tenancy in common in tail of a copyhold.

## VIII. Of barring the remainders over.

1. Force of the equitable rule to consider the tenant in tail as representing the inheritance.

2. By the *quasi* tenant in tail of a lease for lives surrendering and taking a new lease.

3. Tenant in *quasi* tail cannot by will bar the remainders.

**I. In relation to its original nature.**

It was a conditional fee.

Originally, an estate tail was an estate upon condition; to become a fee upon issue had, for the purpose of alienation; but not absolutely; as, if not aliened, it descended *per formam doni*. 15 Ves. 137.

**II. What estates may be limited in tail.**

An estate *pur autre vie*.

An estate *pur autre vie* may be limited in tail. 6 Ves. 158.

**III. The tenant in tail considered as representing the inheritance.**

Rule in equity.

1. A court of equity in many cases considers the tenant in tail as having the whole estate vested in him, at least, for the purposes of suit; for which purposes it does not look beyond the estate tail in a suit to bind the right to the land, in respect of charges created by the author of the gift; as to which the subsequent remainder-man has a clear interest in the suit of the prior tenant in tail. Distinction, where the suit is founded upon contract by the tenant in tail. 9 Ves. 56, 57.

2. A court of equity would in many cases, not all, admit a plea of dismissal upon the merits to bar a remainder-man in tail of a new estate tail under the same gift as well as a person claiming the same estate; upon a principle resulting from the rule, that the tenant in tail represents the inheritance Exception upon special circumstances. 9 Ves. 57.

**IV. Of the rights of a tenant in tail in remainder.**

Against the tenant for life.

Tenant in tail refused a discovery of a settlement from his father tenant for life, and also an injunction to stay waste, his father being dispunishable of waste. Lord Sempster v. Earl Pomfret, Dick. 238.

**V. Of the rights of the issue.**

To appeal from a decree against the tenant in tail.

Appeal from a decree against a tenant in tail by the issue. 9 Ves. 56.

**VI. Of tenant in tail after possibility of issue extinct.**

Instances.

Instances of tenant in tail after possibility of issue extinct; in possession, or of a remainder or reversion. 15 Ves. 423.

**VII. Of barring an estate tail.**

1. An equitable estate tail may be barred by a recovery.

An equitable estate tail may be barred by a recovery, as well as a legal estate tail. Boteler v. Allington, 1 B. C. C. 72.

2. A *quasi* entail of an estate for lives may be barred by release.

*Quasi* entail of an estate for lives, barred by release. 16 Ves. 313.

3. A *quasi* estate tail cannot be barred by will.

A *quasi* estate tail cannot be barred by will. *Semb.* 1 Sch. & Lef. 294.

4. In the case of a tenancy in common in tail of a copyhold.

Vide 2 Eden, 261.

**VIII. Of**

### VIII. Of barring the remainders over.

1. Force of the equitable rule to consider the tenant in tail as representing the inheritance.

Writ of error by remainder-man in tail. 9 Ves. 56.

2. By the *quasi* tenant in tail of a lease for lives surrendering and taking a new lease.

Vide 2 Eden, 339.; Cooper, 178.

8. Tenant in *quasi* tail cannot by will bar the remainders.

Tenants in *quasi* tail cannot by will bar the remainders over. Dillon v. Dillon, 1 Ball & Beatty, 77.

### TAXES.

Of an executor's right to deduct from subsequent payments of interest on a legacy, the property tax due in respect of antecedent payment.

Where the agent of an executor paid interest on a legacy for seventeen years, without deducting the property tax, held that he could not afterwards deduct, out of future interest due, the amount of the property tax on such precedent payments. Currie v. Goold, 2 Mad. 163.

### TENDER.

A tender not available at law may, under circumstances, be so in equity.

Circumstances may make that amount to a tender in equity which was not pleadable as such at law: *e. g.* a tender of a large sum in bank notes during the restriction as to the issuing of cash: *semble*, such cases fall within the head of accident. Biddulph v. St. John, 2 Sch. & Lef. 534.

### THEATRE.

Jurisdiction in the case of a theatre.

1. Order made in the case of Drury-lane theatre on the authority of the cases of the royal circus and the opera-house. *Ex parte* Ford, 7 Ves. 617.
2. Jurisdiction in the case of a theatre, considered as a partnership. Morris v. Colman, 18 Ves. jun. 437.

### TIME.

#### I. In relation to the mode of computing time.

1. Whether the day of inception shall be inclusive or exclusive.
2. Under the Irish ejectment statutes.

#### II. In relation to reasonable time.

Analogy or difference in the application of this doctrine between real and mercantile contracts.

#### III. In relation to the fraction of a day.

Analogy or difference between the English and the civil law.

## IV. In relation to lapse.

1. Force of mere possession at law.
2. Force of mere possession in equity.

## V. Force in equity of a lapse of time.

Time is not regarded in equity as at law. Vide in tit. CONTRACT — CONTRACT BETWEEN VENDOR AND PURCHASER — LACHES.

## I. In relation to the mode of computing time.

1. Whether the day of inception shall be inclusive or exclusive.
  1. No general rule in computing time from an act or an event, that the day is to be inclusive or exclusive; depending on the reason of the thing; according to the circumstances. *Lester v. Garland*, 15 Ves. 248.
  2. Where a right would be divested, or a forfeiture incurred by including the day of the act done, the computation will be made exclusive of it. *1 Ball & Beatty*, 196.
2. Under the Irish ejectment statutes.

The day, on which the *habere* is executed on an eviction under the ejectment statutes for non-payment of rent, is not to be included in the calculation of the six months given to the tenant to redeem. *Dowling v. Foxall*, *1 Ball & Beatty*, 192.

## II. In relation to reasonable time.

Analogy or difference in the application of this doctrine between real and mercantile contracts.

"Reasonable time," in mercantile transactions, not applicable to cases of contracts respecting real property. *Jessop v. King*, 2 B. & B. 95.

## III. In relation to the fraction of a day.

Analogy or difference between the English and the civil law.

Our law rejects fractions of a day more generally than the civil law does. *15 Ves.* 257.

## IV. In relation to lapse.

1. Force of mere possession at law.

Mere possession is not sufficient at law, to bar the claim of the true owner, unless there has been a disseisin, or something tantamount. *Cholmondeley v. Clinton*, 2 Mer. 358.

2. Force of mere possession in equity.

No equity can be acquired by length of possession. *Cholmondeley v. Clinton*, 2 Mer. 360.

## V. Force in equity of a lapse of time.

Time is not regarded in equity as at law.

Time not regarded in this court as at law: for instance, the case of redemption of a mortgage; which cannot be prevented even by special agreement. So, upon a mortgage at five *per cent.* with condition for four, if regularly paid, or at four *per cent.* to have five, if not regularly paid: the five *per cent.* regarded in this court only as a penalty to secure the four; and relief given upon that principle. So, in the old cases upon relief against the penalty of a bond, before the jurisdiction at law. *7 Ves.* 273, 274.

TITHES.

## TITHES.

I. *Of the division of tithes.*

Tithes are great or small, according to their nature.

II. *Of what things a predial tithe is due.*

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2. Definition of agistment tithe.
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4. Agistment tithe not due for animals used in husbandry; nor when occasionally used out of the parish.
5. Agistment tithe is not due for after-pasture, where the lands have been mown in the same year, and have paid tithe.
6. After-pasture.
7. Grass cut and given green to beasts of the plough shall not pay tithe.
8. Tithe of herbage, does not necessarily cover tithe of agistment.
9. Potatoes and turnips consumed in the family of the grower.
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8. Evidence—payment of tithes is presumptive proof against the payer.
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14. Evidence—force of vicar's non-perception, shown to have originated in mistake.
15. Evidence—force of non-perception of specific articles.
16. Evidence—custody of instruments.
17. Evidence—terrier found in the archdeacon's registry.
18. Evidence—ancient book of endowment of a bishop.

19. Evidence

19. Evidence — ecclesiastical surveys.
20. Evidence — terrier.
21. Evidence — agistment tithe.
22. Evidence — in favour of vicar's right to agistment tithe, from payment of a composition under a different impression.
23. Evidence in favour of vicar's right to agistment tithe, from perception of the other small tithes.

**V. Of the mode of setting out tithes.**

1. The setting out of tithes cannot be dispensed with.
2. By portions of a field at a time.
3. An hour's notice of tithing, when requisite, is not sufficient.
4. Invalid custom of tithing calves.
5. Clover hay.
6. Invalid custom of tithing corn.
7. Valid custom of tithing geese.
8. Invalid custom of tithing lambs.
9. Mills.
10. In the case of modern articles.
11. Invalid custom of tithing pigs.
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13. What is a render in kind for wood.
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**VI. Of the rule, *ecclesia ecclesiae decimas solvere non debet*.**

It applies only to the clergy of the same church.

**VII. A prescription in non decimando.**

1. It can only be set up for a large tract of country, well known as a separate district.
2. Whether it can be set up against payment of tithes due of common right.
3. Proof of the deed of severance having existed, is sufficient.
4. Constant nonpayment or retainer of tithes, is not a sufficient discharge.
5. It cannot be set up against a lay impropiator.

**VIII. Of real compositions.**

1. Evidence of immemorial payment will not support a defence of a real composition.
2. The objection to a composition real being presumed from usage, is founded upon the maxim of *nullum tempus*.
3. To establish the composition, the evidence must clearly distinguish it from a prescriptive payment.

**IX. Of real compositions.**

1. The existence of the deed creating the composition, must be shown or presumed to establish the exemption.
2. The consent of the ordinary may be presumed.
3. Presumption of king Edw. 3. having taken upon himself to act as supreme ordinary.
4. A composition of 20s. yearly out of the profits of T. manor, in lieu of the tithes of T. park, is good.

X. Of



X. *De a modus decimandi.*

1. General observations — it is no objection to a *modus*, that it falls unequally on the parishioners.
2. General observations — force of the circumstance to destroy the character of the payments, that they were apportioned by reference to the poor's rates.
3. General observations — a *modus* applicable to the inhabitants of a village, is valid.
4. General observations — a *modus* payable by the owners of the lands, is good.
5. General observations — rankness of a *modus*, a question of fact.
6. General observations — distinction as to rankness between a *modus* for tithe of particular things, and a farm *modus*.
7. General observations — upon the rankness of a *modus*, the *quantum* of the payment is not decisive, if immemorially paid.
8. General observations — a customary payment antecedent to the tithe being due, may be good.
9. A *modus* must have been immemorial — modern articles.
10. Where the vicarage has been established within legal memory.
11. Turnips cannot be the subject of a *modus*, being of recent introduction.
12. It may exist for artificial grasses, used in the improvement of hay.
13. A *modus* must have been immemorial — agistment.
14. What recompence is as durable as the tithe discharged by it.
15. What *modus* shall be too large — fleece.
16. What *modus* shall be too large — hay.
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18. What *modus* shall be too large — pigs.
19. What *modus* shall be too large. — Vide *supra* "General observations."
20. What *modus* shall not be too large — calf.
21. What *modus* shall not be too large — foal.
22. What *modus* shall not be too large — hay.
23. What *modus* shall not be too large — lamb.
24. What *modus* shall not be too large — milk.
25. What *modus* shall not be too large — reed ground.
26. What *modus* shall not be too large — Vide *supra* "General observations."
27. What *modus* shall be certain — ancient orchards.
28. What *modus* shall be certain — cheese.
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30. What *modus* shall be certain — hay.
31. What *modus* shall be certain — milk.
32. What *modus* shall be certain — reed ground.
33. What *modus* shall be uncertain — agistment.
34. What *modus* shall be uncertain — fowls.
35. What *modus* shall be uncertain — hay.
36. What *modus* shall be uncertain — milk.

37. What

37. What modus shall be uncertain — pigs.
38. What modus shall be uncertain — in lieu of prædial tithes.
39. What modus shall be uncertain — rapeseed.
40. What moduses shall be inconsistent — calf and milk.
41. In relation to moduses covering a parish, or part thereof.
42. What customary mode of tithing sheep shall cover the agistment tithe of sheep.
43. What modus is a wool, and not an agistment, modus.
44. Evidence — to prove perception.
45. Evidence — when and by what proofs a receipt shall be evidence.
46. Evidence — admissibility of an entry in a parish register of different moduses, the sum total of which was in a deceased vicar's handwriting.
47. Evidence — reputation not objectionable from the deceased person's having been liable to tithes.
48. Evidence — valuation made at the instance of plaintiff.
49. Evidence — modus supported by the evidence in part, not as to the rest, and capable of distinction, void in toto.
50. Evidence — whether proof of a modus limiting the extent of the one laid, contradicts it.
51. Evidence — disproving a calf modus, by proving a higher payment beyond a certain number.
52. Evidence — what description in the terrier shall not prove a hay modus to be modern.
53. How a modus shall be laid — garden.
54. How a modus shall be laid — milk.
55. How a modus shall be laid — in respect of parcels of an ancient estate.
56. Issue — notwithstanding the apparent rankness.
57. Issue — notwithstanding variations in the payment; being irregularities only in the collection.
58. Issue — the payments must be shown to have the requisites of moduses in point of fact.

**XI. Of a pecuniary composition, with consent of the ordinary.**  
In a miscellaneous case.

**XII. Of presuming a grant from a lay impropriator.**

1. General nonpayment affords no presumption.
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**XIII. Of customary payments in lieu of tithes.**

1. They need not be immemorial.
2. They need not be general throughout the place or parish.

**XIV. Of a lease of tithes.**

1. The render must be certain.
2. A lease for so long as the lessor shall continue vicar of A. is good, and conveys a freehold.
3. Construction of.
4. The disclaimer of a rector binds his lessees.

**XV. Of compositions by way of retainer.**

1. Certainty, an essential to their validity.
2. An agreement with the landlord is not available for the tenant.
3. What apportionment each incumbent is entitled to.
4. The notice to determine the composition must be the same as between landlord and tenant.
5. Whether notice to determine the composition is necessary, where a modus is insisted on.
6. Whether avoided by the incumbent's non-residence.
7. A court of equity will not assist an incumbent in getting rid of a composition, on the ground of non-residence.

**XVI. Of a bill in equity for an account of tithes.**

1. The account is consequential upon the legal right; which, therefore, if doubtful, must first be established at law.
2. Equity will not interfere after long possession.
3. Where there has been an actual pernancy of tithes by lay hands, under conveyances as lay property, for a great while, the plaintiff will be left to law.
4. Bill dismissed, notwithstanding an informality in the answer.
5. Bill dismissed, notwithstanding a trivial inaccuracy in setting out tithe, and other circumstances.
6. An account decreed from mispleading a modus; but without costs, as the defendant had merits.
7. Whether the account will be carried back beyond six years.
8. Whether an account will be decreed as to matters not defended through mistake, induced by the manner of laying the demand.

**XVII. Of a bill in equity, to establish a modus, or a customary payment.**

1. It will not lie upon a mere demand of tithes, without suit.
2. It will not lie to establish a modus as payable to a third person not disputing it.
3. An action by lessee of tithes, for subtraction, is a sufficient ground for the bill.
4. Of the necessary parties to the bill.

**XVIII. Of a bill to discover the title to tithes.**

By the terre-tenant against the rector.

**XIX. Of evidence connected with the subject of tithes, except in relation to endowment.**

1. Long possession is evidence of induction, and so forth.
2. Payment of tithes is presumptive proof against the payer.
3. Admissibility of admissions in an answer, to prove occupation.
4. Admissibility of a former decree, on a demand by rector of tithes out of his parish.
5. Admissibility of the vicar to prove payment to himself of small tithes, in a suit by the rector for great tithes.
6. Vide in div. "Of a *modus decimandi*."

XX. *Of statutes relating to tithes.*

1. St. 2 & 3 Edw. 6. c. 13. s. 3.
2. St. 32 Hen. 8. c. 7.

XXI. *In relation to an inclosure act.*

Construction of.

XXII. *Of tithes in London.*

1. Mere nonpayment of the tithes; under the statute, is no discharge.
2. In relation to leases.
3. The dean of St. Paul's is not a great man within the statute.
4. The dean of St. Paul's dwelling-house, is not exempt.
5. Tithes of the East India company's warehouses.
6. Of the equitable jurisdiction, in relation to.

I. *Of the division of tithes.*

Tithes are great or small, according to their nature.

Whether a tithe be great or small, is determined by the nature of it, and not by the mode or place of its cultivation, or the use to which it is applied. And, therefore, the tithes of beans and peas, though gathered green by the hand for the food of man, are a great tithe, and included under the term *decimæ garbarum*. *Sims v. Bennett*, 1 Eden, 382.; 7 Toml. P. C. 29.

II. *Of what things a prædial tithe is due.*

1. Agistment is a prædial title.

Agistment is a prædial tithe. *Scarr v. Trinity College*, 3 Anst. 760.

2. Definition of agistment tithe.

Agistment tithe is the tithe of the herbage, eaten by cattle, not titheable. *Ellis v. Saul*, 1 Anst. 342.

3. Agistment tithe is due for animals paying no other tithe, though less than a year on the land.

Sheep kept *principally* for the sake of folding, if sold out of the parish before shearing time, shall pay agistment tithe. *Howes v. Carter*, 2 Anst. 500.

4. Agistment tithe not due for animals used in husbandry, nor when occasionally used out of the parish.

Horses kept on one farm for its cultivation, and used *occasionally* on another farm, in a different parish, shall not pay agistment tithe. Otherwise, if *habitually* used. *Filewood v. Button*, 2 Anst. 498.

5. Agistment tithe is not due for after-pasture, where the lands have been mown in the same year, and paid tithe.

Agistment tithe is not claimable for after-pasture, where the lands have been mown in the same year, and paid tithe. *Batchelor v. Smallcombe*, 3 Mad. 12.

6. After-pasture.

When grass has been cut for hay, no tithe is due for the after-pasture. *Ellis v. Saul*, 1 Anst. 342.

7. Grass cut and given green to beasts of the plough, shall not pay tithe.

Grass cut and given green to beasts of the plough, shall not pay tithe. *Collyer v. Howes*, 2 Anst. 481.

8. Tithe of herbage, does not necessarily cover tithe of agistment.

A vicar, founding his claim to agistment tithe, by showing that he alone has taken the other small tithes, held, to have made out his title to that tithe, although never till of late received or demanded by him or his predecessors, and although in antient times the crown had conveyed by grant to lay impropriators, tithe, not only of grain and hay, but of herbage. Herbage not *ex vi termini*, and necessarily covering tithe of agistment, unless perception be proved. *Byam v. Booth and others*, 2 Price, 231.

9. Potatoes and turnips, consumed in the family of the grower.

Potatoes and turnips, consumed in the family of the grower, are liable to tithe. *Williamson v. Lord Lonsdale*, 1 Dan. 49.

10. Stubble mowed, and used as fodder or manure.

Stubble mowed and used as fodder or manure, is not titheable. *Tennant v. Stubbing*, 3 Anst. 640.

11. Wood.

Question as to tithes of lopping of antient pollard oaks, and of beech wood, as well the bodies as lopping. *Walton v. Tryon*, Dick. 244.

### III. Of what things a personal tithe is due.

Account of tithes decreed, as to two pair of new stones added to an ancient mill.

Account of tithes decreed as to two pair of new stones added to an ancient mill. *Manby v. Taylor*, 3 Ves. & Beam. 71.

### IV. In relation to the endowment of vicarages.

1. A specific enumeration will not preclude a right to other tithes.

A particular and minute enumeration of the several articles of endowment in the instrument, does not preclude the vicar's right to other small tithes not mentioned therein. *Manby v. Curtis and others*, 2 Price, 284.

2. Usage will control an instrument of endowment.

Endowment produced, shewing the *vicarage* expressly endowed of hay, not sufficient to support a bill for that tithe, without usage, against evidence of a money payment to the *rector* in lieu of corn and hay. *Manby v. Curtis and others*, 2 Price, 284.

3. Force of the word "*alteragium*."

The words *gardens*, *curtilages*, and *alterage* in an endowment, will not give a vicar the tithe of *potatoes* and *turnips*, or of any other article not known in England at that time. But where there appears to have been a general perception of all small tithes by the vicar, a subsequent endowment will be presumed of small tithes of every description under which the rector will be entitled to these articles. *Williams v. Price*, 1 Dan. 19.; 4 Price, 156.

4. Force of the word "*curtilage*."

The word "*curtilage*" in an endowment, will not *per se* give the vicar the tithe of all articles originally grown in curtilages. *Williams v. Price*, 4 Price, 156.; 1 Dan. 13.

5. Force

## 5. Force of the word "gardens."

The word "gardens," in an endowment, will not give a vicar the tithe of articles of modern introduction, although they might have been originally usually grown only in gardens. *Williams v. Price*, 4 Price, 156.; 1 Dan. 13.

## 6. Evidence — usage is the broad ground of presumption in favour of the vicar's endowment.

Usage is the broad ground of presumption in favour of the vicar's endowment, and if there be an endowment in proof, expressing of what tithes his vicarage shall be endowed, if any tithes received by the vicar be not among them, a subsequent endowment will be presumed. *Williams v. Price*, 4 Price, 156.

## 7. Evidence — presumption of endowment from perception.

It is not sufficient that a vicar, who rests his case on presumption of an endowment from evidence of perception, prove that he has received the tithes claimed from the rest of the parish generally, and even from part of the district in which the defendant's lands are situate, unless he carry it to the parts for which the exemption is claimed by the defence. And the vicar not doing so, proof on the part of the defendants, that no tithe has ever been paid for their lands, will entitle them to an issue. *Armstrong v. Hewitt*, 4 Price, 216. — Nor will the ecclesiastical survey (stating the vicar to be entitled to tithe hay in the parish generally), supply the absence of proof of perception from the *particular* lands. *Ibid.*

## 8. Evidence — payment of tithes is presumptive proof against the payer.

Payment of tithes by defendant, a parishioner, is *prima facie* evidence against him of the rector's title. *Chapman v. Beard*, 3 Anst. 942.

## 9. Evidence — perception by means of a composition.

Perception by means of a composition, which has always been understood by the parties to have been paid for tithe hay, is as strong evidence as if it had been paid in kind. *Parsons v. Bellamy*, 4 Price, 190.

## 10. Evidence — perception of modus, bad in law.

A modus bad in law, received by the vicar, is proof of endowment of the tithe for which the modus was paid. *Travis v. Oxtou*, 1 Anst. 309. n.

## 11. Evidence — presumptions on a claim of small tithes against a general endowment.

Rector claiming small tithes against a vicar endowed generally, has no common law right to presumption in his favour, and therefore held to *strict* proof of his tithe. *Dorman v. Curry*, 4 Price, 109.

## 12. Evidence — perception is evidence of a subsequent endowment.

1. Perception of tithe of hay is sufficient evidence (although not received in kind, but by composition), of a right to that tithe by force of presumption of a subsequent endowment in the vicar, claiming it from the rector's lessees, who plead title under the rector by permissive retainer, the rector relying upon an express exception of that tithe by name in the vicar's existing endowment, but giving himself no evidence of perception on his part or that of his predecessors. *Parsons v. Bellamy*, 4 Price, 190.

2. A vicar claiming tithe of hay, may establish his right by sufficient proof of perception during living memory, where none can be shown to have been enjoyed by the rector, although his endowment *actually negative his right to that tithe expressly*, and state it to belong to the rector, upon the presumption of a subsequent endowment, which the court is bound to adopt. *Ibid.*

3. Perception of tithes by a vicar for any considerable number of years,

where its inception cannot be shown, if it is not met by proof of perception by the rector or any other person, is a sufficient proof of usage to ground a presumption of perception long anterior, and of its having been founded on an endowment. Nor will the court grant the rector an issue in such a case. *Parsons v. Bellamy*, 4 Price, 190.

13. Evidence — grant from the crown, subsequent to endowment.

Grant from the crown (subsequent to endowment) of lands, including in the general words all the tithes, &c., is not sufficient to overturn the vicar's right without proof of perception. *Manby v. Curtis and others*, 2 Price, 284.

14. Evidence — force of vicar's non-perception, shown to have originated in mistake.

1. Where there exists any reason which may have led successive vicars into a mistaken notion that they had no right to tithes, or that their right was committed (as, where vicars were capable of binding their successors), the argument founded on the vicar's non-perception, fails. *Leathes v. Newitt*, 4 Price, 355.

2. Non-perception of tithes is not an available defence as against a vicar, where it may be attributable to a mistake of the law, as to whether the tithe in dispute was a rectorial or vicarial tithe, so as to destroy the vicar's right. *Leathes v. Newitt*, 4 Price, 366.; *vide etiam Dorman v. Curry*, Id. 109.

15. Evidence — force of non-perception of specific articles.

Non-perception of vicarial tithes by either vicar or rector (the latter admitting the vicar's right, except as to certain titheable articles, there being no third claimant), in certain parts of the parish throughout which the vicar receives some small tithes, is negative evidence in favour of the vicar's right to all other than the excepted articles. *Leathes v. Newitt*, 4 Price, 374.

16. Evidence — custody of instruments.

An instrument purporting to be an endowment, without a seal remaining, and another purporting to be an inspeximus of the former under the seal of the ordinary, were rejected as coming out of private hands, unconnected with the matter in dispute. *Potts v. Durant*, 3 Anst. 789.

17. Evidence — terrier found in the archdeacon's registry.

A terrier found in the archdeacon's registry, is admissible. *Potts v. Durant*, 3 Anst. 795.

18. Evidence — ancient book of endowment of a bishop.

Book of endowment of Hugo Wells, bishop of Lincoln, received as evidence. *Leonard v. Franklyn*, 1 Dan. 34.

19. Evidence — ecclesiastical surveys.

1. The ecclesiastical surveys are admissible to prove an ancient endowment, and aided by perception of small tithes, (though not of *all*), will give a vicar a right to tithes of articles of modern introduction against the lessee of the rector. *Canliffe and another v. Taylor and others*, 2 Price, 329.

2. Ecclesiastical survey, not to be relied upon. 1 Dan. 112.

20. Evidence — terrier.

1. A terrier, although not signed by the impropriate rector, nor by any person for him, is evidence against him as to his right to tithes in the parish. *Potts v. Durant*, 3 Anst. 796.

2. Old terriers, recording that tithe of hay is payable in kind, signed by the rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut the presumption of a farm modus attempted to

be established by proof of a money payment having been uniformly rendered beyond living memory, in the absence of any evidence even of reputation, that the tithe had ever been taken in kind from the farm; and that although such terriers are not proved to have been signed by any person interested in the farm. Nor will the court grant an issue in such a case. *Mylton v. Harris*, 3 Price, 19.

3. Parol evidence as far back as living memory could reach, of the uninterrupted payment of a sum of five shillings by the occupiers of land in a certain district, in lieu of the tithe of hay throughout such district, rebutted by terriers stating the five shillings to be payable in lieu of hay grown in crofts only. *Drake v. Smith*, 1 Dan. 104.

4. Parol evidence of uninterrupted payment as far back as living memory could reach, of a modus of eightpence per acre in lieu of tithe hay, not rebutted by terriers, stating the vicar to be entitled to tithe hay, or a modus of eightpence per acre in lieu thereof. *Drake v. Smith*, *Ibid.*

#### 21. Evidence — agistment tithe.

In a bill by the vicar for agistment tithe, which had never been received at all in the parish, the court decreed for the vicar's claim, without an issue, on the evidence of terriers and other old documents, which described him as entitled to all small tithes, except wool and lamb. *Garnons v. Barnard*, 1 Anst. 296.

#### 22. Evidence — in favour of vicar's right to agistment tithe, from payment of a composition under a different impression.

Payment of a composition for tithes of turnips, where pulled or eaten off, where neither party considered it as an agistment tithe, is no evidence of perception of that species of tithe. *Garnons v. Barnard*, 1 Anst. 320.

#### 23. Evidence — in favour of vicar's right to agistment tithe, from perception of the other small tithes.

Vide 2 Price, 231.

### V. Of the mode of setting out tithes.

#### 1. The setting out of tithes cannot be dispensed with.

Setting out of tithes cannot be dispensed with, even where the uncertainty of the weather prevents the corn from being put into shocks at all. *Franklyn v. Gooch*, 3 Anst. 682.

#### 2. By portions of a field at a time.

A farmer may cut down a field in any portions most convenient, provided he sets out all; then cut down, before any is carried away; and provided it be not done vexatiously. *Hall v. Machett*, 3 Anst. 915.

#### 3. An hour's notice of tithing, when requisite, is not sufficient.

Where, by the custom, notice of tithing is to be given, an hour's notice is not sufficient. *Tennant v. Stubbing*, 3 Anst. 640.

#### 4. Invalid custom of tithing calves.

A custom that calves in kind are to be delivered at the will of the owner, after they be three weeks old, and at such time of the year as the owner thinks best to spare them, not hindering his breed; and if the parson delay fetching, to pay for the keeping, is bad. *Jenkinson v. Royston*, 1 Dan. 128.

#### 5. Clover hay.

1. Where, by the usual mode of husbandry, clover hay is not made into cocks at all, the tithe may be set out in the swathe. *Collyer v. Howes*, 2 Anst. 481.; *Baker v. Athil*, *Id.* 491.



2. Clover hay is titheable in the cock, not in the swathe. *Collyer v. Howe*, 3 Anst. 954.

6. Invalid custom of tithing corn.

A custom of tithing by throwing aside every tenth sheaf as the corn is about to be carried, is bad. Tithes must be so set out, that the rector may compare them with the nine parts. *Tennant v. Stubbing*, 3 Anst. 640.

7. Invalid custom of tithing geese.

A custom that geese should be delivered in kind before Midsummer, and that if any person have seven, he should pay a halfpenny for each, and that if seven and under ten, he should be allowed for them that want of ten, one halfpenny each, and so for an odd number, good. *Jenkinson v. Royston*, 1 Dan. 129.

8. Invalid custom of tithing lambs.

A custom that tithe lambs should be delivered the first day of May, and that if any person have under seven lambs, he is to pay for every lamb a halfpenny; and if seven lambs and under ten, one lamb, and to be allowed for every lamb short of ten, a halfpenny, and so likewise for any odd number; and that lambs falling after first of May, are to be kept until a month old, and if longer, the keeping to be paid for, bad for uncertainty. *Jenkinson v. Royston*, 1 Dan. 128.

9. Mills.

A water-mill is titheable as a prædial and local tithe in respect of the person to whom it is payable, but as a personal tithe in the mode of accounting. *Hall v. Machett*, 3 Anst. 915.

10. In the case of modern articles.

Where a titheable matter has been introduced into a parish within time of memory, but the mode of letting it has always been uniform, the court will support the practice by analogy to customary modes of tithing, *comme sembler*. *Baker v. Athill*, 2 Anst. 492.

11. Invalid custom of tithing pigs.

A custom that pigs should be delivered at the will of the owner, after they be nine days old, and that if the parson delay the fetching, therefore, he should pay for the keeping, is bad. *Jenkinson v. Royston*, 1 Dan. 129.

12. Invalid custom of tithing rapeseed.

A custom, that of rapeseed the tenth bushel should be rendered ready dressed, the parson allowing for the dressing one penny per bushel; bad for uncertainty, it not being stated, what was to be rendered for a less quantity than a bushel. *Jenkinson v. Royston*, 1 Dan. 130.

13. What is a render in kind for wood.

*Quære*, whether a custom to render the tenth tree is a payment in kind for wood. *Jenkinson v. Royston*, 1 Dan. 130.

14. Valid custom of tithing wool.

A custom with respect to wool, that the parson should have the tenth stone or pound, presently after clipping, and that any person selling sheep out of the parish after Candlemas day, and before clipping, should nevertheless pay one penny for the wool, is good. *Jenkinson v. Royston*, 1 Dan. 130.

VI. *De the rule, ecclesia, ecclesie decimas solvere non debet.*

It applies only to the clergy of the same church.

*Ecclesia ecclesie decimas solvere non debet*, applies only to the clergy of the same church. *Warden, &c. of St. Paul's v. the Dean*, 4 Price, 65.

VII. 2

## VII. A prescription in non decimando.

1. It can only be set up for a large tract of country, well known as a separate district.

A prescription in *non decimando* can only be set up for a large tract of country, well known as a separate district. *Nagle v. Edwards*, 3 Anst. 702.

2. Whether it can be set up against payment of tithes due of common right.

Whether a prescription in *non decimando* can be set up against payment of tithes due of common right, *quære*. *Nagle v. Edwards*, 3 Anst. 702.

3. Proof of the deed of severance having existed, is sufficient.

There cannot be prescription in *non decimando* against a lay impropiator; but it is not necessary to produce the deed of severance; it is sufficient to show that it existed. *Fanshaw v. Rotheram*, 1 Eden, 276.; 3 Gwillim, 1177.

4. Constant nonpayment or retainer of tithes, is not a sufficient discharge.

To a bill for tithes, even by a lay impropiator, prescription in *non decimando*, or presumption from mere retainer, without colour of title, is no defence; and will not be sent to law. *Berney v. Harvey*, 17 Ves. jun. 119.

5. It cannot be set up against a lay impropiator.

Mere nonpayment of a particular species of tithe, is no evidence against a lay rector of a conveyance of that tithe. *Nagle v. Edwards*, 3 Anst. 702. *Lord Petre v. Blencoe*, Id. 945.

## VIII. Of real compositions.

1. Evidence of immemorial payment will not support a defence of a real composition.

1. A composition real insisted on as a defence, is not supported by evidence of immemorial payment. *Robertson v. Appleton*, 2 Anst. 375.

2. To make out a defence to a bill for tithes, of a composition real, it is not enough to show that the same money payment has been constantly received in satisfaction of the tithes, for a considerable period before the 13 Eliz.; but evidence must be given of the existence of an agreement in writing, and that it was made between all the proper parties interested. *Bennett v. Skeffington*, 4 Price, 143.

2. The objection to a composition real being presumed from usage, is founded upon the maxim of *nullum tempus*.

The objection to a composition real being presumed from usage, is founded on the maxim *nullum tempus occurrit ecclesiæ*. *Ward v. Shepherd*, 3 Price, 607.

3. To establish the composition, the evidence must clearly distinguish it from a prescriptive payment.

In order to establish a real composition for tithes, the evidence must be such as to distinguish it clearly from a prescriptive payment. *Hawes v. Swaine*, 2 Cox, 179.

## IX. Of real composition.

1. The existence of the deed creating the composition, must be shown or presumed to establish the exemption.

1. Composition real cannot be established without showing the deed creating it, or proving the existence of such deed. *Heathcote v. Mainwaring*, 3 B. C. C. 217.

2. Com-

2. Composition real by grant of land in lieu of tithe, not proved by reputation of the fact of such an agreement having existed, and being the origin of the exemption claimed, although corroborated by evidence of nonpayment of tithe for the district, claiming the exemption, unless a deed, or evidence of one having once existed, be put in proof. *Chatfield v. Fryer*, 1 Price 253.

3. The mere fact of payment from a period anterior to the 13th Eliz. will not be sufficient to establish a composition real. The deed or instrument by which it was made, must be produced, or some evidence given, to show that it has existed. *Bennett v. Skeffington*, 1 Dan. 10.

2. The consent of the ordinary may be presumed.

The consent of the ordinary to a composition real, may be presumed from length of time. *Sawbridge v. Benton*, 2 Anst. 372.

3. Presumption of king Edw. III. having taking upon himself to act as supreme ordinary.

Where king Edward III. entered into a composition real, as owner of the land and patron of the church, he may also be presumed to have taken upon himself to act as supreme ordinary, *comme semble*. *Sawbridge v. Benton*, 2 Anst. 379.

4. A composition of 20s. yearly out of the profits of T. manor, in lieu of the tithes of T. park, is good.

A composition of 20s. yearly out of the profits of T. manor, in lieu of the tithes of T. park, is good. *Sawbridge v. Benton*, 2 Anst. 372.

### X. Of a *modus decimandi*.

1. General observations — it is no objection to a *modus*, that it falls unequally on the parishioners.

It is no objection to a *modus*, that it falls unequally on the parishioners, by being as heavy on the occupiers of small, as of large tenements and farms. *Bennett v. Read*, 1 Anst. 328.

2. General observations — force of the circumstance to destroy the character of the payment, that they were apportioned by reference to the poor's rates.

Money payments in lieu of tithes, though made as far back as living memory can reach, held not to be *moduses*, where many of the witnesses state that such payments were apportioned by reference to the poor's rates. Nor will an issue be granted to try the character of such payments, so described by the witnesses' depositions. *Walter v. Holman*, 4 Price, 171.

3. General observations — a *modus* applicable to the inhabitants of a village, is valid.

A *modus* applicable to the inhabitants of a village, has sufficient perpetuity in contemplation of law. *Bennet v. Read*, 1 Anst. 328.

4. General observations — a *modus* payable by the *owners* of the lands, is good.

A *modus* payable by the *owners* of lands covered by it, is good. *Ord v. Clarke*, 3 Anst. 638.; *Scarr v. Trinity college*, Id. 765, 766.

5. General observations — rankness of a *modus*; a question of fact.

1. Rankness of a *modus* is only evidence; not an objection in point of law. 6 Ves. 672.

2. Rankness of a *modus*, a question of fact. 8 Ves. 536.

6. General observations — distinction as to rankness between a *modus* for tithe of particular things, and a farm *modus*.

Distinction as to rankness between a *modus* for tithe of particular things, and a farm *modus*. 6 Ves. 672.

7. General observations — upon the rankness of a *modus*, the *quantum* of the payment is not decisive, if immemorially paid.

Upon the rankness of a *modus*, the *quantum* of the payment is not decisive, if immemorially paid. 8 Ves. 539.

8. General observations — a customary payment antecedent to the tithe being due, may be good.

1. A customary mode of tithing sheep, paying one penny per head for sheep brought into the parish after Candlemas, and clipt in the parish in lieu of tithe of wool; threepence per head for sheep in the parish before Candlemas, and carried out before shearing time, as an average payment for the wool carried out, is good. The latter may be a wool *modus*, though the tithe of wool is not then due. *Ellis v. Saul*, 1 Anst. 341.

2. By such a customary mode of tithing sheep, though the payments are made to the rector; and the endowment of the vicar comprehends all the small tithes, yet the agistment tithe of sheep is covered. *Ellis v. Saul*, 1 Anst. 342.

9. A *modus* must have been immemorial — modern articles.

A *modus* for tithes of articles of modern introduction cannot be supported, because of the anachronism. *Layng v. Yarborough*, 4 Price, 383.

10. Where the vicarage has been established within legal memory.

Account of vicarial tithes decreed against a *modus* of one shilling per acre for each acre of marsh land for tithe of hay and all other vicarial and small tithes: the vicarage appearing to have been established by endowment in 1367, within legal memory. *Scott v. Smith*, 1 Ves. & Beam. 142.

11. Turnips cannot be the subject of a *modus*, being of recent introduction.

*Modus* for turnips, bad; being of too recent introduction into this country to be the subject of immemorial usage. *Leyson v. Parsons*, 18 Ves. jun. 173.

12. It may exist for artificial grasses, used in the improvement of hay.

A *modus* may exist for artificial grasses, used in the improvement of hay. *Bertie v. Beaumont*, 2 Price, 303.

13. A *modus* must have been immemorial — agistment.

Although the tithe of agistment is of recent introduction, especially in the north of England, a *modus* of a certain sum of money, in lieu of tithe of grass, whether mown or made into hay, or eaten by barren and unprofitable cattle, will cover the tithe of agistment. *Williamson v. Lord Lonsdale*, 1 Dan. 49.

14. What recompence is as durable as the tithe discharged by it.

A *modus* of twopence, payable by every householder or inhabitant in the parish, for all tithe of fuel, of fruits, of agistment, and of wood, is good. *Bennet v. Read*, 1 Anst. 322. n.

15. What *modus* shall be too large — fleece.

One shilling for every tenth fleece, in lieu of the tithe of the ten fleeces, rank. *Layng v. Yarborough*, 4 Price, 383.

16. What

## 16. What modus shall be too large — hay.

Moduses of eighteen pence and two shillings per acre for tithe hay, held to be rank. *Heaton and others v. Cooke and others*, Wightw. 281.

## 17. What modus shall be too large — lamb.

A modus of three shillings for a lamb, is so rank that the court will not send it to an issue. *Bishop v. Chichester*, 2 B. C. C. 161.

## 18. What modus shall be too large — pigs.

1. Modus of one shilling for every seventh pig on the ninth day, was held good after some doubt. *Bertie v. Beaumont*, 2 Price, 303.

2. One shilling for every tenth pig, in lieu of the tithe of such ten pigs, rank, and not sufficiently particular as to intermediate numbers, and therefore bad. *Layng v. Yarborough*, 4 Price, 383.

19. What modus shall be too large. — Vide *supra* "General observations."

## 20. What modus shall not be too large — calf.

A modus of threepence a year for every cow, and sixpence for every calf in lieu of the tithes of cows, calves, and milk, is good. *Prevost v. Benett and others*, 2 Price, 271.

## 21. What modus shall not be too large — foal.

1. Fourpence for every foal, a good modus. *Layng v. Yarborough*, 4 Price, 383.

2. Modus of a penny for every foal, good. *Jenkinson v. Royston*, 1 Dan. 127.

## 22. What modus shall not be too large — hay.

An issue directed to try a modus of twelve pence an acre in lieu of tithe hay. *Heaton and others v. Cooke and others*, Wightw. 281.

## 23. What modus shall not be too large — lamb.

Vide 2 Price, 303. 314.; 4 Price, 383.; 1 Dan. 115.

## 24. What modus shall not be too large — milk.

1. Vide 2 Price, 272.

2. Modus of one shilling for a milch cow, in lieu of the tithe of milk of such cow, sent to an issue. *Leathes v. Newitt*, 4 Price, 355.

3. Modus of twopence for each milch cow, good. *Jenkinson v. Royston*, 1 Dan. 127.

## 25. What modus shall not be too large — reed ground.

Modus of one penny at Easter, for every acre of reed ground, good. *Jenkinson v. Royston*, 1 Dan. 130.

26. What modus shall not be too large. — Vide *supra* "General observations."

## 27. What modus shall be certain — ancient orchards.

A modus for every ancient orchard, is good. *Scott v. Allgood*, 1 Anst. 16.

## 28. What modus shall be certain — cheese.

A modus of every tenth day's cheese, during twenty weeks, from Holyrood-day, in lieu of tithe of milk, is good, *comme semble*. *Wake v. Russ*, 1 Anst. 295.

## 29. What modus shall be certain — garth.

Twopence for every cottage and garth, a good modus. *Layng v. Yarborough*, 4 Price, 383.

## 30. What

30. What *modus* shall be certain — hay.

1. As to a *modus* of one penny for tithe of all hay, *quære*. *Blackburn v. Jepson*, 17 Ves. jun. 473.

2. Annual payment of one penny by each occupier, for tithe of hay; a good *modus*. *Leyson v. Parsons*, 18 Ves. jun. 173.

31. What *modus* shall be certain — milk.

1. One penny for every strip cow, a good *modus*. *Layng v. Yarborough*, 4 Price, 383.

2. *Modus* of one penny for every heifer that hath but one calf, in lieu of milk, and all profits arising by such cow and heifer, except the calf, good. *Jenkinson v. Royston*, 1 Dan. 127.

32. What *modus* shall be certain — reed ground.

A custom to pay two eggs for every hen or duck, and for every cock or drake, three eggs, in lieu of the tithe of eggs, is bad. *Jenkinson v. Royston*, 1 Dan. 130.

33. What *modus* shall be uncertain — agistment.

Vide 3 Price, 19.

34. What *modus* shall be uncertain — fowls.

Vide 1 Dan. 130.

35. What *modus* shall be uncertain — hay.

1. Vide 17 Ves. 473.

2. A *modus* of a penny in lieu of tithe of hay of the lands occupied with each house in the parish, is bad. *Travis v. Oxtou*, 1 Anst. 309. n.

36. What *modus* shall be uncertain — milk.

1. A *modus* of five shillings for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe milk of the cow belonging to such calves, called renew cows, or cows having had each a calf within the year, preceded by a *modus* of three halfpence for every cow called a renew cow, or a cow that has had a calf within the year, and is full of milk; in lieu of the tithe of the milk of such cow, cannot be supported, on the ground of inconsistency. *Layng v. Yarborough*, 4 Price, 383. The latter standing alone, would also be objectionable, because it is not stated what is to be paid for the number of calves under five, or between ten and five. *Ibid*.

2. *Modus* of a penny a cow for milch cows, summered upon lands within a parish, disallowed, because of the uncertainty of the word summered. *Rumney v. Beale*, 1 Dan. 35.

37. What *modus* shall be uncertain — pigs.

Vide 4 Price, 383.

38. What *modus* shall be uncertain — in lieu of prædial tithes.

1. *Modus* of fourpence by each occupier having lands, cultivated by the plough, by three or more horses, usually called a plough, in lieu of all small prædial tithes of all such lands so cultivated; bad, for uncertainty as to the quantity of land. *Blackburn v. Jepson*, 17 Ves. jun. 473.

2. A *modus* of one penny for every occupier of land in tillage, in lieu of all prædial tithes grown upon such lands, is bad. *Williamson v. Lord Lonsdale*, 1 Dan. 49.

39. What *modus* shall be uncertain — rapeseed.

Eighteen pence in lieu of tithe of rapeseed, when sold in the seed, is bad for uncertainty, and being capable of fraud. *Layng v. Yarborough*, 4 Price, 383.

## 40. What

## 40. What moduses shall be inconsistent — calf and milk.

Vide 4 Price, 383.

## 41. In relation to moduses covering a parish, or part thereof.

1. A modus covering a parish is rather a custom than a prescription, and may be good where a prescriptive modus, covering particular lands, would be bad. *Bennet v. Read*, 1 Anst. 329.

2. A modus pleaded of a sum of money anciently and uniformly paid for tithes within a certain part of a parish, held good, although it far exceed the sum which such part should have paid, if it had contributed its due proportion with reference to the rest of the parish, measuring the share of such part according to its extent with respect to the whole parish, and although some witnesses show it to have been broken in upon; and one, that he remembered (as appeared from depositions in an old cause), the origin of the payment. *Byam v. Booth and others*, 2 Price, 231.

## 42. What customary mode of tithing sheep shall cover the agistment tithe of sheep.

Vide 1 Anst. 341.

## 43. What modus is a wool, and not an agistment, modus.

A modus of one penny for every sheep, and a halfpenny for every lamb, brought into the parish after Candlemas, and sold out before shearing time, is a wool modus, not an agistment modus. *Garmons v. Barnard*, 1 Anst. 320.

## 44. Evidence — to prove perception.

Proof of delivery of a cheese (payable as a modus), at the house of the tithe gatherer, but not to himself, cannot be admitted to prove perception of the modus. *Wake v. Russ*, 1 Anst. 295.

## 45. Evidence — when and by what proofs a receipt shall be evidence.

1. A receipt even of more than fifty years old offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes, is not admissible evidence of the fact of such customary payment having been acted on, so as to establish the defence of a modus; unless it can be also proved who the parties to the receipt were, and in what character they stood, and unless proof be given of the handwriting or death of the party giving it. *Wood B. dissentient. Manby v. Curtis and others*, 1 Price, 225.

2. An old receipt of a former rector, in the hands of a defendant for a money payment in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, was held admissible evidence to support a modus. *Bertie v. Beaumont*, 2 Price, 303.

## 46. Evidence — admissibility of an entry in a parish register of different moduses, the sum total of which was in a deceased vicar's handwriting.

An entry in a parish register of different moduses, the sum total of which was in the handwriting of a deceased vicar, admitted in evidence. *Perigal v. Nicholson and others*, Wightw. 63.

## 47. Evidence — reputation not objectionable from the deceased person's having been liable to tithes.

It is no objection to evidence of reputation of a modus, that the deceased person from whom it came was liable to pay tithes. *Harwood v. Sims and others*, Wightw. 112.

## 48. Evidence — valuation made at the instance of plaintiff.

A valuation of tithes, made by a surveyor at the instance of the rector,  
with

with reference to certain money payments reputed to have been always made in lieu of such tithes, was held *not* to be evidence to fix the rector with an acknowledgment of such money payments, unless it be distinctly proved that the surveyor was expressly required by the rector to make the valuation with reference to such payments. *Bertie v. Beaumont*, 2 Price, 303.

49. Evidence — modus supported by the evidence in part, not as to the rest, and capable of distinction, void in toto.

Modus supported by the evidence in part, not as to the rest, and capable of distinction, void in toto; viz. so much for every calf, up to seven, proved; and different sums proved from those laid as to other numbers. 17 Ves. jun. 478.

50. Evidence — whether proof of a modus limiting the extent of the one laid, contradicts it.

Another modus of threepence for all sheep carried out of the parish between Candlemas and shearing time, covering the same place and persons, does not contradict the former modus for agistment, but is only to be considered as binding it in the extent covered by the latter. *Bennet v. Read*, 1 Anst. 323.

51. Evidence — disproving a calf modus, by proving a higher payment beyond a certain number.

Modus disproved by the evidence; for every cow producing a calf, three-halfpence; or if no calf, one penny: the evidence proving a higher payment beyond a certain number; account of tithes decreed. *Blackburn v. Jepson*, 17 Ves. jun. 473.

52. Evidence — what description in the terrier shall not prove a hay modus to be modern.

A modus claimed for hay was described in the terriers to be for all grass, "except clover and the like." This is not a proof of the modus being modern. *Franklin v. Spilling*, 3 Anst. 760.

53. How a modus shall be laid — garden.

A modus of one penny a year in lieu of the tithe of gardens, is good, and may be so pleaded, without stating that it is payable for *ancient* gardens. As to the fact of the modus being payable for gardens generally, or ancient gardens, the jury will be directed to take that into their consideration, and the judge to indorse the *postea* according to their verdict. *Prevost v. Benett and others*, 2 Price, 272.

54. How a modus shall be laid — milk.

Vide 4 Price, 355.

55. How a modus shall be laid — in respect of parcels of an ancient estate.

A modus claimed in respect of divers pieces of land, consisting of about sixty-one acres, parcel of a certain ancient estate called R., consisting of 1500 acres, was held good. *Ord v. Clarke*, 3 Anst. 638.

56. Issue — notwithstanding the apparent rankness.

Issue directed on a modus for certain lands, amounting to one shilling per acre for all tithes; notwithstanding the apparent rankness. *O'Connor v. Cook*, 6 Ves. 665.

57. Issue — notwithstanding variations in the payment; being irregularities only in the collection.

Issue directed to try moduses; alleged variations in some of the payments appearing



appearing to be only irregularities in the collection. *Blackburn v. Jepson*, 17 Ves. jun. 473.

58. Issue — the payments must be shown to have the requisites of moduses in point of fact.

Other money payments put in evidence by a vicar than those set up by the occupier, cannot be considered moduses, unless he also show by the evidence that such payments have the requisites of moduses in point of fact, as that they are of immemorial origin, and invariable amount. There is otherwise no ground for saying that the defendants are entitled to have an issue to try them. *Leathes v. Newitt*, 4 Price, 371.

#### XI. Of a pecuniary composition, with consent of the ordinary.

In a miscellaneous case.

Where an agreement having been made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe, with some addition, in consequence of the rector's losing certain rights of common by inclosure, and also providing an annual pecuniary compensation in lieu of tithes, which upon the successor's declining to abide by, an amicable suit was instituted in the court of chancery, to which the ordinary (but not the patron, who was the king) was made a party, and the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the articles. Held, that the agreement, though acquiesced under for eighty years (forty of which, however, the rector against whom the decree was made had remained incumbent), was not binding as to the pecuniary compensation, the patron not having been a party, and the composition having been made only with regard to the past, and not to the future increasing value of the tithes. *Attorney-general v. Cholmley*, 2 Eden, 304.; *Amb. 510.*; *Burn's Eccl. Law*, 439.

#### XII. Of presuming a grant from a lay impropriator.

1. General nonpayment affords no presumption.

1. Immemorial nonpayment of any tithes, from a district, cannot raise a presumption of an exemption by grant from the lay rector; but is strong evidence to explain the extent of the grant of the rectory, if at all doubtful. *Lord Petre v. Blencoe*, 3 Anst. 945.

2. A grant of the tithes of land will not be presumed from long nonpayment, although the lands be shown to have been once in the possession of a former lay impropriator, unless some evidence of the existence of a grant be offered, or enjoyment of the tithes be shown by at least something like actual perannuity, or a dealing with the tithes, as owner. Nor will evidence of retainer only be sufficiently strengthened to support such a presumption, by its being shown, that a former impropriator had declared the lands in question to be exempt from the payment of tithes, or by instances of exception of the tithes in leases by the impropriate rector. *Meade and others v. Norbury*, 2 Price, 338.

3. A church being void and dilapidated, is no ground of discharge from the payment of small tithes to the impropriate rector, on the notion of an agreement having been entered into between the rector and the parishioners, by which the ecclesiastical duties have been dispensed with, in consideration of an abandonment of the small tithes. *Meade and others v. Norbury*, 2 Price, 338.

2. Mere nonpayment of a particular species of tithe, affords no presumption.

Vide 3 Anst. 702. 945.

## XIII. Of customary payments in lieu of tithes.

## 1. They need not be immemorial.

1. Customary payment in lieu of tithes need not be immemorial. Whether eight years sufficient, or what other period, *quære*. 9 Ves. 165.

2. Decree for tithes in London at 2s. 9d. in the pound, under the statute 37 Hen. 8. c. 12.; the occupiers not proving any certain customary payment in lieu of tithes; which payment will exempt an individual house if usually made a sufficient time to acquire the character of customary; though within time of memory, and not general through the place or parish. *The Warden and Minor Canons of St. Paul's v. Kettle*, 2 Ves. & Beam. 1.

3. They need not be general throughout the place or parish.

*Ibid.*

## XIV. Of a lease of tithes.

## 1. The render must be certain.

An agreement to accept a reasonable composition for tithes, not exceeding 3s. 6d. per acre, is not a lease of the tithes, for the uncertainty of the render. *Brewer v. Hill*, 2 Anst. 414.

2. A lease for so long as the lessor shall continue vicar of A., is good, and conveys a freehold.

A lease of tithes, or other matter which lies in grant, for so long time as the lessor shall continue vicar of A., is good, and conveys a freehold. *Brewer v. Hill*, 2 Anst. 414.

## 3. Construction of.

The lessee of a rector, in whose lease there is an exception of various small tithes *nominatim*, and of all the tithes belonging to the vicar, is not entitled to tithe of potatoes, although he has always received some of the small tithes in kind, not mentioned in the lease *specialim*, either as demised or excepted, and particularly for geese and pigs: his general right being generally abridged by the operation of the particular exceptions in the lease, which was held to carry the tithes of articles of modern introduction to the vicar; for that it was not to be inferred, from the lessee of the rector having received certain articles of small tithes, that he is entitled to take tithe of potatoes, although the vicar was not entitled to *all* the small tithes, nor had enjoyed the tithe in dispute. *Cunliffe and another v. Taylor and others*, 2 Price, 329.

## 4. The disclaimer of a rector binds his lessees.

Disclaimer of a rector binds his lessees. *Leathes v. Newitt*, 4 Price, 374.

## XV. Of compositions by way of retainer.

## 1. Certainty, an essential to their validity.

An agreement to accept a reasonable composition, not exceeding 3s. 6d. per acre, is bad for the uncertainty. *Brewer v. Hill*, 2 Anst. 413.

2. An agreement with the landlord is not available for the tenant.

An agreement with a landlord to accept a composition from his tenant, is not binding. *Brewer v. Hill*, 2 Anst. 413.

## 3. What apportionment each incumbent is entitled to.

Composition for tithes received after the death of the incumbent by the successor, apportioned with reference to the respective periods of enjoyment. *Aynsley v. Wordsworth*, 2 Ves. & Beam. 331.

4. The notice to determine the composition must be the same as between landlord and tenant.

Notice to determine a composition for tithes, must be the same as between landlord and tenant. *Bishop v. Chichester*, 2 B. C. C. 161.

5. Whether notice to determine the composition is necessary where a modus is insisted on.

Whether notice is necessary to determine a composition, where a modus is insisted on, *quære*. *Atkyns v. Lord Willoughby*, 2 Anst. 397.

6. Whether avoided by the incumbent's non-residence.

1. A rector having come to an agreement with his parishioners for tithes, cannot in equity set up his own non-residence to avoid the contract. *Atkinson v. Folkes*, 1 Anst. 67.

2. Such an agreement is not within the 13 or 14 Ells. *Ibid*.

7. A court of equity will not assist an incumbent in getting rid of a composition on the ground of non-residence.

*Ibid*.

#### XVI. Of a bill in equity for an account of tithes.

1. The account is consequential upon the legal right, which, therefore, if doubtful, must first be established at law.

1. An account of tithes is consequential upon the legal right; and therefore, if the least doubt is thrown upon it by *prima facie* evidence, the account cannot be decreed, till the right is established at law. *Foxcroft v. Parris*, 5 Ves. 221.

2. Bill for tithes. Answer admitting the right to one-third, and submitting to account, and claiming the other two-thirds under a title derived from a grant by queen Elizabeth; submitting to be examined upon interrogatories, but not setting forth a description of the lands. The defendants having gone into evidence in support of their claim, pressed to have the bill dismissed generally: the plaintiff pressed for a general account. The master of the rolls decreed an account as to one-third; and as to two-thirds, the plaintiff declining to try the right at law, dismissed the bill. *Foxcroft v. Parris*, 5 Ves. *Ibid*.

2. Equity will not interfere after long possession.

1. Where defendant, and those under whom he claimed, had been upwards of 130 years in the pernancy of the tithes, a bill by a lay impropiator was dismissed. *Franshaw v. Rotheram*, 1 Eden, 276.

2. Where a layman is in possession of a portion of tithes, under a title traced back for 150 years, a court of equity will not disturb the possession; but leave the rector to establish his right at law. *Scott v. Airey*, 1 Anst. 311.

3. Where there has been an actual pernancy of tithes by lay hands, under conveyances as lay property, for a great while, the plaintiff will be left to law.

Bill to establish the rector's right to tithes, and for an account: the defence, though informally stated as a prescription *de non decimando* in a *que estate*, was as two-thirds possession by the lord of the manor under an apparent title by various conveyances, &c. stated by the answer, from 37 Hen. 8. of the lands with tithes generally, or two-thirds specifically, with evidence of reputation and notice to the plaintiff, who had purchased the advowson, and was lessee of the tithes: but the commencement of the title did not appear: the bill was dismissed with costs. *Strutt v. Baker*, 2 Ves. 625.

4. Bill dismissed, notwithstanding an informality in the answer.

Vide 2 Ves. 625.

5. Bill dismissed, notwithstanding a trivial inaccuracy in setting out tithe, and other circumstances.

A trivial incorrectness in setting out the tithe of wool, for which amends had been tendered, and nonpayment of Easter dues, which were never demanded, are not sufficient to save a bill from being dismissed. *Baker v. Athill*, 2 Anst. 493.

6. An account decreed from mispleading a modus; but without costs, as the defendant had merits.

An account of tithes decreed upon the ground of mispleading a modus, where there was such evidence of the payment set up, as to shew that the defendant had merits, with costs. *Gillibrand v. Scotson*, 4 Price, 267.

7. Whether the account will be carried back beyond six years.

Courts of equity are not bound in tithe causes to any limitation, in point of the time for which the tithes are sought, although *à convenienti*; it has been usual to confine the account to a period of six years, where the court sees no reason to depart from such usage. *Warden, &c. of Saint Paul's v. The Dean*, 4 Price, 86.

8. Whether an account will be decreed as to matters not defended through mistake, induced by the manner of laying the demand.

The bill was for tithe of agistment of barren and unprofitable cattle; the defendant, supposing it not to relate to sheep, made no defence as to them; the court refused to direct an account as to the sheep. *Turner v. Williams*, 3 Anst. 829.

## XVII. *Of a bill in equity to establish a modus, or a customary payment.*

1. It will not lie upon a mere demand of tithes, without suit.

1. A bill to establish a customary payment in lieu of tithes does not lie upon a simple demand of tithes, without suit. *Gordon v. Simpkinson*, 11 Ves. 509.

2. A bill to establish a modus will not lie, where there has been no suit for tithes in kind. *Lord Coventry v. Burslem*, 2 Anst. 567. n.

2. It will not lie to establish a modus as payable to a third person not disputing it.

The rector of M. claiming tithes in kind, the occupier and landlord filed a cross bill to establish a modus, payable to the rector of S., by the lord of the liberty of which the lands were parcel. It was objected: 1st, That the rector of S. not disputing the modus, a bill would not lie to establish it; 2dly, That the other owners of lands in the liberty should have been parties. The objections were allowed, and the bill dismissed. *Woolaston v. Wright*, 3 Anst. 802.

3. An action by lessee of tithes, for subtraction, is a sufficient ground for the bill.

If an action is brought by the lessee of tithes for subtraction, it is a sufficient ground for filing a bill to establish a modus. *Lord Stawell v. Atkyns*, 2 Anst. 564.

4. Of the necessary parties to the bill.

1. Vide 3 Anst. 802.

2. Vide in tit. CHANCERY PLEADING.

### XVIII. Of a bill to discover the title to tithes.

By the terre-tenant against the rector.

1. The terre-tenant cannot file a bill to discover the title of the rector in possession, in order to avoid paying tithes, where the title is not otherwise in issue. *Bowman v. Lygon*, 1 Anst. 1.

2. But if the title is in issue in the original suit for tithes, he may have such discovery by a cross-bill, without setting up any counter title. *Ibid.*

### XIX. Of evidence connected with the subject of tithes, except in relation to endowment.

1. Long possession is evidence of induction, and so forth.

Fifteen years possession of a benefice is *prima facie* evidence of a regular induction, and of reading the 39 articles. *Chapman v. Beard*, 3 Anst. 942.

2. Payment of tithes is presumptive proof against the payer.

*Ibid.*

3. Admissibility of admissions in an answer, to prove occupation.

The reading of admissions from an answer in a tithe cause to prove occupation, confined to that part which related to lands in defendant's occupation at the time of filing the bill, and plaintiffs not allowed to read that part which related to lands of which the defendant became subsequently possessed. *Rumney v. Beale*, 1 Dan. 36.

4. Admissibility of a former decree, on a demand by rector of tithes out of his parish.

An old former decree in favour of a predecessor of a rector, and a verdict obtained by him on an issue under it, will not assist a suit by him for tithes in kind, arising from lands *not within his parish*, founded on the receipt for many years of a money payment, in lieu of such tithes, by way of composition, (and not pretended by the defence to be a modus,) or preclude the necessity of a new trial at law, if ever since that decree and verdict, the succeeding rectors have neglected to take advantage of the result of the former suit, and received the same payment as before. On such a claim, a rector has no common law right. *Sanders v. Longden*, 4 Price, 117.

5. Admissibility of the vicar to prove payment to himself of small tithes, in a suit by the rector for great tithes.

In a suit instituted by the rector, for an account of great tithes, the evidence of the vicar to prove payment of the small tithes to himself, is admissible. *Barker v. Baker*, Wightw. 397.

### XX. Of statutes relating to tithes.

1. St. 2 & 3 Edw. 6. c. 13. s. 3.

Agistment tithe is not within the 2 & 3 Edw. 6. c. 13. s. 3. *Ellis v. Saul*, 1 Anst. 342.

2. St. 32 Hen. 8. c. 7.

The statute 32 Hen. 8. is silent as to the manner in which a person must make out his right against the church, or patentees standing in the place of the church; and only provides for the re-assurance and recovery of them, like temporal possessions in the king's court. *Fanshaw v. Rotherham*, 1 Eden, 285.

### XXI. In relation to an inclosure act.

Construction of.

An inclosure act directed part of a waste to be sold, tithe free, to defray the

the expences of the inclosure. The rector was not otherwise a party; and the saving clause extended to all claims, except those of the lord and the commoners; yet the rector's title to these tithes was bound. *Riddel v. White*, 1 Anst. 281.

## XXII. *Of tithes in London.*

1. Mere nonpayment of the tithes under the statute, is no discharge. Mere nonpayment of the tithes under the statute is not any answer, as it would not be to the claim of tithe at common law. The Warden and Minor Canons of St. Paul's v. Kettle, 2 Ves. & Beam. 1.

### 2. In relation to leases.

1. Where there has been no new lease granted for many years, the clergy of London are to be paid for their tithes, on the expiration of the old one, according to the improved annual value; and when any fine is paid on taking a new lease in consideration of which the annual rent is reduced, the amount of such fine is to be taken into the calculation of the estimate of the yearly value. Warden, &c. of Saint Paul's v. The Dean, 4 Price, 65.

2. Under 37 H. 8. c. 12. the payment of a large fine, provided it be attended with no diminution of the accustomed rent, is not fraudulent or covinous within the statute; and the 2s. 9d. in the pound, will be decreed upon the rent only. Minor Canons of St. Paul v. Crickett, 1 Dan. 37.

### 3. The dean of St. Paul's is not a great man, within the statute.

The dean of Saint Paul's is not a great man within the meaning of the exemption in the decree made under the statute of 37 Hen. 8. c. 12. regarding the payment of tithes in London. Warden, &c. of Saint Paul's v. The Dean, 4 Price, 65.

### 4. The dean of St. Paul's dwelling house, is not exempt.

1. The dwelling house of the dean of Saint Paul's is not exempt from the payment of tithes to the parson of Saint Gregory. Warden, &c. of Saint Paul's v. The Dean, 4 Price, 65.

2. The dwelling house, &c. of the deanery of Saint Paul's, in London, is not exempt from the payment of tithes to the warden and minor canons, under the 37 Hen. 8. c. 12. Ibid.

3. The rate according to the amount of which the payment for such tithes is to be computed is 2s. 9d. in the pound, on the fair yearly rent or actual annual value of the premises to be let, as in the case of all other houses paying tithes. Ibid.

### 5. Tithes of the East India company's warehouses.

Decree under the statute 37 Hen. 8. for payment of tithes in London, as to warehouses, erected by the East India company upon the site of old buildings, and occupied by them, at 2s. 9d. in the pound upon the value to be let; without an issue: no specific, customary, payment in lieu of tithes being alleged. *Antrobus v. East India Company*, 15 Ves. 9.

### 6. Of the equitable jurisdiction, in relation to.

1. Chancery hath given direction to compel the payment of tithes, for houses situate in the city of London. *Kinaston v. Miller*, Dick. 773.

2. Notwithstanding the statute and decree 37 Hen. 8. c. 12. the court of chancery has jurisdiction upon the subject of tithes in London. An account was decreed according to the improved rent. Another defendant setting forth his lease at a low rent and a fine, and alleging by answer, that he had never heard of any greater rent being paid, there being no evidence against it, was held liable only according to that rent. *Canons of St. Paul's v. Crickett*, 2 Ves. 563.

## TITLE-DEEDS.

**Who are entitled to the possession of title-deeds.**

1. The tenant for life, is *primâ facie* entitled.
2. They will therefore be delivered out of court to him.
3. But the court will not order them to be delivered to him.
4. Nor will they dispossess him.
5. They may however be taken from a jointress upon her jointure being confirmed.
6. When third persons will be dispossessed in favour of the remainder-man.

**Who are entitled to the possession of title-deeds.**

1. The tenant for life, is *primâ facie* entitled.

1. *Primâ facie* title-deeds are property in the custody of tenant for life. May be taken from a jointress upon her jointure being confirmed. 1 Ves. 76.

2. Title-deeds are incident to the possession of a freehold estate. 3 Ves. 225.

3. Tenant for life is entitled to the possession of the title-deeds. 1 Sch. & Lef. 223.

2. They will therefore be delivered out of court to him.

1. Title-deeds delivered out of court to tenant for life, except when brought into court under an order for safe custody. Webb v. Lord Ly-mington, 1 Eden, 8.

2. Title-deeds delivered out of court upon the application of the trustee and the tenant for life. Duncome v. Mayer, 8 Ves. 320.

3. But the court will not order them to be delivered to him.

When deeds are in the hands of a tenant for life, the court will not take them out of his hands: but when they are not in his hands; the court will not order them to be delivered to him. Hicks v. Hicks, Dick. 650.

4. Nor will they dispossess him.

Ibid.

5. They may however be taken from a jointress upon her jointure being confirmed.

Vide 1 Ves. 76.

6. When third persons will be dispossessed in favour of the remainder-man.

Where tenant for life is satisfied, and does not care about the title, but remainder-man is not, court will take care of the deeds, and not leave them in the hands of third persons, who have no right, to the prejudice of remainder-man. 1 Ves. 78.

## TOLERATION ACT.

1. Views of the toleration act.
2. In relation to stat. 53 Geo. 3. c. 160.

## 1. Views of the toleration act.

1. It was not intended by the legislature, in passing the 53 Geo. 3. c. 160. to make any alteration of the common law respecting the objects of that statute. *Attorney-general v. Pearson*, 3 Mer. 399.

2. The object of the toleration act was only to repeal certain penal laws therein mentioned, leaving the common law as it stood with respect to all common law offences against religion. *Attorney-general v. Pearson*, 3 Mer. 405.

## 2. In relation to stat. 53 Geo. 3. c. 160.

The act 53 Geo. 3. c. 160. extends only to the repeal of the clause in the toleration act, and the other statutes therein referred to, but leaves the common law where it was. *Attorney-general v. Pearson*, 3 Mer. 408.

## TREES.

## I. Of the property in timber.

1. Tenant in tail after possibility, has an interest and property in the timber.
2. When felled, it vests in a tenant for life dispunishable.
3. Tenant for life dispunishable, has no right to timber severed during a prior estate.
4. Tenant for life has no property in underwood felled by a preceding tenant.
5. In miscellaneous cases.

## II. Of the property in the produce of timber.

Tenant for life dispunishable, is entitled to the interest of money produced by the sale of timber.

## III. When timber may, or will be ordered to, be felled.

1. In the case of an executory devise over.
2. Extent of a tenant's, dispunishable for life, right to fell timber.
3. Miscellaneous cases.

## IV. Conversion of timber to a collateral purpose.

1. It seems that the right of timber for repairs authorises sale and application of the produce.
2. By tenant for life entitled to timber for repairs, to reimburse himself expences incurred in repairs.
3. By tenant for life impeachable, with power under an inclosure act to mortgage for the expense of the inclosure.

## V. In relation to the issue in tail.

He recovered against the remainder-man for timber felled by agreement between the latter and the tenant for life.

## VI. Rights of the purchaser of standing timber from a tenant for life, impeachable.

The tenant for life cannot prevent his cutting it.



VII. Interference of a court of equity to preserve timber felled for those entitled.

1. An order will be made to prevent its removal.
2. By ordering the produce to be invested.

I. Of the property in timber.

1. Tenant in tail after possibility, has an interest and property in the timber.

Tenant in tail after possibility of issue extinct, being dispunishable for waste by the law, as equally with tenant for life without impeachment of waste by settlement, an interest and property in the timber. 15 Ves. 427.

2. When felled, it vests in a tenant for life, dispunishable.

Tenant for life without impeachment of waste, being dispunishable, has also the property in the trees severed. 15 Ves. 425.

3. Tenant for life dispunishable, has no right to timber severed during a prior estate.

Tenant for life without impeachment of waste, cannot maintain trover for timber severed during a prior estate: but it vests immediately in the owner of the inheritance. Tenant for life impeachable, is in the same case as to Underwood. 1 Ves. 484.

4. Tenant for life has no property in underwood felled by a preceding tenant.

Tenant for life has no property in the underwood till his estate comes into possession; therefore cannot have an account of what was cut wrongfully by a preceding tenant. Pigot v. Bullock, 1 Ves. 479.

5. In miscellaneous cases.

1. B. was tenant for life with remainder to his first and other sons in tail, remainder to O. for life, remainder to her first and other sons in tail, with other contingent remainders, with remainder to B. in fee. O. had a child who died almost immediately, before any other contingent remainder-man came *in esse*. B. cut down timber, his own remainder in fee being the next existent estate of inheritance, but afterwards O. had another child. B. shall not take advantage of his own wrong by taking the timber so cut, nor is the second child of O. entitled, until it shall be seen whether B. shall have a child, but the produce shall be paid into court by B., with interest at four per cent., and accumulate for the benefit of such person as shall appear at the death of B. to have title to it. Williams v. Duke of Bolton, 1 Cox, 72.

2. Devise of real estates to A. & B. and their heirs, to the use of them and their heirs, in trust to permit C. to receive the rents and profits for life, and after her decease to stand seised of the said premises, in trust for the second son of D. and the heirs male of his body, remainder in trust for the third, fourth, and other sons of D. in tail male, remainder in trust for E. for life without impeachment of waste, remainder to trustees to preserve, &c.; remainder to the first and other sons of E. in tail male, &c.: proviso; that in case there should not be a second son of D. at the time of the death of C., then until such second son should be born, the said trustees should pay the rents and profits of the said estates to such persons as were next in remainder, and should be entitled to receive the same in case no such son should be born: C. having cut timber, this was sold under an order of the court, and the produce paid into the bank. At C.'s death, D. had no son, and

and E. was dead, leaving F. his eldest son. The produce of the timber belongs to F. absolutely, and shall not abide the event of D.'s having a son. *Dare v. Hopkins*, 2 Cox, 110.

## II. Of the property in the produce of timber.

Tenant for life dispunishable, is entitled to the interest of money produced by the sale of timber.

Tenant for life, without impeachment of waste, other than wilful waste, held entitled to the interest of money produced by sale of timber. Any claim of tenant for life to cut timber, a question at law only. *Ex parte Wickham*, Cooper, 288.

## III. When timber may, or will be ordered to, be felled.

### 1. In the case of an executory devise over.

Where there is an executory devise over, even of a legal estate, this court will not permit timber to be cut: more especially in the case of a trust estate. 10 Ves. 278.

### 2. Extent of a tenant's, dispunishable for life, right to fell timber.

Right of tenant for life without impeachment of waste, to cut timber, generally, in a husbandlike manner, independent of the effect upon the beauty of the place, except equitable waste. 16 Ves. 185.

### 3. Miscellaneous cases.

1. Settlement on marriage, of lands of the husband to the use of the husband for life without impeachment of waste: remainder to trustees to preserve contingent remainders: remainder to the wife for life, for her jointure, and in bar of dower: remainder to the first and other sons of the marriage in tail male: remainder to the daughters in the same manner: remainder to the heirs of the body of the husband and wife. The husband being dead without issue, as to the right of the widow to cut timber, and, which would be a consequence, to the property in it, when severed, as tenant in tail after possibility of issue extinct, either in possession, by the offer of merger, if the estates can unite, or, if not, in remainder, *quære*. A case directed. *Williams v. Williams*, 15 Ves. 419.

2. Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively without impeachment of waste; with various limitations in strict settlement: all the estates for life being without impeachment of waste; and the ultimate remainder in fee. The trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole. As to the consequence, whether, if the trustees are not by their character prevented from taking any benefit, the tenant for life may have any, and what, proportion of the timber; and how the excess is to be disposed of, *quære*. *Burgess v. Lamb*, 16 Ves. 174.

3. Land devised to be sold, the money to be laid out in other estates, to be settled: the rents and profits until sale to go to the persons entitled to the estates; to be purchased. Tenant for life without impeachment of waste cannot cut timber on the estate to be sold. *Ibid.* 180.

4. Devise in strict settlement, with a clause of forfeiture by cutting any trees. Upon a bill by the infant remainder-man in tail, an inquiry was directed, whether any trees in the park, not ornamental, or affording shelter to the mansion-house, are proper to be felled; and whether it would be for the benefit of all parties interested, that they should be felled and sold, and the money laid out in other estates to be settled to the same uses. *Delapole v. Delapole*, 17 Ves. jun. 150.

## IV. Con.

## TREES.

## IV. Conversion of timber to a collateral purpose.

1. It seems that the right to timber for repairs includes the right of applying the produce.

It seems that the right to cut timber for the purpose of repairs extends to selling timber and applying the produce. *Wilder v. the Dean, Sec. of Warchester, 3 Mer. 421.*

2. By tenant for life entitled to timber for repairs, to reimburse himself expenses incurred in repairs.

Tenant for life entitled to timber for repairs, cannot sell the same to reimburse herself expenses incurred in repairs. *Gower v. Eyre, Cooper, 156.*

3. By tenant for life impeachable, with power under an inclosure act to mortgage for the expense of the inclosure.

Tenant for life punishable for waste, with power under an inclosing act to mortgage for the expense of the inclosure, fell timber, and applied the produce instead: decreed to account to owner of next estate of inheritance. *Lee v. Alston, 1 Ves. 78.*

## V. In relation to the issue in tail.

He recovered against the remainder-man for timber felled by agreement between the latter and the tenant for life.

Tenant for ninety-nine years, if he so long live, without impeachment of waste, except voluntary; remainder to trustees to preserve contingent remainders; remainder to first and other sons in tail male; remainder to A. & fee, having no son, agrees with A. to fell timber, and to divide the produce. The tenant for ninety-nine years has afterwards a son, who recovers from A.'s representatives. *Garth v. Cotton, Dick. 183.*

## VI. Rights of the purchaser of standing timber from a man for life, impeachable.

The tenant for life cannot prevent his cutting it.

Tenant for life liable to waste; having sold timber, cannot prevent vendee from cutting it. *3 Ves. 3.*

## VII. Interference of a court of equity to preserve timber for those entitled.

1. An order will be made to prevent its removal.

Order made to prevent removal of timber wrongfully cut. *Anscombe v. Anscombe, 1 Ves. 93.*

2. By ordering the produce to be invested.

A., tenant for life, remainder to his sons successively in tail male; remainder to B. for life, and to her sons in the same manner, and to preserve contingent remainders: A. being also seized of the reversion: cut and sold timber before the birth of a tenant in tail: afterwards A. & son, who died soon after his birth, and another son, who survived A. & son, produce of the timber was decreed to be laid out in the fund: A. & son, who died soon after his birth, and another son, who survived A. & son, life of A., and upon his death without having had a son, was decreed laid out in land, to be settled to the uses of the estate upon which it was cut. *Powlett v. the Duchess of Bolton, 3 Ves. 574.*

## TROVER.

1. By whom maintainable.
2. Against whom maintainable.

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 1. By whom maintainable.

Trover does not lie for one not having the property, nor against one in possession under, and making sale by, order of the owner; for conversion is the gist of it: and if no conversion at moment of sale, refusal afterwards will not do. *Weymouth v. Boyer*, 1 Ves. 418.

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 2. Against whom maintainable.

*Ibid.*

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 USES AND TRUSTS.

## I. Use.

1. Of the nature and quality of a use before the statute 27 Hen. 8.

*In relation to the case, where the confidence was to an intent that could not be executed.*

2. Of the modern doctrine of uses.

1. *Influence of the statute of frauds.*
2. *Where the trustee is incompetent.*
3. *Springing use.*

## II. Trust.

1. Of the origin and nature of trust estates.

1. *What may be the subject of trust — a patent.*
2. *Essentials in the creation of trusts.*
3. *Of the time at which trusts must arise.*
4. *A trust is collateral to the land.*
5. *Trusts when enforced in substantial ownership, become the mere form of a legal conveyance.*
6. *Trust of the legal estate can be co-extensive only with the legal estate.*
7. *A trust, in its nature illegal, cannot be enforced.*
8. *A trust, in contravention of a statute, cannot be enforced.*
9. *Limitation of a trust to the lord, failing the heirs of cestui que trust, is valid.*
10. *The creation of a trust cannot affect the right of a third person.*
11. *General rule as to the jurisdiction of courts of equity to model trusts.*
12. *Executory trusts — no difference in executing executory trust by will and covenant in marriage articles.*
13. *Executory trusts — interposition of trustees to preserve contingent remainders.*
14. *Executory trusts — what is evidence of an intent that the court should model the limitations.*
15. *Executory trusts — dissenting chapel.*
16. *Executory trusts — in a miscellaneous case.*
17. *Direct trusts — analogy or difference between the rules of equity and at law, in construing an estate as executed, or a trust.*
18. *Direct trusts — what estates are trusts.*

19. *Direct*

19. *Direct trusts — what estates are executed.*
20. *Direct trusts — distinction between trusts executed and executory, and the effect.*
21. *Direct trusts — indefinite purpose.*
22. *Direct trusts — where testator desires all his money may be disposed of as land, or vice versa.*
23. *Direct trusts — where the application of the subject matter is discretionary in the party taking.*
24. *Direct trusts — a trust cannot be executed, where no intent appears to create it, except by operation of law.*
25. *Direct trusts — secret.*
26. *Resulting or implied trusts — common law presumption.*
27. *Resulting or implied — conveyance without consideration.*
28. *Resulting or implied — where there is fraud.*
29. *Resulting or implied — renewal of a lease by a trustee.*
30. *Resulting or implied — purchase with trust money.*
31. *Resulting or implied — purchase in the name of a stranger.*
32. *Resulting or implied — an agreement raises a trust in equity.*
33. *Resulting or implied — without the word "trust."*
34. *Resulting or implied — that equity may raise a trust, there must be at least a meritorious consideration.*
35. *Resulting or implied — general rules respecting words of confidence, direction, recommendation, or request, raising trusts.*
36. *Resulting or implied — cases in which words of confidence, &c. were held to raise trusts.*
37. *Resulting or implied — cases in which words of confidence, &c. were held not to raise trusts.*
38. *Resulting or implied — from other words.*
39. *Resulting or implied — jurisdiction to convert the subject matter, as between the representatives of the different estates.*
40. *Resulting or implied — rule at law as to when executors take the residue; when not.*
41. *Resulting or implied — cases in which executors may, or were held to, take the residue.*
42. *Resulting or implied — cases in which executors may, or were held, not to take the residue.*
43. *Resulting or implied — mode in which executors, when entitled, take the residue.*
44. *Resulting or implied — where there is no next of kin, executors, themselves excluded, are trustees for the crown.*
45. *Resulting or implied — analogy or difference between the rules at law and in equity, as to real estate resulting under a devise, to the heir.*
46. *Resulting or implied — cases, under devises, in which real estate was held to result to the heir.*
47. *Resulting or implied — cases under devises, in which real estate may, or was held, not to result to the heir.*
48. *Resulting or implied — for the heir on a conversion.*
49. *Resulting or implied — for the heir of a party taking under a will converting property.*
50. *Resulting or implied — on a seisin ex parte materna.*
51. *Resulting or implied — general rule as to the person for whom, &c.*
52. *Resulting or implied — where the trust cannot take effect.*
53. *Resulting or implied — in the case of a legacy given to erect a charity.*
54. *Resulting or implied — in the case of a conditional legacy lapsed.*
55. *Resulting or implied — a term created for payment of a stranger's debt, which he himself pays.*
56. *Resulting or implied — to the lord in escheat.*

57. *Resulting or implied — presumption against intending an infant to be a trustee.*

2. General rules for the construction of instruments creating trusts.

1. *The intention shall be the governing principle.*
2. *The limitations of trusts are to be construed the same as of legal estates.*

3. Of the construction of deeds creating trusts.

1. *Trusts to raise portions.*
2. *The word "profits."*
3. *In the case of terms to raise by rents and profits: trustees may raise by sale or mortgage.*
4. *A case in which a debt was held not included in a general trust for payment of debts.*
5. *A case in which the trust was for payment of the debts of a tenant for life.*

4. Of the construction of wills creating trusts.

1. *A case in which the limitation of a trust was held to be in tail.*
2. *In the case of terms to raise by rents and profits: trustees may raise by sale or mortgage.*
3. *A trust fund to purchase cannot be applied in repairs or improvements.*
4. *A case in which a discretion given to trustees did not authorise them to change the limitations of a settlement.*
5. *In the case of a power to cut timber under sanction of trustees.*

5. Of the rules by which trust estates of freehold are governed.

1. *Of the analogy or difference between uses and trusts.*
2. *Of the analogy or difference between executing trusts by will and by deed.*
3. *Of the analogy or difference between a direct trust and a charge.*
4. *A trust is equivalent to the legal ownership.*
5. *Trusts are deviseable — by what words.*
6. *A trust of accumulation, void for excess only.*
7. *Relief to those in the post.*

6. Of the rules by which trust-terms are governed.

1. *Assignment to a purchaser of trust-terms created for payment of debts.*
2. *Of letting a tenant for life, subject to a trust term, into possession.*
3. *Void for excess only.*

7. Of the rules by which trust-estates in personality are governed.

*A trust is equivalent to the legal ownership.*

8. Of the estate and duty of trustees.

1. *Estate of trustees.*
2. *Their acts shall not prejudice the trust — general rule.*
3. *Their acts shall not prejudice the trust — disseisin, abatement, or intrusion.*
4. *Their acts shall not prejudice the trust — eviction.*
5. *Their acts shall not prejudice the trust — failure.*
6. *Their acts shall not prejudice the trust — fine by a purchaser with notice.*
7. *Their acts shall not prejudice the trust — fine and nonclaim to a person having notice.*
8. *Their acts shall not prejudice the trust — laches.*

9. *Their*

9. *Their acts shall not prejudice the trust — mortgage by their purchaser.*
10. *Their acts shall not prejudice the trust — miscellaneous.*
11. *A direct trust shall not be barred by lapse of time.*
12. *A constructive trust may be barred by lapse of time.*
13. *Trustees can derive no benefit from the trust.*
14. *Of the rights of a trustee on the death of the cestui que trust without heirs.*
15. *Of the right of a trustee, not having acted, to a legacy for his trouble.*  
Vide in tit. WILL.
16. *Trustees are bound to reimburse the cestui que trust — general rules.*
17. *Trustees are bound to reimburse the cestui que trust — lending money on personal security.*
18. *Trustees are bound to reimburse the cestui que trust — for taking a defective security.*
19. *Trustees are bound to reimburse the cestui que trust — on the fund of investment failing.*
20. *Trustees are bound to reimburse the cestui que trust — on the fund of investment sinking in value.*
21. *Trustees are bound to reimburse the cestui que trust — misrepresenting an investment.*
22. *Trustees are bound to reimburse the cestui que trust — failure of agents.*
23. *Trustees are bound to reimburse the cestui que trust — laches.*
24. *Trustees are bound to reimburse the cestui que trust — for neglecting to renew a lease.*
25. *Trustees are bound to reimburse the cestui que trust — on selling stock without authority.*
26. *Trustees are bound to reimburse the cestui que trust — on engaging an infant's name in an adventure, but afterwards refusing to engage the fund.*
27. *Trustees are bound to reimburse the cestui que trust — from acting under a forged power.*
28. *Trustees are bound to reimburse the cestui que trust — from enabling tenant for life to mortgage, by delivering the title deeds to him.*
29. *Trustees are bound to reimburse the cestui que trust — on joining with remainder-man to evict cestui que trust.*
30. *Trustees are bound to reimburse the cestui que trust — analogy in cases of breach of trust to the statute of limitation.*
31. *Trustees are bound to reimburse the cestui que trust — liability of one for another — distinction between trustees and executors.*
32. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a receipt.*
33. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a receipt and re-conveyance of a mortgaged estate.*
34. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a sale.*
35. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a transfer and sale.*
36. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by suffering the other to have trust-money under a note of hand.*
37. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by concealing his breach of trust.*
38. *Effect of a clause of indemnity.*
39. *Where purchasers are bound to see trusts performed.* Vide in tit. CONTRACT between VENDOR and PURCHASER.
40. *Trustee charged for a misrepresentation to a purchaser.*
41. *Trustees*

41. *Trustees seldom permitted to purchase the trust-estate — general rules.*
42. *Trustees seldom permitted to purchase the trust-estate — cases in which they have been permitted.*
43. *Trustees seldom permitted to purchase the trust-estate — cases in which they have been refused.*
44. *Trustees seldom permitted to purchase the trust-estate — effect of lapse of time.*
45. *Trustee having engaged trust-property in an adventure, cannot sell either to himself or another.*
46. *Of the authority of a trustee to change the securities of investment.*
47. *Of the authority of a trustee to sell, under a power, to arise by sale or mortgage, executed by mortgaging.*
48. *Effect of a clause for the election of new trustees.*
49. *Effect of a clause for filling up vacancies in the trusteeship, so as to keep the number complete.*
50. *Jurisdiction of courts of equity to contro la trustee in appointing a new one.*
51. *Jurisdiction of courts of equity to supply a vacancy in the office of trustee, vice the heir, and to invalidate his intermediate acts.*
52. *Reinstatement of a trustee after declining to act.*
53. *Discharged, and others appointed.*
54. *Devolution of trusts.*
55. *Trustees have equal power.*
56. *The act of the majority binds the minority.*
57. *Order, under circumstances, to pay dividends to trustees, or one of them.*
58. *Trustees are allowed all costs and expences.*
59. *Course pursued on a trustee of funded property absconding.*
60. *Order, under 36 Geo. 3. c. 90., for the transfer of stock by one trustee, the other having absconded.*
61. *Course pursued on the claim for payment by a mortgage creditor, under a trust for payment of his debt.*
62. *Of the obligations of trustees to preserve contingent remainders.*

## I. Use.

1. Of the nature and quality of a use before the statute 27 Hen. 8.

*In relation to the case where the confidence was to an intent that could not be executed.*

In the case of uses before the statute, where the confidence was to an intent, that could not be executed, it never was settled, what should be done with the estate. *Burgess v. Wheate*, 1 Eden, 219.

2. Of the modern doctrine of uses.

1. *Influence of the statute of frauds.*

The statute of frauds has only imposed a form in declaring the use; the control of the use remains as it was before the statute, the absolute will and declared intent of the owner. *Wright v. Lord Cadogan*, 2 Eden, 257.; *Amb.* 468.

2. *Where the trustee is incompetent.*

1. Where the trustee is deficient, the trust shall attach on the estate the law raises. *Souley v. the Clockmaker's Company*, 1 B. C. C. 81.

2. Thus, devise to a corporation in trust; although it be void, the trust shall attach upon the estate the law raises. *Souley v. the Clockmaker's Company*, *Ibid.*

3. *Springing*



3. *Springing use.*

1. No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Carwardine v. Carwardine*, 1 Eden, 34.; *Fernes*, Ex. Dev. 388.

2. There may be any number of springing uses within twenty-one years after lives in being. 2 Ves. 241.

## II. Trust.

## 1. Of the origin and nature of trust estates.

1. *What may be the subject of trust — a patent.*

*Quære*, whether a patent can be the subject of a trust. 1 Ves. 129.

2. *Essentials in the creation of trusts.*

Requisites to constitute a trust; sufficient words; a definite subject; and a certain object. 9 Ves. 323.

3. *Of the time at which trusts must arise.*

Though a use or trust must arise out of the original feoffment to uses, yet they need not be specifically created at the time of the execution of the deed. *Wright v. Lord Cadogan*, 2 Eden, 256.; *Amb.* 468.; 1 Toml. P. C. 486.

4. *A trust is collateral to the land.*

A trust is collateral to the land, and created by contract of the party; and therefore, one who comes in in the post, shall not be liable to it; but an equity of redemption is inherent in the land, and binds all persons in the post or otherwise. *Burgess v. Wheate*, 1 Eden, 206.

5. *Trust, when enforced, is substantial ownership, become the mere form of a legal conveyance.*

Where a court of justice takes cognizance, and compels the execution of trusts in substantial ownership, the trust becomes the mere form of a legal conveyance. *Burgess v. Wheate*, 1 Eden, 218.

6. *Trust of the legal estate, can be co-extensive only with the legal estate.*

Trust of the legal estate can be only co-extensive with the legal estate. *Burgess v. Wheate*, 1 Eden, 206.

7. *A trust, in its nature, illegal, cannot be enforced.*

The court will not execute a trust in its nature illegal. *Attorney-general v. Pearson*, 3 Mer. 399.

8. *A trust, in contravention of a statute, cannot be enforced.*

A trust cannot be enforced in equity, when in contravention of the provisions of a statute; even though a penalty be, by the statute, annexed to the offence. *Ottley v. Browne*, 1 Ball & Beatty, §60.

9. *Limitation of a trust to the lord, failing the heirs of cestui que trust, is valid.*

Limitation of a trust to the lord, failing the heirs of *cestui que trust*, would have been good, because such a limitation would have been good at law, and is implied in the conveyance of every legal fee. *Burgess v. Wheate*, 1 Eden, 237.

10. *The creation of a trust cannot affect the right of a third person.*

The creation of a trust cannot affect the right of a third person. *Burgess v. Wheate*, 1 Eden, 251.

11. *General*

11. *General rule as to the jurisdiction of courts of equity to model trusts.*

A court of equity cannot model a trust to an intention, in opposition to a complete declaration. It can only interpose in the case of an imperfect trust., *Le Rousseau v. Rede*, 2 Eden, 6.

12. *Executory trusts — no difference in executing executory trust by will and covenant in marriage articles.*

1. Distinction between a will, making a direct gift and a covenant, by articles to be executed; not between a covenant upon consideration of marriage and an executory trust by will. 12 Ves. 230.

2. Covenant, in a marriage settlement, to settle leasehold estates in trust for such persons, and such or the like estates, ends, intents, and purposes, as far as the law will allow, as were declared concerning real estate, limited to the first and other sons in tail male, with several remainders, executed by giving the absolute interest in the leasehold estates to the first tenant in tail in possession, having attained the age of twenty-one. *Countess of Lincoln v. Duke of Newcastle*. Ibid. 218.

13. *Executory trusts — interposition of trustees to preserve contingent remainders.*

Testator directs his executors to invest personal estate in the purchase of real estates, which, when purchased, he devises to A., "to him and the male heirs of his body for ever, and if A. should die without issue male, then he devised the same to the heir male of the body of B." After the estate tail to A., the court will insert a limitation to trustees to preserve contingent remainders. *Harrison v. Naylor*, 2 Cox, 247.

14. *Executory trusts — what is evidence of an intent that the court should model the limitations.*

Where the assistance of the trustees is necessary to complete a limitation, it is a sufficient evidence of the testator's intent, that the court should model the limitations, but where they are already declared, the court has no authority to alter them. *Austen v. Taylor*, 1 Eden, 368.; *Amb.* 376.

15. *Executory trusts — dissenting chapel.*

Joint purchase to hold to the purchasers, their heirs, successors, and assigns for ever, in trust for erecting a protestant dissenting chapel: the regulation of such an establishment, with no fixed revenue, but supported only by voluntary contribution, is the proper subject of a bill, not an information: the appointment of a minister in the congregation generally, not in the heir of the surviving trustee; the number of trustees to be kept up: but the mode of appointing them and the minister, whether by the majority simply, or in any more limited way, being uncertain, an inquiry was directed, who, according to the nature of the establishment, are entitled to propose trustees, and elect and approve a minister. *Davis v. Jenkins*, 3 Ves. & Beam. 151.

16. *Executory trusts — in a miscellaneous case.*

Vide 12 Ves. 218.

17. *Direct trusts — analogy or difference between the rules of equity and of law, in construing an estate as executed, or a trust.*

No instance where equity has considered an estate as not executed, at the same time that law would have considered it as executed. *Carwardine v. Carwardine*, 1 Eden, 36.

18. *Direct trusts — what estates are trusts.*

1. Where any act is to be done, as a conveyance to be made, the estate is a trust, not a use executed. 7 Ves. 201.

2. Devise to trustees to raise by mortgage, or lease, so much money as would pay testator's debts, and afterwards to permit A. to receive the rents and

and profits for his life, and after his decease to permit his eldest son and the issue male of such eldest son to receive, &c.; and for want of issue of A., then to B. in like manner; and for want of issue of both, or if their issue should die without issue, then over. Held a trust estate, and that A. took in tail. *Stanley v. Lennard*, 1 Eden, 87.

3. Devise, to trustees (after deducting taxes, &c.) to pay the residue to A. for life, remainder to the use of the heirs male of A.: these two estates do not unite so as to enable A. to suffer a recovery. *Shapland v. Smith*, 1 B. C. C. 75.

4. Devise, charged with debts, to trustees and their heirs; in trust to receive and take the rents, issues, and profits; and thereout to support and educate the deviser's son till the age of twenty-one; and then to him. Not a use executed in the son before the age of twenty-one. 7 Ves. 322.

5. Executory trust by will. 12 Ves. 231.

6. Devise in trust, subject to the charges, to permit A. to receive and take the rents and profits for life: whether not a use executed, *quære*. 1 Ves. & Beam. 137.

7. Devise to trustees, their heirs, &c. for the life of the deviser's son, to support contingent remainders, in trust to permit him to receive the rents for life, and after his decease to his first and other sons in tail: an equitable estate in the son: the legal estate in the trustees, with a legal remainder to the first and other sons. *Biscoe v. Perkins*, 1 Ves. & Beam. 485.

#### 19. *Direct trusts—what estates are executed.*

1. Limitation to trustees to stand seised, and receive rents and profits to the use of A., is an estate executed in A. *Carwardine v. Carwardine*, 1 Eden, 36.

2. Real to wife for life; remainder to trustees to preserve contingent remainders; remainder to A. for life; remainder to trustees; remainder to the heirs of her body; remainder over with a declaration that she should only have an estate for life: these are legal estates. *Thong v. Bedford*, 1 B. C. C. 313.

#### 20. *Direct trusts—distinction between trusts executed and executory, and the effect.*

Distinction between trusts executed and executory, and the effect. 12 Ves. 238.

#### 21. *Direct trusts—indefinite purpose.*

Distinction between express trust for an indefinite purpose, and where from the indefinite nature of the purpose the court concludes, that a proper trust could not be intended; though the words import trust. The principle of the latter case not applied to express trust. 2 Ves. & Beam. 298.

#### 22. *Direct trusts—where testator desires all his money may be disposed of as land, or vice versa.*

Where testator desires all his money may be disposed of as land, or vice versa; that is a direct trust, and will be executed in equity. 2 Ves. 176.

#### 23. *Direct trusts—where the application of the subject matter is discretionary in the party taking.*

If a trust is intended, but is not expressed, or is ineffectually created, or fails, the next of kin are entitled; but if the person taking has a discretion, whether to make the application, or not, it is an absolute gift, not a trust. 10 Ves. 535.

#### 24. *Direct trusts—a trust cannot be executed, where no intent appears to create it, except by operation of law.*

A trust cannot be executed where no intent appears to create it, except by operation of law. *Burgess v. Wheate*, 1 Eden, 207.

#### 25. *Direct*

25. *Direct trusts — secret.*

1. Bill by the heir at law against residuary devisees, legatees, and executors; suggesting a secret trust, undertaken at the request of the testator, either not legally declared, or, if so, void as to the real estate, and written acknowledgments by the defendants of an intended trust for charitable purposes: the will also by equal legacies to them and some particular expressions importing a trust. A general demurrer to the discovery and relief was overruled. *Muckleston v. Brown*, 6 Ves. 52.

2. Bill by heir, suggesting a secret void trust for charity in residuary devisees, but without evidence of a trust expressed, or of an engagement, expressed or tacit, preventing it, dismissed with costs; unless the heir would take an issue; to which he is entitled. *Paine v. Hall*, 18 Ves. jun. 475.

26. *Resulting or implied trusts — common law presumption.*

At common law the use was intended to be in the feoffee or conusee; and is not averred; as it must be, if to the use of the feoffor, &c. 3 Ves. 666.

27. *Resulting or implied trusts — conveyance without consideration.*

Resulting trust for grantor in a deed, where the consideration is only five shillings. 1 Ves. 92.

28. *Resulting or implied trusts — where there is fraud.*

1. A trustee for the sale of estates for payment of debts, who purchased them himself, by taking undue advantage of the confidence reposed in him by the plaintiff, and previously to the completion of the contract, sold them at a highly advanced price; decreed to be a trustee as to the sums produced by such last-mentioned sale, for the original vendor. *Fox v. Mackreth*, 2 Cox, 320.; 2 B. C. C. 400.

2. A. tenant for life, with remainder to B. in tail, by fraud gets B.'s authority to levy a fine, and convey the land to a purchaser; he invests the purchase money in the funds, where it is clearly identified. A. is chargeable as a trustee to the amount, but B. has no lien on the particular fund. *Newcomb v. Burdon*, 2 Anst. 343.

29. *Resulting or implied trusts — renewal of a lease by a trustee.*

1. A renewal of a lease for lives taken by tenant for life, is a trust for the benefit of those in remainder. *Bowles v. Stewart*, 1 Sch. & Lef. 209.

2. Renewal of a lease taken by a trustee, shall enure to the benefit of *cestui que* trust. *Griffin v. Griffin*, 1 Sch. & Lef. 352.

3. A. purchases a leasehold estate devised to him for the use of the plaintiff, at an appraisement, and afterwards gets a new lease in his own name; also purchases part of the testator's share, declared to be a trustee, and accountable for the same to the plaintiff. *Killinck v. Flexney*, 4 B. C. C. 160.

4. Bequests of leaseholds for years determinable upon lives, for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease. The term expired in the life of the testator; who continued to hold, and pay half-a-year's rent before his death, as tenant by the year. Upon the general words, unrestrained, comprising the interest from year to year, and the intention upon the whole will, a subsequent lease obtained by the executrix, the widow, and tenant for life under the will, was held subject to the uses of the will; as the residue of the term at his death, if any, however short, would have been. *James v. Dean*, 11 Ves. 383.

5. Testator seised in fee of a moiety of an estate at L., and in possession of the other moiety as tenant from year to year, to St. J.'s college, (his lease from the college having expired,) gives to his wife *durante viduitate* "all that his messuage or tenement, with the farm and lands at L., and all his estate and interest therein, she paying the rent reserved to St. J.'s college," &c. The widow, after his death, obtains a new lease, and subsequently purchases the reversion of one, to whom it had been conveyed by the college, under

an act of parliament: held, 1st, that the renewed lease was taken subject to the trusts of the will, and those in remainder to contribute to the fine paid by the widow, in proportions, to be settled by the master; 2dly, that the purchase of the reversion, not from the college, but from the person to whom it had been conveyed by the college, was not, under the circumstances, to be taken subject to the trusts of the will. *Quære*, If the purchase had been from the college itself. *Randall v. Russell*, 3 Mer. 190.

6. A., possessed of a church lease for three lives, devised it to trustees for certain purposes till his son R. should attain twenty-one; and when his said son should attain that age, he directed his trustees to stand seised of it to the use of his said son and the heirs of his body. And by a codicil he directed, that if his son R. should die without issue, his son P. should inherit the estate in the same manner as R. was to inherit it. R. being *quasi* tenant in tail, if he surrendered this lease and take a new one to himself and his heirs for three new lives, there is no equity on behalf of P. to make R. or his devisees, trustees of the new lease for P. *Blake v. Blake*, 1 Cox, 266.

7. A tenant for life of a leasehold interest, the subject of settlement, surrendering the lease, and taking a new one for his own benefit, is a trustee for those entitled to estates in remainder under the settlement; and an accumulation of rent from the death of the tenant for life to the expiration of the new lease, belongs not to his devisee, but to the person next entitled under the settlement. *Eyre v. Dolphin*, 2 B. & B. 290. A mortgagee with notice of the settlement, cannot protect himself as a purchaser, or be distinguished from the tenant for life, the mortgagor. *Ibid*.

### 30. Resulting or implied trusts — purchase with trust-money.

1. One covenants to pay money to trustees to be laid out in real estate: he does not pay it, but purchases an estate: it is subject to the uses. *Sowden v. Sowden*, 1 B. C. C. 582.

2. Purchases were to be made with the trust money, but no time limited for making them: the husband made a purchase, but directed it not to be to the uses: it shall not be applied to them; but the personal estate is liable for the breach of contract. *Pitt v. Jackson*, 2 B. C. C. 51.

3. Account decreed against a trustee, who having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account, though no part of the trust-money actually laid out. *Wilkinson v. Stafford*, 1 Ves. 32.

4. Trustee for the purchase of land, died without personal assets, but having purchased land: the estates were held not liable to the trust; the circumstances affording no presumption, that they were purchased in execution of the trust. *Perry v. Phelps*, 4 Ves. 108.

5. Trustee for the purchase of land, died without personal assets; having purchased land. If the trust could have been executed during his life, which upon the construction was questionable, yet, no part of the trust fund being traced, and the circumstances affording no presumption that the purchases were made in execution of the trust, they were held not liable. *Parry v. Phelps*, 17 Ves. jun. 173.

6. Purchases held not a substitution for estates sold under a power in a settlement to sell and invest the money in estates to be settled to the same uses; there being no original trust, subsequent agreement, or representation relied on. Account decreed of the money produced by the sale, not of the present value. *Denton v. Davies*, 18 Ves. jun. 499.

### 31. Resulting or implied trusts — purchase in the name of a stranger.

1. Payment in name of A. with his money raises a trust: but it is an equity which may be rebutted by evidence. 1 Ves. 275.

2. Purchase in the name of another, not a child or wife, a trust for the person

person advancing the money; unless the presumption from that circumstance is repelled by evidence. *Rider v. Kidder*, 10 Ves. 360.

3. Purchase in the name of another, a trust for the party who pays the consideration: except by a parent in the name of his child; which is presumed an advancement. The presumption capable of being rebutted; but does not give way to slight circumstances. *Finch v. Finch*, 15 Ves. 43.

4. Resulting trust by a joint advance upon a purchase in the name of one. *Wray v. Steele*, 2 Ves. & Beam. 388.

5. Copyhold granted to A. and B., his wife, and C. his younger son, to take in succession for their lives, and the life of the survivors. The purchase-money was all paid by A. C. is not a trustee of his life-interest for A., but takes it beneficially as an advancement from his father. *Dyer v. Dyer*, 2 Cox, 92.

32. *Resulting or implied — an agreement raises a trust in equity.*

Agreement concerning any subject, though in form personal, raises a trust in equity against the party himself, volunteers, and claimants, with notice under him; except where the effect would be to restore the power of violating it; as, where tenant in tail has suffered a recovery contrary to his covenant. 1 Ves. 478.

33. *Resulting or implied — without the word "trust."*

Trust by implication without the word "trust." 1 Ves. & Beam. 273.

34. *Resulting or implied — that equity may raise a trust, there must be at least a meritorious consideration.*

Where necessary to come to equity to raise an interest by way of trust, there must be at least a meritorious consideration. 1 Ves. 55.

35. *Resulting or implied — general rules respecting words of confidence, direction, recommendation, or request, raising trusts.*

1. Words of desire or request, in order to amount to a devise, must have precise objects. *Harland v. Trigg*, 1 B. C. C. 142.

2. No trust upon words of request or recommendation, unless the objects and the subject are certain. 10 Ves. 536.

3. Words of request or desire in a will, will raise a trust where the property and the object are certain. *Pierson v. Garnet*, 2 B. C. C. 38.

4. Testator by shewing his desire, creates a trust, unless plain words or necessary implication, that there is to be a discretion to defeat it. 2 Ves. 335.

5. Words of recommendation not considered imperative, unless the objects and subject are certain. 7 Ves. 85.

6. Words of recommendation, or precatory, or expressing hope, &c.; if the objects and subject are certain, are imperative, and create a trust. 8 Ves. 380.

7. Recommendation in a will, imperative. 9 Ves. 546.

8. Effect of a directory clause in a will, raising an executory trust; which equity will mould to the purposes of the testator. 12 Ves. 234.

9. Precatory words held imperative, where the object and subject are certain. 18 Ves. jun. 41.

10. Word of confidence, if the object be certain, and the subject ascertained, in equity always create a trust. *Wright v. Atkyns*, Cooper, 115.

11. Words of entreaty in a bequest create a trust, although there be a power of selection amongst children or grandchildren. *Prevost v. Clarke*, 2 Mad. 458.

12. Power, which by the will the party is required to execute as a duty. He is a trustee for the exercise of it; and has no discretion, whether he will exercise it, or not. The court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those, for whose benefit he is to execute it. 8 Ves. 574.

36. *Resulting or implied—cases in which words of confidence, &c. were held to raise trusts.*

1. The words were, "I give the residue to P. P., his executors, administrators, and assigns; and it is my dying request to the said P. P., that if he shall die without issue living at his death, the said P. P. will dispose of what fortune he shall receive under the will, to and among the descendants of my late aunt A. C., in such manner and proportion as he shall think proper." This was held at the rolls, to raise a trust for the descendants of A. C. 2 B. C. C. 38. 226.

2. Trust raised under a recommendation by a will to a legatee, to dispose of her legacy among certain persons after her death. *Malim v. Keighly*, 2 Ves. 333. 529.

3. Trust raised by implication from letters, and a paper referred to by them, and in the handwriting of the party, though not signed or dated; and by operation of law from advances of money. *Forster v. Hale*, 3 Ves. 696.

4. Legacy to a father, the better to enable him to provide for his younger children: he consented to secure the capital; but was held entitled to the interest. *Brown v. Cassamajor*, 4 Ves. 498.

5. Devise to A. and her heirs for ever, "in the fullest confidence, that after her decease, she will devise the property to my family." A. has an estate for life only, with remainder in trust for the devisor's heir, as *persona designata*. *Wright v. Atkyns*, 17 Ves. jun. 255.

6. Devise to a nephew in fee, "not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts, and manner, as he shall think fit, in preference to any descendant on his own female line." Trust in the event described for, the sister's children. *Parsons v. Baker*, 18 Ves. jun. 476.

7. Devise and bequest of real and leasehold estates to the devisor's widow and her heirs, "in the fullest confidence that after her decease, she will devise the property for my family." Held, an estate for life only, with remainder in trust for the devisor's heir as *persona designata*. *Wright v. Atkyns*, 19 Ves. 299.

8. Devise, after a direction that all the debts shall be paid, amounts to a charge. 1 Ves. & Beam. 274.

9. Codicil requiring and entreating the executor, who was also residuary legatee, by will or deed to settle and secure 500*l.* to be paid at his decease, the testator declaring that he had omitted to express it in his will, not doubting that the executor will readily comply with the request; a trust, by way of legacy out of the assets; not a condition imposed independent of them. *Taylor v. George*, 2 Ves. & Beam. 378.

10. Testator expressing his will and desire, that one-third of the principal of his estate and effects be left entirely to the disposal of his wife among such of her relations as she may think proper, after the death of his sister; a trust for her next of kin at the time of her death, having made no disposition. *Birch v. Wade*, 3 Ves. & Beam. 198.

11. "I give to A. C. 500*l.*; and it is my will and desire that A. C. may dispose of the same amongst her relations, as she by will may think proper." Held, a trust for the relations of A. C., and the 500*l.* well bequeathed by the will of A. C. to her sister, and her sister's children, though made without reference to the will of the first testator. *Forbes v. Ball*, 3 Mer. 437.

37. *Resulting or implied—cases in which words of confidence, &c. were held not to raise trusts.*

1. Devise to testator's wife, "not doubting she will give what shall be left to my grandchildren;" not sufficient to raise a trust. *Wyrme v. Hawkins*. 1 B. C. C. 179.

2. The

2. The testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter A. out of the same, as long as she, his wife, should live, and at her decease to dispose of what shall be left among his children, in such manner as she shall judge most proper. There is not an absolute trust for the children after the death of the wife. *Pushman v. Fil-liter*, 3 Ves. 7.

3. Resulting trust for the heir; the only express devise being to convey to the devisor's son, from and after his age of thirty; which he did not attain; and no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty. *Nash v. Smith*, 17 Ves. jun. 29.

4. Devise to A. for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to the testatrix's mother's relations, is not mandatory as to the objects of the appointment. *Randal v. Hearle*, 1 Anst. 124.

38. *Resulting or implied trusts — from other words.*

1. The testator devised estates, which he had surrendered in several parishes "to my grandchildren:" not sufficient to raise a trust. *Wynne v. Hawkins*, 1 B. C. C. 179.

2. A woman, under a power, gave 300*l.* by a testamentary paper, to her husband; but so much as should be remaining at his death, to her brothers and sisters: the property is in the husband absolutely, the words not being sufficiently certain, as to the property, to raise a trust. *Sprange v. Barnard*, 3 B. C. C. 585.

3. Direction to trustees to cut trees in aid of testator's real and personal estate; held not a trust, but a mere power, upon the whole of the will. *Gower v. Eyre*, *Cooper*, 156.

39. *Resulting or implied — jurisdiction to convert the subject matter, as between the representatives of the different estates.*

The court will not interfere between representatives by changing the nature of property in execution of a trust, the object of which has failed. *Croft v. Sice*, 4 Ves. 60.

40. *Resulting or implied — rule at law as to when executors take the residue; when not.*

1. At law executors take any beneficial interest, unless contrary intent. 1 Ves. 67.

2. At law the appointment of an executor is a gift of every thing not disposed of. 7 Ves. 228.

41. *Resulting or implied — cases in which executors may, or were held to, take the residue.*

1. Executor takes all not meant to be disposed of; not all that is not disposed of, as in the instance of lapse; or being appointed executor in trust, and no object expressed. 18 Ves. jun. 254.

2. A legacy will not take away executor's right to the residue, unless inconsistent with the supposition that he is to take the whole. 2 Ves. 80.

3. Executor is entitled to an unbequeathed residue, unless there is a strong and violent presumption against him: a legacy to him affords such presumption, but parol evidence of the intention is admissible to rebut that, and is not to be confined to the time of making the will; but it must be to show the intention at that time only. *Clennell v. Lewthwaite*, 2 Ves. 465. 644.

4. Executor takes the residue, undisposed of, unless there is a strong and violent presumption against him. A legacy does afford that presumption, unless there are special circumstances. 4 Ves. 729.

5. Bequest to executor, by way of exception, is not sufficient to bar him from the residue undisposed of. 4 Ves. 731.

6. A legacy to an executor raises a presumption against his legal title to the residue; which he may rebut by evidence. 7 Ves. 229.



7. Legacies of a diamond ring to one, and of 200*l.* each to some of the others for mourning rings, as a token of affection, &c., would not make the executors trustees. *Sadler v. Turner*, 8 Ves. 617.

8. Bequest to executors in trust, but the trust not declared, or failing, is a trust for the next of kin. 14 Ves. 370.

9. Executors having unequal legacies, are not debarred from taking the undisposed residue. *Bowker v. Hunter*, 1 B. C. C. 328.

10. Where there are several executors, some of them having legacies, does not turn them into trustees. *Frewin v. Relfe*, 2 B. C. C. 220.

11. Executors, some having unequal, and others no legacies, shall take the undivided surplus equally. *Oliver v. Frewin*, 1 B. C. C. 590.

12. So, where some of the executors have unequal, and others no legacies. *Frewin v. Oliver*, *Ibid.*

13. Unequal legacies do not make executors trustees of the residue. 12 Ves. 309.

14. Executors, with unequal legacies, not trustees for the next of kin of the residue undisposed of. *Rawlings v. Jennings*, 13 Ves. 39.

15. A blank space between the last line of a will and the signature, raises no presumption of an intention to dispose of the residue against the legal right of the executor. *White v. Williams*, 3 Ves. & Beam. 72. Evidence offered by the next of kin, rejected: the presumption not being raised. *Ibid.*

16. Where a testator gives a legacy to A. by will, and afterwards, by codicil, appoints him his executor, *quære*, if the violent presumption to exclude him from the surplus, arises. But where the appointment follows the gift of the legacy, though at any interval, in the same instrument, the rule does apply, because the whole instrument must be construed to have effect at once from the moment of signature. *Langham v. Sanford*, 2 Mer. 21.

17. Appointing one a trustee as well as executor, shall not bar his taking an undisposed residue. *Battely v. Windle*, 2 B. C. C. 31.

18. Residue, unbequeathed, decreed to the executor, who was a legatee, upon the intention appearing in the will and by parol evidence. *Clenell v. Lewthwaite*, 2 Ves. 465. 644.

19. See TRUST, 22. 23.

20. A paper, proved as a will, reciting the marriage articles of the testator's daughter with A.; confirming those articles; and directing, that all the testator's property and effects shall be vested in A. preferable to any executor or administrator upon and after the testator's decease for all and every the purposes of his said agreement expressed or intended. The probate obtained by A. as executor, conclusive; and he was held not a trustee for the next of kin, upon parol evidence of declarations, subsequent to the will. *Walton v. Walton*, 14 Ves. 318.

21. Testator gave all his estate and effects to two persons, their heirs, executors, &c.; upon trust, in the first place, to pay, and charged and chargeable with all his debts and funeral expences, and the legacies after given. Those persons, whether they could claim in their individual characters, or not, being afterwards appointed executors, held entitled to the residue, undisposed of, (including a legacy to a charity, void by the stat. 9 Geo. 2. c. 36.) for their own benefit; against the claim of the next of kin: the whole property being personal. *Dawson v. Clark*, 15 Ves. 409.

22. Executor having general and specific legacies, not expressly for his care, &c., was not precluded from giving evidence of the intention, that he should have the residue beneficially, by an exception of plate out of furniture, bequeathed to him, and by a bequest to him of a contract for a leasehold house, subsequent to the appointment of executor; the effect being only, that he should not take the plate under that bequest of furniture; and a future disposition of the residue might have been contemplated. Upon the evidence, raising no direct intention in his favour, but mere inference

from equivocal declarations, with an intention to make an express residuary disposition, the executor declared a trustee of the residue for the next of kin. *Langham v. Sanford*, 17 Ves. jun. 435.

23. General devise and bequest to two persons, their heirs, executors, administrators, &c. upon trust, in the first place, to pay, and charged and chargeable with all the testator's debts and funeral expences, and the legacies after given. Those persons, being afterwards appointed executors, taking the absolute property, subject only to a charge, are entitled to the residue undisposed of, (including a legacy to a charity, void by statute 9 Geo. 2. c. 36.) for their own benefit, against the claim of the next of kin; the whole property being personal. Upon their right, as executors, *quære*. *Dawson v. Clark*, 18 Ves. jun. 247.

24. Unequal legacies to executors; the residue of the testator's personal estate being undisposed of, held, that they were entitled to such residue; the giving to them of unequal legacies, manifesting that it was the intention of testator that one should have more than the other. *Bowker v. Hunter*, Dick. 605.

25. Executors not trustees of the residue for the next of kin: two of them only having a legacy, expressed to be a testimony of regard; and immediately following a particular trust, imposed upon them. *Griffiths v. Hamilton*, 12 Ves. 298.

26. Executors entitled to the residue, undisposed of: no inference against their legal right by any interest under the will; one only having a legacy; and, though called trustees as to specific trusts, imposed upon them, distinct from their appointment, as executors, no clear intention to make them trustees of the residue; which requires a strong and violent, though not irresistible presumption. *Pratt v. Sladden*, 14 Ves. 193.

27. Surviving executor held entitled to the whole residue, where the executors had unequal legacies; and, though the testator had left his will unfinished, a blank being in the ordinary place for the residuary clause. *White v. Williams*, Cooper, 58.

42. *Resulting or implied* — cases in which executors may, or were held not to, take the residue.

1. Where it appears by express declaration or plain inference, that executors are not intended to take the residue beneficially, they are trustees. A legacy is only one mode of showing it; and if expressed to be for care and trouble, parol evidence cannot be received. 4 Ves. 22.

2. A specific legacy shall bar the wife, being executrix, from taking the undisposed surplus. *Martin v. Rebow*, 1 B. C. C. 154.

3. Executor having an annuity of 3*l.* for collecting rents, turns the executor into a trustee. *Lowson v. Copeland*, 2 B. C. C. 156.

4. Executrix having a life-estate, residue to be divided among next of kin. *Zouch v. Lambert*, 4 B. C. C. 326.

5. Executor having a legacy expressly for his care and trouble, is a trustee of the residue, undisposed of, for the next of kin. 12 Ves. 308.

6. Executor having a legacy expressly for his care, &c., cannot produce evidence of intention that he should take the residue beneficially. 17 Ves. jun. 443.

7. Executor with a legacy, or executors having equal legacies, trustees for the next of kin, of the residue undisposed of; as being part given, they cannot be intended to take the whole. 1 Ves. & Beam. 277.

8. Executors having equal legacies for their care and trouble; trustees of the residue for the next of kin. *Gibbs v. Rumsey*, 2 Ves. & Beam. 294.

9. Executors appointed expressly in trust, take the residue, undisposed of, not beneficially, but in trust for the next of kin. 14 Ves. 198.

10. Personal property bequeathed upon trust, which does not exhaust the whole, the executor not entitled to the surplus. 18 Ves. jun. 255.

11. Legacy

11. Legacy to an executor who is also a trustee, excludes him from the beneficial interests in the residue, unless expressly given. *Bull v. Kingston*, 1 Mer. 314.

12. The executor being by a legacy for his care, clearly a trustee of the residue for the next kin, the other must be a trustee also. *White v. Evans*, 4 Ves. 21.

13. Equal legacies to two executors, make them trustees of the residue undistributed of; notwithstanding inequality as to the real estate. So, though the legacies are given by a subsequent instrument. 6 Ves. 64.

14. Two of the executors being clearly trustees by the effect of directions annexed to their appointment, all the executors are trustees for the next of kin of the residue undistributed of. *Sadler v. Turner*, 8 Ves. 617.

15. One of the executors being a trustee of the residue, all are trustees. 13 Ves. 308.

16. A legacy to the next of kin, does not rebut the trust of the residue undistributed of. 12 Ves. 310.

17. In the ordinary case of lapse, the executor will not take, though the subject is not given to any one else. 18 Ves. jun. 255.

18. Where the residue is given to one who dies in the lifetime of the testator, whereby it is lapsed, the executors, though they have no legacies, are trustees for the next of kin. *Bennet v. Batchelor*, 3 B. C. C. 28.

19. Residuary legatee dying in life of testator, executors are trustees of residue for next of kin, though no legacy to them, except 10*l.* to one for mourning. *Bennet v. Batchelor*, 1 Ves. 63.

20. Real and personal estate being given to trustees to be sold and converted into personalty, the trustees to pay the produce to A. for life, without further disposition; the residue does not go to the trustees as undistributed of, (though made executors, and one of them had a legacy;) but is a resulting trust for the heir for so much as was the produce of the real estate, and as to the personal for the next of kin. *Robinson v. Taylor*, 2 B. C. C. 589.

21. Where the testatrix, by will, made the defendants trustees, and gave them legacies, and by codicil appointed them executors, and ordered them to be paid for journeys and expences; this shews an intention to make them executors in trust only. *Dean v. Dalton*, 2 B. C. C. 634.

22. Testator gives to defendant several benefits, in case she continues unmarried, but gives her a sum of money secured on a market, absolutely, and makes her executrix; the residue shall go to the next of kin. *Nourse v. Finch*, 4 B. C. C. 239.

23. Executor held a trustee for the next of kin of the residue undistributed of upon a legacy, against an argument upon the will opposing the presumption. *Abbott v. Abbott*, 6 Ves. 343.

24. Executor trustee of the surplus for next of kin, where both had legacies. *Kennedy v. Stainsby*, 1 Ves. 66. n.

25. Executors, having legacies of 20*l.* a-piece to buy mourning rings, and equal specific legacies, were upon the former held trustees of the undistributed of residue for the next of kin. *Nisbett v. Murray*, 5 Ves. 149.

26. Executors, though not having legacies, held trustees of the residue for the next of kin. *Urquhart v. King*, 7 Ves. 225.

27. Residue unbequeathed; codicil disposing of it, but with blanks for names, &c. not filled up, and unexecuted, found with the will; and contradictory evidence of intent: executor having a specific legacy trustee for the next of kin. *Nourse v. Finch*, 1 Ves. 344.

28. Residue unbequeathed; codicil disposing of it, but with blanks for names, &c. not filled up, and unexecuted, found with the will: and contradictory evidence of intent: executor having a specific legacy is a trustee for the next of kin. *Hornsby v. Finch*, 2 Ves. 78.

29. Executor having specific bequests by will and codicil, held a trustee for the next of kin as to the residue undistributed of. *Holford v. Wood*, 4 Ves. 76.

30. Testatrix

30. Testatrix by will, appointed an executor, and gave him a legacy : afterwards, by a testamentary paper, she directed the residue to be disposed of according to private instructions to him ; and, having by a subsequent codicil added another executor, died without giving any instructions : the executors are trustees of the residue for the next of kin. *Mordaunt v. Hussey*, 4 Ves. 117.

31. A partnership in London being appointed, not individually, but as a firm, executors and guardians claimed the residue undisposed of in exclusion of persons appointed attorneys, executors, and guardians, in Denmark, and others appointed attorneys and executors in India : decreed a trust for the next of kin ; and it was referred to the master to appoint a guardian. *De Mazer v. Pybus*, 4 Ves. 644.

32. Bequest of various particulars, comprising all the testator's personal estate, to his wife for life : then, after specifically disposing of and charging with legacies certain parts after the death of his wife, he appointed her executrix, she paying his debts and funeral expences : held a resulting trust as to the residue ; there being no farther disposition, and no evidence. *Dick. v. Lambert*, 4 Ves. 725.

33. Testatrix bequeathed to her sister B. for life ; declaring, that it was her absolute desire, that she bequeathed to those of her own family what she has power to dispose of, provided they behave well to her. B., by her will, declaring, she meant to make no disposition of her sister's property, it was held a trust for the next of kin of B. *Cruwys v. Colman*, 9 Ves. 319.

34. Testator, revoking all wills and codicils, declared that to be his codicil ; by which he directs, that the whole of his property, " shall pass by this my codicil according to law," save and except some legacies mentioned ; and appointed his brother sole executor ; requesting him to make such little arrangements as he has reason to think the testator should wish. The executor is a trustee for the next of kin and widow, according to the statute of distributions. *Lord Cranley v. Hale*, 14 Ves. 307.

35. General devise and bequest to executors, having equal legacies of stock for mourning, their heirs, executors, &c. on the especial trust to devote all, both real and personal, to debts, legacies, and annuities ; a resulting trust of the residue. *Southouse v. Bate*, 2 Ves. & Beam. 396.

36. Personal estate bequeathed to trustees upon trust. The executors, one of whom was also one of the trustees, not entitled beneficially, in default of the declaration of trust. *Milnes v. Slater*, 8 Ves. 295.

37. Executors trustees of the residue, undisposed of, for the next of kin by the effect of expressions in the will, importing a trust, and reversionary legacies upon the decease of two annuitants. Legacies to the next of kin do not exclude them. *Seley v. Wood*, 10 Ves. 71.

38. Residuary bequest cancelled by striking through with a pencil all the disposing part, leaving only the general description, with notes in pencil in the margin, indicating alteration, and a different disposition of certain articles ; a resulting trust for the next of kin. *Mence v. Mence*, 18 Ves. jun. 348.

39. Instances, where the residue being intended to be given from the executors, they cannot take it ; though the bequest does not take effect. 15 Ves. 414.

40. Testator gives to A. 10,000*l.*, together with the furniture in his houses, (plate only excepted,) and appoints him executor. Although the legacy constitutes a violent presumption in law, that the testator meant to exclude him from the beneficial interest in the residue, the exception out of the bequest of furniture is not a circumstance to confirm that presumption, so as to preclude him from giving parol evidence of intention in his power ; such evidence being also liable to be repelled by evidence of a contrary intention. The evidence not amounting to a direct intention in the executor's favour ; and being met by contrary evidence, tending to confirm the legal presumption

tion against him, he was declared by the master of the rolls to be a trustee of the residue for the next of kin; and decree affirmed upon appeal. N.B. In this case it was contended, that to rebut the presumption of law, it is enough to shew evidence of an intention to exclude the next of kin, without any evidence of direct intention in favour of the executor; but the lord chancellor's judgment seems to have left that point undecided. *Langham v. Sanford*, 2 Mer. 6.

41. Testator appoints A. and B. his executors, together with his wife, "hoping they will be so good, out of respect to his wife, to accept the office." And *as to what worldly property he had*, "I dispose of the same in manner following." The testator then gave several specific and pecuniary legacies, but made no disposition of the residue. Held, that the intention was clearly expressed by the clause requesting the executors to accept the office, followed by the declaration as to his disposal of his whole property, that the executors should not take the residue beneficially. *Giraud v. Hanbury*, 3 Mer. 150.

43. *Resulting or implied trust — mode in which executors, when entitled, take the residue.*

Executors take the residue, precisely in the same plight as residuary legatees would take it. 15 Ves. 417.

44. *Resulting or implied — where there is no next of kin, executors, themselves excluded, are trustees for the crown.*

Executors having legacies given to them, and there being no next of kin to take the undivided surplus, are trustees for the crown. *Middleton v. Spicer*, 1 B. C. C. 201.

45. *Resulting or implied trusts — analogy or difference between the rules at law and in equity, as to real estate resulting under a devise to the heir.*

Whatever is not disposed of in equity results to the heir, as at law. 10 Ves. 280.

46. *Resulting or implied trusts — cases, under devises, in which real estate was held to result to the heir.*

1. Real estate given to an executor in trust to sell, and to make one mass with the personal estate, and the residue to be divided amongst particular legatees, in proportion to their legacies; two of the legatees died in the testator's lifetime; such proportion as they would thereby have been entitled to, had they lived, which arose from the real estate; held, on appeal, to result for the benefit of the heir at law. *Akeroid v. Smithson*, Dick. 566.

2. E. C. conveyed several sums of money to trustees, to be laid out in land, to be settled to the use of himself for life, remainder as to the lands, to be purchased with different sums, to several of the same uses, but with different ultimate remainders: by will, he gave leasehold estates and a mortgage to secure annuities; the surplus interest, or the rents of the lands to be purchased to be paid to R. C. for life, and to be settled in the same manner as his other estates. It being uncertain which of the limitations the devise was to follow, it is, as to the ultimate remainder (the intermediate uses being spent,) undisposed of, and goes to the heir at law as a resulting trust. *Leslie v. Duke of Devonshire*, 2 B. C. C. 187.

3. Devise of real and personal in trust: personal alone being sufficient, and the residue undisposed of, there is a resulting trust as to the real for the heir at law. *Robinson v. Taylor*, 1 Ves. 44.

4. Devise upon a future contingency; and no intermediate disposition of the rents and profits: a resulting trust for the heir. 3 Ves. 725.

5. Entitled by way of resulting trust until the determination of an event, upon which future contingent estates were to arise, restrained from cutting timber. *Stansfield v. Habergham*, 10 Ves. 273.

6. Conversion of real estate into personal by will for a particular purpose, which failed : a resulting trust for the heir, against the next of kin. *Williams v. Coade*, 10 Ves. 500.

7. Devise of real estate to be sold. The object being a provision for legacies, not an absolute conversion to all intents, a resulting trust for the heir at law as to the surplus ; which was not affected by the appointment of " residuary executor." *Berry v. Usher*, 11 Ves. 87.

8. Resulting trust for the heir : a special disposition of money to be raised by sale of the estate, failing by lapse. 12 Ves. 416.

9. General devise and bequest upon trusts, not sufficient to exhaust the whole property ; a resulting trust for the heir and next of kin. 15 Ves. 416.

10. Devise and bequest upon trust ; the devisee cannot take beneficially the real estate not exhausted ; but a trust results for the heir ; nor can the executor, whether himself, the trustee, or another, take beneficially the surplus of the personal property. 18 Ves. jun. 255.

11. Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one ; upon his death under that age, a resulting trust for the respective representatives. *Chambers v. Brailsford*, 18 Ves. jun. 368.

12. Devise, when the devisee attains twenty-one, a resulting trust for the heir until that period ; and by the previous death of the devisee, the remainder accelerated. *Chambers v. Brailsford*, *Ibid*.

13. Where a term was created, and no trusts of it declared, but the estates devised to tenant for life, with remainders over, the court decided that there was no resulting trust as to the term, but that it attended the inheritance. *Sidney v. Miller*, *Cooper*, 206.

14. When in a will, the intention of the testator, being to provide an auxiliary fund for legacies, and not a complete conversion out and out ; the residue of the real estate, after making good the deficiency of the personal in payment of legacies, a resulting trust for the heir at law : notwithstanding a legacy given him, and the testator " appointed and devised residuary legatees." *Kellett v. Kellett*, 1 Ball & Beatty, 533.

15. Devise after payment of debts, legacies, &c. of specific freehold and leasehold estates, to A., subject to incumbrances ; and of all other his freehold and leasehold estates, together with all his personal estates, to trustees, to sell ; and out of the money, in the first place, to pay their expences in execution of the will or trusts ; and, without farther disposition, appointing the trustees executors. A resulting trust as to the produce of the real estate for the heir at law. *Hill v. Cock*, 1 Ves. & Beam. 173.

16. Devise of freehold estate, in trust, to sell and apply the money towards payment of the legacies ; the residue of the personal estate, after payment of debts, legacies, &c. upon trust to convert all the said residue of his personal estate into ready money, to be laid out in freehold property, to be settled. The personal estate leaving a residue beyond the charges, the real estate a resulting trust for the heir at law ; and charged with the legacies, not primarily, but only as an auxiliary fund to the personal estate. *Maugham v. Mason*, 1 Ves. & Beam. 410.

17. Money produced by the sale of real estate, bequeathed for charitable purposes, a resulting trust for the heir. *Gibbs v. Rumsey*, 2 Ves. & Beam. 294.

47. *Resulting or implied trusts — cases under devises, in which real estate may, or was held not to, result to the heir.*

1. If an estate is devised, charged with legacies, which fail, the devisee, and not the heir, shall have the benefit of it. 4 Ves. 811.

2. In case of lapse of real estate the heir takes. 8 Ves. 25.

3. No resulting trust for an heir taking a benefit in the will ; but subject to circumstances. 1 Ves. & Beam. 278.

4. Construction of a devise in fee, subject and chargeable with annuities, upon the intention collected from the whole will, a beneficial devise, and not a trust resulting to the heir as to the surplus beyond the annuities. *King v. Dennison*, 1 Ves. & Beam. 260.

5. Residuary bequest to trustees and executors described both by their character and names, to be disposed of to such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion shall think proper and expedient; an absolute interest to them beneficially, or an absolute power of appointment; excluding the next of kin, and the heir, as to the produce of real estate. *Gibbs v. Rumsey*, 2 Ves. & Beam. 294.

48. *Resulting or implied — for the heir on a conversion.*

Question of a resulting trust only arises between the real and personal representative of the testator, not between the representatives of a party taking under the will. *Ashby v. Palmer*, 1 Mer. 296.

49. *Resulting or implied — for the heir of a party taking under a will, converting property.*

*Ibid.*

50. *Resulting or implied trusts — on a seisin ex parte maternā.*

Conveyance by one seized *ex parte maternā*: the use results in the same manner: so, if expressly limited to him. 3 Ves. 667.

51. *Resulting or implied — general rule as to the person for whom, &c.*

A trust cannot result by operation of law, but for those for whom it might have been declared by the party creating it. *Burgess v. Wheate*, 1 Eden, 207.

52. *Resulting or implied trusts — where the trust cannot take effect.*

A conveyance of land, to raise a sum of money, and pay the interest to A. until marriage, then to pay her the principal; A. never marries: this is a resulting trust to the settlor, but in his hands is personalty, and passes by the bequest of the residue in his will. *Hewit v. Wright*, 1 B. C. C. 86.

53. *Resulting or implied — in the case of a legacy given to erect a charity.*

Where legacy is given only to erect a charity, legatee is a trustee at all events; and can have no pretensions for himself. 1 Ves. 475.

54. *Resulting or implied trusts — in the case of a conditional legacy lapsed.*

Appointment of a sum of money by will; the appointee to pay an annuity, and give bond for the payment. The appointment lapsing by the death of the appointee in the life of the testator, the annuity a trust by way of legacy, not a condition. 2 Ves. & Beam. 381.

55. *Resulting or implied trusts — a term created for payment of a stranger's debt, which he himself pays.*

The testator gave to trustees for terms, remainder to A. and B. for life: the trusts of the terms were to pay scheduled debts of A. and B., and to make them an allowance; the debts being stated to be paid, a trust results to A. and B.: a demurrer by the trustees against creditors, as having no interest, was therefore overruled. *Davidson v. Foley*, 2 B. C. C. 203.

56. *Resulting or implied trusts — to the lord in escheat.*

No trust can result to the lord; as a trust can only result in lieu of the inheritance conveyed without consideration, and here none is conveyed by the lord. *Burgess v. Wheate*, 1 Eden, 245.

57. *Resulting or implied trusts — presumption against intending an infant to be a trustee.*

Presumption against intending an infant to be a trustee. 1 Ves. & Beam. 278.

## 2. General rules for the construction of instruments creating trusts.

### 1. *The intention shall be the governing principle.*

The intention of a person creating a trust chiefly governs, where not against good policy. *Burgess v. Wheate*, 1 Eden, 195.

### 2. *The limitations of trusts are to be construed the same as of legal estates.*

The same construction ought to be put upon words of limitation in cases of trusts and of legal estates, except where the limitations are imperfect, and something is left to be done by the trustees. Hence, a devise of a trust was held an estate tail, from the apparent intent of the testator, and the general words of the will, though there was a limitation to trustees to preserve contingent remainders — a reference to issue male living at the time of the decease of the devisee — a restriction of failure of issue male to the lifetime of persons *in esse* — and a limitation in fee annexed to the words “heirs of the body.” *Wright v. Pearson*, 1 Eden, 119.; *Amb.* 358.

## 3. Of the construction of deeds creating trusts.

### 1. *Trusts to raise portions.*

A trust created to raise 36,000*l.* for the portions of three daughters, A., L., and C., to be paid amongst them at such time and times, and in such shares and proportions as M. should appoint by deed or will; and in default of appointment, to be paid to and amongst said A., L., and C. in equal shares on their respectively attaining twenty-one or marriage; provided that if any of said daughters should die under twenty-one or unmarried, 24,000*l.* only to be raised for the surviving daughters, to be paid to and amongst them at such time or times, and in such shares as M. should appoint; and if no appointment, then to be paid equally between them at twenty-one or marriage, and if two die before twenty-one and unmarried, then a like proviso for raising only 12,000*l.* L. attains twenty-one, and dies. The whole 36,000*l.* is to be raised; but M. has no power to appoint the share of L.: it goes equally between the survivors and the personal representatives of L. An appointment as to the remaining 24,000*l.* between A. and C. equally, is good. *Vane v. Lord Dungannon*, 2 Sch. & Lef. 118.

### 2. *The word “profits.”*

Term created for payment of debts, which trustees were to raise by rents and *profits*, or by mortgage or sale. Profit means *general profits*. *Bell v. Maidman*, Dick. 607.

### 3. *In the case of terms to raise by rents and profits: trustees may raise by sale or mortgage.*

Terms to raise by rents and profits: trustees may raise by sale or mortgage. 1 Ves. 234.

### 4. *A case in which a debt was held not included in a general trust for payment of debts.*

A. created a trust for the payment of incumbrances out of the rents and profits of his real estate, part of which being subject to the arrears of a rent-charge to the crown, was discharged by a privy seal, provided 5000*l.* be paid to B. and C., for securing which, a term was created by act of parliament. Held, that this was a debt affecting the estate, and not within the trusts of the deed, and therefore that the tenants for life must keep down the interest. *Earl of Peterborough v. Mordaunt*, 1 Eden, 474.

### 5. *A case in which the trust was for payment of the debts of a tenant for life.*

1. Where a term for years was by settlement vested in trustees, to raise by sale or mortgage, money to discharge the debts of the tenant for life, who soon after, with his own money, pays the debts, without taking assignments of the securities; a mortgage of this term, by the trustees; several years



years after, by the direction of the tenant for life, was held to be a due execution of the trust. *Redington v. Redington*, 1 Ball & Beatty, 131.

2. The tenant for life, has, during his whole life, a right to call for an execution of the trust, and to stand in the place of creditors. *Ibid.*

3. After an express declaration of the tenant for life to charge, it cannot, from debts being paid by him; from no assignment of the securities being taken; or from length of time, be presumed, he intended to exonerate the estate. *Ibid.*

#### 4. Of the construction of wills creating trusts.

1. *A case in which the limitation of a trust was held to be in tail.*

*Vide* 1 Eden, 119.

2. *In the case of terms to raise by rents and profits: trustees may raise by sale or mortgage.*

*Vide* 1 Ves. 234.

3. *A trust fund to purchase cannot be applied in repairs or improvements.*

A trust fund created by will to be laid out in the purchase of lands, no part of it shall be laid out in repairs or improvements of the purchased estates. *Bostock v. Blakeney*, 2 B. C. C. 653.

4. *A case in which a discretion given to trustees did not authorise them to change the limitations of a settlement.*

Direction to trustees to correct any defect or incorrect expression in the will, and to form the settlement from what appears to them to be the testator's real meaning, does not authorize them to change the limitations. *Stanley v. Stanley*, 16 Ves. 491.

#### 5. In the case of a power to cut timber under sanction of trustees.

Power contained in a will, for the devisees for life, when in possession, to cut down timber, as four trustees, or the survivors or survivor of them, should assign, allow of, or direct: all the four trustees being dead, held that the court would execute the trust by referring it to the master, to see what timber was fit to be cut down from time to time. *Hewett v. Hewett*, 2 Eden, 332.; *Amb.* 508.

#### 5. Of the rules by which trust estates of freehold are governed.

##### 1. Of the analogy or difference between uses and trusts.

1. The analogy between uses and trusts must be confined to those cases where they are considered as distinct from the legal estate; in other cases, they both fall within the rules of law. *Burgess v. Wheate*, 1 Eden 195.

2. The opposition between uses and trusts, does not consist in any material difference in the essence of the things themselves, but in the difference of the practice of the court of chancery. *Ibid.* 217.

3. The forum where they are adjudged, is the only difference between trusts and legal estates. *Ibid.* 223.

4. The difference between uses and trusts does not consist in the principles and rules applied to them, but in the extent of the application of those principles and rules. *Ibid.* 248.

5. Analogy between legal and equitable estates. 3 Ves. 127.

##### 2. Of the analogy or difference between executing trusts by will and by deed.

*Vide* 12 Ves. 230.

##### 3. Of the analogy or difference between a direct trust and a charge.

Distinction between a direct trust and a charge; though enforced in equity much in the same way. 1 Ves. & Beam. 276.

##### 4. A trust is equivalent to the legal ownership.

1. *Cestui que* trust is in the eye of equity actually and absolutely seized of the

the freehold; and therefore the legal consequences of an actual seisin of a freehold, shall follow for the benefit of one in the post. *Burgess v. Wheate*, 1 Eden, 226.

2. It is true, that courts of equity have considered trusts as between the trustee, *cestui que* trust, and those claiming under them, as imitating the possession. But it is too much to say, that because trusts are so considered, therefore the creation and instrument of trust is a nullity, and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it. *Ibid.* 250.

5. *Trusts are devisable — by what words.*

1. By a devise in general terms a trust estate will pass; unless an intention to the contrary can be inferred from expressions in the will, or purposes, or objects of the testator. *Lord Braybrooke v. Inskip*, 8 Ves. 417.

2. The rule, that a trust estate will pass by a general devise, confined by objects, appearing upon the will, inconsistent with that intention. *Ex parte Morgan*, 10 Ves. 101.

6. *A trust of accumulation, void for excess only.*

Trust of rents of leasehold estate, to accumulate and be laid out in freehold estates, to be settled; ceased at the age of twenty-one of the first tenant in tail. *Phipps v. Kelynge*, 2 Ves. & Beam. 57.

7. *Relief to those in the post.*

That part of the old law of uses which did not allow any relief to be given for or against estates in the post, does not now bind by its authority in the case of trusts. *Burgess v. Wheate*, 1 Eden, 217.

6. Of the rules by which trust-terms are governed.

1. *Assignment to a purchaser of trust-terms created for payment of debts.*

Devise to trustees and their heirs, to the use of other trustees for one thousand years upon trust, by sale, lease, mortgage, or otherwise, to raise and pay such sum as the personal estate should fall short of the debts; and after raising and paying thereof, then in strict settlement. A bill being filed by creditors, the personal estate proving deficient, and the trustees of the inheritance having contracted to sell under a power, upon their supplemental bill, praying the benefit of the accounts against the surviving trustee of the term, though no party to the original cause, that the debts may be paid out of the purchase money, and that on payment the term may be assigned to the purchasers, it was so decreed; the defendants not objecting. *Fletcher v. Hoghton*, 5 Ves. 550.

2. *Of letting a tenant for life, subject to a trust-term, into possession.*

Tenant for life, subject to a trust-term, not let into possession before account; nor till the trust is executed, unless on paying into court a sum sufficient to answer it; or, where the best way of performing the trust appears to be by letting him into possession. *Blake v. Bunbury*, 1 Ves. 194.

3. *Void for excess only.*

Trust of a term during the respective minorities of the respective tenants for life in tail in possession, &c. to receive and lay out the rents, &c. in stock, to accumulate, for such persons as should upon the expiration of such minorities, or death of the minors, be tenants in possession, or entitled to the rents, &c. and of the age of twenty-one, too remote; and, being void in its creation, is incapable of modification, so as to establish it in the extent to which it might have been originally carried. *Lord Southampton v. Marquis of Hertford*, 2 Ves. & Beam. 54.

## 7. Of the rules by which trust-estates in personality are governed.

*A trust is equivalent to the legal ownership.*

Where the trustee sells out stock improperly, the *cestui que* trust may elect whether he will have the stock replaced, or the produce of it. 2 B. C. C. 653.

## 8. Of the estate and duty of trustees.

1. *Estate of trustees.*

1. Trustee can transmit no benefit; his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust. *Burgess v. Wheate*, 1 Eden, 227.

2. The transmutation of possession to a trustee conveys to him the legal burthens, and invests him with the legal privileges. *Ibid.* 251.

2. *Their acts shall not prejudice the trust — general rule.*

No act of the trustee can vary the right of the *cestui que* trust: but his situation may; as where the *cestui que* trust is his heir, the right to dower depends upon which dies first. 3 Ves. 341.

3. *Their acts shall not prejudice the trust — disseisin, abatement, or intrusion.*

Upon a bare trust, no estate can be gained by disseisin, abatement, or intrusion, whilst the trust continues. *Hopkins v. Hopkins*, 2 Mer. 358.

4. *Their acts shall not prejudice the trust — eviction.*

Equity will not permit a trustee to evict his *cestui que* trust. 1 B. & R. 445.

5. *Their acts shall not prejudice the trust — failure.*

In general cases, trusts will not fail by the failure of the trustee. 6 Ves. 663.

6. *Their acts shall not prejudice the trust — fine, by a purchaser with notice.*

One taking from a trustee, with notice, levies a fine to strengthen his estate; this shall not bar the *cestui que* trust. 1 Sch. & Lef. 379.

7. *Their acts shall not prejudice the trust — fine and non-claim, to a person having notice.*

Fine and non-claim by a trustee to a person having notice of the trust, shall not bar the *cestui que* trust: it is merely a conveyance. *Kennedy v. Daly*, 1 Sch. & Lef. 355. 379.

8. *Their acts shall not prejudice the trust — laches.*

1. So long as a trust subsists, the right of a *cestui que* trust cannot be barred by the length of time during which he has been out of possession. *Cholmondeley v. Clinton*, 2 Mer. 361.

2. Trust not disappointed by the failure or negligence of the trustees. 16 Ves. 26.

3. Effect of length of time in equity, by analogy to the statutes of limitation; though not directly affecting trusts. 17 Ves. jun. 96.

4. *Cestui que* trust, is barred by length of time operating against his trustee. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629.

9. *Their acts shall not prejudice the trust — mortgage by their purchaser.*

Devise for payment of debts; the devisees convey to A. B. for the purposes of the trust, who mortgages to several persons, with notice. These mortgages are good. *Hardwick v. Mynd*, 1 Anst. 109.

10. *Their acts shall not prejudice the trust — miscellaneous.*

The assignee of the trustees was devisee in fee of other estates under the

same

same will; he conveyed them to one of the trustees, to secure a debt due to him from the devisor. The specialty creditors shall take, not subject to this incumbrance, as the whole is a fraud upon them. *Hardwick v. Mynd*, 1 Anst. 113.

11. *A direct trust shall not be barred by lapse of time.*

Though no time bars a direct trust, as between *cestui que* trust and trustee, a constructive trust barred by long acquiescence; though the true state of the fact may be easily ascertained, and the ground of original relief was clear, and even arising out of fraud. 17 Ves. jun. 97.

12. *A constructive trust may be barred by lapse of time.*

*Ibid.*

13. *Trustees can derive no benefit from the trust.*

1. The court views trustees with jealousy: and in case of two estates, one in trust, the other belonging to the trustee, will not permit him to act for his own or infant's benefit, as he pleases. 1 Ves. 43.

2. Trustee to appoint, cannot appropriate part of the sum appointed to himself; but may recall it into the original fund. *Boyle v. Bishop of Peterborough*, 1 Ves. 300.

3. If a trust is imposed, the trustee cannot take beneficially; though the trust may be too indefinite for execution. 2 Ves. & Beam. 297.

4. A trustee cannot, by delaying a conveyance, create a benefit for himself. *Burgess v. Wheate*, 1 Eden, 238.

5. The rule, that "a trustee shall gain no benefit for himself," shall not entitle a *cestui que* trust to compel a party, who knew nothing of the trust, to execute an agreement made with the trustee, and on the credit of his solvency. *O'Herliby v. Hedges*, 1 Sch. & Lef. 123. 131.

6. Devise of a copyhold (duly surrendered) to A., and his heirs in trust for B. and his heirs: upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him; and his bill was dismissed without costs. *Williams v. Lord Lonsdale*, 3 Ves. 752.

14. *Of the rights of a trustee, on the death of the cestui que trust without heirs.*

Vide 3 Ves. 752.

15. *Of the rights of a trustee, not having acted, to a legacy for his trouble.*

Trustee dying nineteen months after the testatrix, without having acted, held entitled to a legacy, given as a token of regard, and a recompence for his trouble: no refusal or neglect to act, where necessary, appearing. *Brydges v. Wootton*, 1 Ves. & Beam. 134.

16. *Trustees are bound to reimburse the cestui que trust — general rules.*

1. Trustees and their representatives are chargeable in equity, for a breach of trust, whether they derive benefit from it or not. 1 Sch. & Lef. 272.

2. Trustees are mere stake-holders; and cannot be affected with more than they actually received, without wilful default. *Pybus v. Smith*, 1 Ves. 190.

3. Trustee not liable for a loss arising from an accident, without any fault or remissness on his part. *Knight v. Earl of Plymouth*, Dick. 120.

17. *They are bound to reimburse the cestui que trust — lending money on personal security.*

1. Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust; and the legatee, and afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed. *Harden v. Parsons*, 1 Eden, 145.

2. Trustees taking upon themselves to lend an infant's money on a private security,

security, must in all cases be responsible in case of the failure of the security. *Holmes v. Dring*, 2 Cox, 1.

18. *They are bound to reimburse the cestui que trust — for taking a defective security.*

Trustees having laid out the fund upon a bad security, obtained from the debtor under circumstances unfavourable and to the prejudice of other creditors, a charge on his estate under a power: their bill to enforce the charge against the son, tenant in tail under the marriage settlement, was dismissed with costs. *Bradbury v. Hunter*, 3 Ves. 187. 260.

19. *Trustees are bound to reimburse the cestui que trust — on the fund of investment failing.*

Trustee not answerable for having applied the trust property even to what turned out a losing adventure, if without fraud or negligence. 1 Ves. 41.

20. *Trustees are bound to reimburse the cestui que trust — on the fund of investment sinking in value.*

If a trustee lay out trust-money in a fund, which the court does not adopt, and such fund afterwards sink in its value; this court, though there were no *mala fides*, will throw the loss upon the trustee; otherwise, if laid out in the fund which the court adopts. *Hancom v. Allen*, Dick. 498.

21. *Trustees are bound to reimburse the cestui que trust — misrepresenting an investment.*

Trustees under a misrepresentation, that the fund was invested in stock charged with interest at 5 per cent. upon the same principle as if they had sold out stock, and used the money, viz. an option to the *cestui que trust* to have the actual profit, or 5 per cent. *Bate v. Scales*, 12 Ves. 402.

22. *Trustees are bound to reimburse the cestui que trust — failure of agent.*

Trustee not charged with a loss by the failure of the banker to the agent, in whose hands the money was deposited pending a transaction for the change of a trustee. *Adams v. Claxton*, 6 Ves. 226.

23. *Trustees are bound to reimburse the cestui que trust — laches.*

Trustees charged with a loss occasioned by their negligence, though without any corrupt motive. The costs followed of course. *Caffrey v. Darby*, 6 Ves. 488.

24. *Trustees are bound to reimburse the cestui que trust — for neglecting to renew a lease.*

1. Settlement of a renewable lease in trust out of the rents and profits to pay the fines and charges of renewing; and, subject thereto, for husband and wife successively for life; remainder to the first son at twenty-one. The trustees, not having renewed in the lives of the tenants for life, answerable as for a breach of trust, though not deriving any benefit from it; liable, therefore, with the assets of the tenants for life, with reference to their enjoyment, and the occupying tenant, having purchased the husband's life-interest, to procure a renewal for the son: the trustees indemnified against the expence, by an application of the assets of the tenants for life in the first instance; but the occupying tenant not charged in their favour. *Lord Montfort v. Lord Cadogan*, 17 Ves. jun. 485.

2. Settlement of a renewable lease in trust out of the rents and profits to pay the charges of renewal, and subject thereto for husband and wife successively for life, remainder to the first son at twenty-one. The trustees having neglected to renew, are answerable as for a breach of trust, and liable to pay to the son the amount of what he had laid out in procuring a renewal; to be repaid to them out of the estates of the tenants for life, with reference, not to the duration of their respective possession, but to the proportions

portions in which they would actually have suffered a diminution of rent in case the rents had been properly applied towards the renewals. The assignee of one of the tenants for life, with notice of the settlement, neither primarily liable, nor to be called upon by the trustees to contribute towards their repayment; but only in case of all the other estates proving insufficient, to make good to the son the deficiency. *Montfort v. Cadogan*, 2 Mer. 3.

25. Trustees are bound to reimburse the cestui que trust — on selling stock without authority.

1. Trustee mistaking his power, sold stock without authority; decreed to replace it immediately; if at a less price, to invest the surplus in the same stock to the same uses. *Earl Powlet v. Herbert*, 1 Ves. 297.

2. Trustee of stock sells it: the *cestui que* trust has an option to have the stock or the produce with interest. 4 Ves. 497.

3. Executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money; the *cestuis que* trust have an option to have the stock replaced, or the money produced by the sales, with interest at 5 *per cent.* or more, if more has been made by it, and the costs occasioned by his misconduct. *Pocock v. Reddington*, 5 Ves. 794.

4. Settlement upon marriage, of stock, the property of the wife, in trust from time to time to receive the dividends and pay them into the hands of the wife for her sole and separate use; her receipt to be a discharge: after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The trustees with the privity of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity: he died insolvent. Upon the bill of the widow and children, the fund being replaced by the trustees, was transferred to the accountant-general upon the trusts of the settlement; the trustees to pay the dividends to the widow from the death of the husband, with costs. *Whistler v. Newman*. 4 Ves. 129.

26. *Trustees are bound to reimburse the cestui que trust — on engaging an infant's name in an adventure, but afterwards refusing to engage the fund.*

Trustee not answerable for having engaged the infant's name in an adventure, if afraid of the consequences he does not engage the property. *Contra*, Morton Eden's case in the house of lords, 1 Ves. 42.

**27. Trustees are bound to reimburse the cestui que trusts—from acting under a forged power.**

A trustee, whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust-money; for if forged, it is, in consideration of law and equity a nullity, and the right remains as before. *Ashby v. Blackwell*, 2 Eden, 302.; *Amb.* 503.

28. Trustees are bound to reimburse the cestui que trust—from enabling tenant for life to mortgage, by delivering the title deeds to him.

Bill to charge a trustee, as having by delivering the title deeds to the tenant for life enabled him to make a mortgage of a settled estate as tenant in fee, dismissed; the fraudulent purpose of enabling him to mortgage resting upon the evidence of a single witness, and being positively denied by the answer; as far as the allegations of the bill gave an opportunity of answering: but without costs, on the ground of negligence; and without prejudice to an action; and with an option to the plaintiff to take an issue. *Evans v. Bicknell*, 6 Ves. 174.

29. Trustees are bound to reimburse the cestui que trust — on joining with remainder-man to evict cestui que trust.

**Trustees, who joined with remainder-man to eject *cestui que* trust for life,**

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**not**

not excused from making good the whole rent reserved by subsequent accidental deficiencies. *Kaye v. Powell*, 1 Ves. 408.

30. *Trustees are bound to reimburse the cestui que trust — analogy in cases of breach of trust to the statute of limitation.*

No analogy in cases of breach of trust to the statute of limitation. *Attorney-general v. Brewers' Company*, 1 Mer. 495.

31. *Trustees are bound to reimburse the cestui que trust — liability of one for another — distinction between trustees and executors.*

Distinction between trustees and executors, in favour of the former, where one, who has not received the money, has joined in the receipt, approved by Lord Eldon. 11 Ves. 324.

32. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a receipt.*

A trustee charged, though he did not receive the money, under the circumstances; having joined in the receipt: the sale unnecessary; and permitting his co-trustee to keep and act with the money contrary to the trust. Not charged in respect of the interest of one of the *cestuis que trust*, having notice of the breach of trust, and acquiescing. *Brice v. Stokes*, 11 Ves. 319.

33. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a receipt, and reconveyance of a mortgaged estate.*

Joining in a receipt, and reconveyance of a mortgaged estate, liable though the other receive the whole money. *Scurfield v. Howes*, 3 B. C. C. 90.

34. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a sale.*

One of two executors and trustees, not having acted, otherwise than by joining with his co-executor and trustee in the sale of stock, under a representation, that the sale was necessary for payment of debts, which it was not; the produce having been received by the latter, and the greater part applied by him to his own private purposes. Held chargeable for the amount, except so far as any part was applied to the trust purposes, together with interest at four *per cent.*, notwithstanding the parties, beneficially interested, consented to, and approved of, the sale under a similar misrepresentation. *Underwood v. Stevens*, 1 Mer. 712.

35. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by joining in a transfer and sale.*

Trustees and executors charged with a loss, occasioned by a breach of trust, by joining in a transfer and sale, and lending the produce to a partnership, in which one of them was engaged; the others not receiving any benefit. Decree against all, to account for the funds. *French v. Hobson*, 9 Ves. 103.

36. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by suffering the other to have trust-money under a note of hand.*

One trustee suffering the other to have trust-money under a note of hand; held liable. *Keble v. Thompson*, 3 B. C. C. 112.

37. *Trustees are bound to reimburse the cestui que trust — liability of one for another, by concealing his breach of trust.*

Concealing the breach of trust of his co-trustee, shall be equally liable with him for the money, to the *cestui que trust*. *Boardman v. Mosman*, 1 B. C. C. 68.

38. *Effect of a clause of indemnity.*

1. The indemnity of the trustees, under a deed of trust, does not give the persons employed by them a right as creditors against the trust-fund. *Worrall v. Harford*, 8 Ves. 4.

2. Construction of a clause, giving trustees liberty to forbear enforcing payment; that it was for their indemnity; as if with a view to insolvency, it might amount to fraud. 1 Ves. & Beam. 379.

39. *Where purchasers are bound to see trusts performed.*

All persons coming into possession of property bound by a trust, with notice of the trust, are chargeable in equity as trustees. 1 Sch. & Lef. 262.

40. *Trustee charged for a misrepresentation to a purchaser.*

Trustee charged in respect of a misrepresentation to a purchaser; having notice; and alleging only, that he did not recollect the fact. This is a more proper subject for equity than law: at least, there is a concurrent jurisdiction. *Burrowes v. Lock*, 10 Ves. 470.

41. *Trustees seldom permitted to purchase the trust estate — general rules.*

1. Principle of the rule against purchases of the trust property by trustees, assignees, &c. 8 Ves. 345.

2. General rule upon a purchase of trust property by the trustees on their own account, that at the option of the *cestui que* trust it shall be re-sold; being up at the price, at which the trustees purchased: who, if there is no advance, shall be held to their purchase. *Lister v. Lister*, 6 Ves. 631.

3. To set aside a purchase by a trustee of the trust property, it is not necessary to show, that he has made an advantage. Principle of the general rule. 8 Ves. 348.

4. Not necessary to undo a sale to a trustee of the trust property, to show he has made an advantage. Ground of the rule against such purchases; unless the character of trustee is previously shaken off. 10 Ves. 193.

5. Principle of the rule, upon which purchases by trustees of the trust property are set aside. 10 Ves. 385.

6. Ground of the doctrine, as to a trustee buying the trust property; and the effect of acquiescence. 11 Ves. 226.

7. Instances, in support of the rule against purchases of trust property by the trustee. 10 Ves. 394.

8. If a trustee conveys to a person with notice, and takes a re-conveyance, it operates nothing. 1 Sch. & Lef. 379.

9. So, if the person to whom he conveyed had no notice, yet on the re-conveyance the trust would attach, though it did not attach on the person to whom he conveyed; nor would have attached if that person had conveyed to another without notice. 1 Sch. & Lef. 379.

10. There is no general rule, that a trustee to sell shall not be himself the purchaser: but he shall not thereby gain profit to himself: one of several trustees to sell having purchased, and afterwards sold at a profit, was therefore decreed to account for that profit with costs. *Whichcote v. Lawrence*, 3 Ves. 740.

11. There is no rule, that a trustee to sell cannot be purchaser: but, however fair the transaction, it must be subject to an option in the *cestui que* trust, if he comes in a reasonable time, to have a re-sale; unless the trustee to prevent that, purchases under an application to the court. *Campbell v. Walker*, 5 Ves. 678.

12. Grounds on which a purchase by the trustee from the *cestui que* trust may be supported. 9 Ves. 246.

42. *Trustees seldom permitted to purchase the trust-estate — cases in which they have been permitted.*

1. Purchase, under a trust for payment of debts, by the trustee, as agent for



for his father, both creditors in partnership established under the circumstances; particularly, that the *cestui que* trust had full information, and the sole management; making surveys, settling the particulars, fixing the prices, &c. *Coles v. Trecothick*, 9 Ves. 234.

2. Purchase by a trustee from the *cestui que* trust, established under circumstances; with confirmation and acquiescence. *Morse v. Royal*, 12 Ves. 355.

43. *Trustees seldom permitted to purchase the trust-estate — cases in which they have been refused.*

1. Purchase by trustees of the trust property set aside; not being within the exception to the rule, viz. full information to the *cestui que* trust, and no advantage taken by the trustee of his situation to produce a beneficial bargain to himself. Trust, upon a re-sale, as to the price received. Considerable length of time before the bill had no effect; as it did not distinctly appear, that the *cestui que* trust knew the purchase was made on account of the trustees. *Randall v. Errington*, 10 Ves. 423.

2. Trustees for sale purchased through a trustee, at an undervalue; though without fraud, and by auction; and the *cestui que* trust, being infants, incapable of discharging the trustees. The purchase set aside with costs. *Sanderson v. Walker*, 19 Ves. 601.

3. Conveyance of an estate to D. by way of security for the re-investment of a specific sum of stock, and for payment of the dividends in the meantime, with a power of sale in case of default: under this deed D. is a trustee for the party making the conveyance, and as such disabled from purchasing for himself so long as he continues to be a trustee, without the consent of his *cestui que* trust. Therefore, the estate being put up to sale by auction, at which C., as agent for D., was the only bidder, and it was knocked down to him accordingly: the sale was decreed not to stand, although no evidence of fraud or undervalue; and not to be supported by evidence of the plaintiff's having known and approved of the sale taking place, and afterwards attempting to damp it, nor of a previous conversation with her attorney, in which the latter exhorted the purchaser to bid a good price for the estate to keep up the sale. *Quære*, if C. had purchased for himself, and not for D., whether the sale could have been supported; he being present in the character of solicitor for D., the vendor. *Downes v. Grayebrook*, 3 Mer. 200.

44. *Trustees seldom permitted to purchase the trust-estate — effect of lapse of time.*

1. Purchase of trust property by trustees for their own benefit, set aside after a considerable lapse of time and several assignments. *Attorney-general v. Lord Dudley*, Cooper, 146.

2. Bill to set aside a purchase by a trustee for himself and his children, after a lapse of eighteen years, upon the length of time only. *Ex parte Greogry*, Cooper, 201.

45. *Trustee having engaged trust-property in an adventure, cannot sell either to himself or another.*

Trustee having engaged trust-property in an adventure, cannot sell either to himself or another. 1 Ves. 42.

46. *Of the authority of a trustee to change the securities of investment.*

Discretion of trustee, having power to change securities, but not without consent, not controlled, unless mischievously and ruinously exercised. *De Manneville v. Crompton*, 1 Ves. & Beam. 354.

47. *Of the authority of a trustee to sell, under a power, to arise by sale or mortgage, executed by mortgaging.*

Under a trust to raise money by sale or sales, mortgage or mortgages, whether

whether the trustees, having raised the money by mortgage, can afterwards sell to pay off that mortgage, *quære*. *Palk v. Lord Clinton*, 12 Ves. 48.

48. *Effect of a clause for the election of new trustees.*

1. Testator directed a new trustee to be appointed, if either should die or become incapable of acting; one absconded charged with forgery, but was not outlawed; referred to the master to appoint a new trustee. *Millard v. Eyre*, 2 Ves. 94.

2. A provision, in case of the death of a trustee, for the substitution of another, and a conveyance by the survivor, so that he and the new trustees should be jointly interested in the trust, satisfied by the substitution of two trustees, after the death of both the former, and a conveyance by the heir of the survivor. *Morris v. Preston*, 7 Ves. 547.

3. Clause in case of the desertion or removal of trustees, directing the remaining trustees, within a limited time, to elect new trustees in the room of the trustees so deserting, &c., does not extend to disable a trustee so having deserted, &c. from acting again, where no successor had in the meantime been appointed, nor to the case of a trustee who had left the object of his trust (a congregation of protestant dissenters,) on account of its having been converted, against his approbation, to purposes distinct from the intent of the founder. *Attorney-general v. Pearson*, 3 Mer. 412.

49. *Effect of a clause for filling up vacancies in the trusteeship, so as to keep the number complete.*

A trust consisting of twenty-five persons, who are to proceed to elect new trustees, so as to fill up their number, when they are reduced to fifteen, may elect before that time. *Doe ex dem. Dupleix v. Roe*, 1 Anst. 86.

50. *Jurisdiction of courts of equity to control a trustee in appointing a new one.*

The court controls a trustee in the exercise of a power to appoint new trustees, though given in very large words. *Webb v. the Earl of Shaftesbury*, 7 Ves. 480.

51. *Jurisdiction of courts of equity to supply a vacancy in the office of trustee, vice the heir, and to invalidate his intermediate acts.*

Where by neglect the number of trustees in a trust to present to a living was not filled up at the time of an avoidance, the court would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special ground: but the court will take care as to the future, that the trust shall be properly filled up. *Attorney-general v. Bishop of Litchfield*, 5 Ves. 825.

52. *Reinstatement of a trustee after declining to act.*

A trustee by his answer, declined to act, and on the hearing, it was referred to the master to appoint new trustees. The original trustee afterwards agreed to act; and on application to the court, that the trustee might be at liberty to amend his answer in this respect, so as to enable the court on a rehearing to vary that part of the decree: the court refused to do this; but thought the master was at liberty, on statement of these circumstances, to decline the appointment of new trustees. *Miles v. Neave*, 1 Cox, 159.

53. *Discharged, and others appointed.*

1. On motion, a reference directed to inquire, whether the defendant, a trustee, remains accountable for any acts done by him as trustee, and, if not, to settle a release. — *v. Osborne*, 6 Ves. 455.

2. One of the trustees under an act of parliament being gone abroad, and having released, there being no provision for the change of the trustees, upon a bill it was referred to the master to appoint a new trustee. *Buchanan v. Hamilton*, 5 Ves. 722.

3. Decree

3. Decree discharging from a trust a woman, who had married a foreigner; though the answer denied an intention of quitting the kingdom; and stated her desire of continuing in the trust. *Lake v. De Lambert*, 4 Ves. 592.

4. Vide 7 Ves. 547.; 3 Mer. 412.

54. *Devolution of trust.*

1. Vide 2 Eden, 332.

2. Residuary devise and bequest for such of the testator's relations and kindred, in such proportions, &c. as his executors should think proper; recommending and advising his said trustees and executors to give the greatest share to such person and persons, who, in their opinion and judgment, should appear to them to be his nearest relations, and the most deserving; declaring his intention not to control their discretion; but that every thing relative to that disposition, who were in relation, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them. A trust, and a power. The ground of the power being personal confidence, it is *primd facie* limited to the original trustees; not without express words passing to others, to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee. A trust, therefore, executed by the court for the next of kin at the death of the testator, according to the statute of distributions. *Cole v. Wade*, 16 Ves. 27.

55. *Trustees have equal power.*

Vide 4 Ves. 97.

56. *The act of the majority binds the minority.*

A majority of trustees may bring actions in the name of the whole. *Doe ex dem. Dupleix v. Roe*, 1 Anst. 86.

57. *Order, under circumstances, to pay dividends to trustees, or one of them*

Order, under circumstances, to pay dividends to trustees, or one of them. *Shortbridge's case*, 12 Ves. 28.

58. *Trustees are allowed all costs and expences.*

1. That a trustee cannot, in all matters of trust, or in the nature of trust, be allowed any compensation for his trouble, is a settled rule in equity. 1 Ball & Beatty, 189.

2. Instances where trustees have been allowed, and refused, compensation for their trouble. 1 B. & B. 190.

3. Trustee or the next friend of an infant, entitled to fair expences, beyond taxed costs, under the head of just allowances. *Fearn v. Young*, 10 Ves. 184.

4. A trustee and executor, though taking under the will a commission as a satisfaction for his trouble, entitled to allowances under a general trust to set and manage, as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards', bailiffs', and game-keepers' salaries and expences, and all other charges and expences he should think proper. But he was not allowed to appoint an establishment, game-keepers, &c. except as the due management required. Inquiry therefore directed as to that; and whether the liberty of sporting during the continuance of the trust could be let for the benefit of the *cestui que* trust: if not, the game belongs to the heir. *Webb v. the Earl of Shaftesbury*, 7 Ves. 480.

59. *Course pursued on a trustee of funded property, absconding.*

A surviving trustee of funds, absconds: the court directs the dividends of those funds to be paid to *cestui que* vic. *Wharton v. Massey*, Dick. 429.

60. *Order, under 36 G. 3. c. 90., for the transfer of stock by one trustee, the other having absconded.*

Order, under the statute 36 Geo. 3. c. 90., upon proof, that one trustee was abroad, an absconding bankrupt, and not likely to return, that the remaining trustee should transfer the stock into the names of himself in another person appointed a co-trustee. *Williams v. Bird*, 1 Ves & Beam. 3.

61. *Course pursued on the claim for payment by a mortgage creditor, under a trust for payment of his debt.*

An estate was conveyed to trustees upon trust, amongst other things, to pay a debt due to P. P. filed a bill against the trustees for payment of his debt, stating it to be of such an amount. The trustees disputed the amount of the debt due. On payment into court for the sum claimed by P., and of a further sum as a security for P.'s costs, and undertaking immediately to go to an account, P. was directed to release the mortgaged premises, and gave up his securities. A motion however was afterwards made before the lord chancellor to discharge this order, and he discharged it. *Postlethwaite v. Blythe*, 3 Mad. 242.

62. *Of the obligations of trustees to preserve contingent remainders.*

1. Generally, trustees joining to destroy the contingent remainders, before the tenant in tail is of age, a breach of trust. 16 Ves. 307.

2. Trustee to preserve contingent remainders, joining to destroy them, before the first tenant in tail is twenty-one, liable for a breach of trust; so, a purchaser, with notice: but if after the tenant in tail is twenty-one, not punishable, even where the trustee would not have been directed to join. 1 Ves. & Beam. 491.

3. Trustees to preserve contingent remainders, joining in a recovery; held, with reference to the circumstances and occasion, no breach of trust. *Moody v. Walters*, 16 Ves. 283.

4. Trustee to preserve contingent remainders, joining in a recovery; with the remainder-man in tail, having attained twenty-one; held no breach of trust; and no objection to a specific performance. *Biscoe v. Perkins*, 1 Ves. & Beam. 485.

5. The court will not compel a trustee, for preserving contingent remainders, to join in a recovery, unless to continue the estate, or under very particular circumstances. *Barnard v. Large*, 1 B. C. C. 534.

6. Trustees to preserve contingent remainders, honorary trustees not to be compelled to join in destroying them. 1 Ves. & Beam. 492.

7. Trustees to preserve contingent remainders, will be restrained in equity from barring the remainders they were appointed to support. 1 B. & B. 58.

8. Trustees to preserve contingent remainders, not to permit tenant for life or years by the destruction of that estate, to bring forward a remainder to himself or another, for the purpose of cutting timber. 10 Ves. 278.

## USURY.

### I. In relation to the statutes of usury.

They are founded upon principles of public policy.

### II. What transactions are usurious.

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2. Leases — general rules.
3. Leases — in the case of mortgages.
4. In the case of mortgages.

5. In

5. In the case of agreements respecting stock.
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### III. What transactions are not usurious.

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### IV. A negotiable security tainted with usury, is bad in the hands of an innocent indorser.

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### VI. Jurisdiction of courts of equity to set aside instruments tainted with usury.

1. Distinction between the jurisdiction in equity and in bankruptcy.
2. The terms upon which relief will be granted.

## I. In relation to the statutes of usury.

They are founded upon principles of public policy.

The statutes against usury are founded on principles of public policy: and it is against public policy, that those who make profit on their money without hazard should have as large a profit as those who employ it in hazardous undertaking. 1 Sch. & Lef. 195. 312.

## II. What transactions are usurious.

### 1. General rules.

1. Usury is taking more than the law allows, upon a loan, or for forbearance of a debt. 1 Ves. 531.

2. Warrant of attorney to secure the repayment of 600*l.* with interest from the 25th of March; usurious, unless the whole of the money was actually advanced on that day. But if the agreement were, that the money being *quasi* paid to the borrower on that day, but left in the lender's hands as a banker, to be drawn out from time to time as the borrower wanted it, though the money not being ready, at a time when so applied for, would be a breach of the contract, yet it would not be usury; but upon that, as a question for a jury, an issue was offered. In this case, the lender having taken out execution on the warrant of attorney, gave up the proceeds received from the sheriffs, under an agreement with the assignees (who gave him a release,) that he should come in with the other creditors for the balance due to him: such agreement was held to mean a *provable* balance, and not to let in the debt if affected with usury. *Ex parte Banglay*, 1 Rose, 168.

### 2. Leases — general rules.

1. A beneficial lease granted at the same time with a loan of money by lessee to lessor, held fraudulent and void, as affording to the lender a profit

profit on the money lent, beyond legal interest. *Brown v. O'Dea*, 1 Sch. & Lef. 115.

2. In order to prevent the statute of usury applying to such transactions, it ought to appear "that the lease was contracted for, wholly independent of, without any regard to, and unconnected with, a loan, or treaty, or communication for a loan of money." 1 Sch. & Lef. 119.

3. A beneficial lease obtained under the influence of loans of money made, or expected to be made, by the lessee to the lessor, is a fraudulent evasion of the statutes of usury, and an undue advantage taken of the lessor; and therefore void. *Drew v. Power*, 1 Sch. & Lef. 182.

4. In such cases, the true consideration is, not whether the loan of money was part of the bargain made; but whether the relation of debtor and creditor was that which induced the granting of the lease. 1 Sch. & Lef. 191, 192.

5. When a loan of money is an inducement to granting a lease, it vitiates the whole transaction. 1 Sch. & Lef. 194.

6. A lease granted at the same time with a loan of money by lessee to lessor, set aside; although the proposal for connecting the loan with the lease moved from the lessor, *Molloy v. Irwin*, 1 Sch. & Lef. 310.

7. But an under-tenant, *bond fide*, and not concerned in the transaction of the loan, not disturbed. 1 Sch. & Lef. 310.

8. A lease granted in consideration of a loan of money, cannot, on principles of public policy, be supported, and it must be set aside. 1 Ball & Beatty, 116.

9. When a loan of money is made in consideration of a lease, and an available security is given for it, the dealing is usurious. 1 Ball & Beatty, 128.

### 3. Leases — in the case of mortgages.

1. A contract between a mortgagor and mortgagee for a lease to be granted by the former in consideration of forbearance, is usurious. 2 Sch. & Lef. 218.

2. A lease for 999 years made by mortgagor to mortgagee, set aside: the policy of the law upon which the statutes of usury are founded, not permitting such a transaction between persons standing in the relation of mortgagor and mortgagee. And this, *semble*, although the lease was made at a fair value. *Webb v. Rorke*, 2 Sch. & Lef. 661.

### 4. In the case of mortgages.

1. Mortgagee cannot originally stipulate for a collateral advantage; as that, if interest is not paid at the end of the year, it shall be converted into principal; or, that the mortgagee shall be receiver, with a commission; as tending to usury: but he may stipulate for a receiver, to be paid by the mortgagor; and may appoint a bailiff, &c. 9 Ves. 271.

2. Vide 2 S. & L. 218. 661.

### 5. In the case of agreements respecting stock.

Contract for repayment of a debt, with legal interest, or at the option of the creditor, to transfer so much stock as it would have produced on the day it was payable: void as usurious; the principal and interest being secured, with a chance of a rise of the stock; not therefore like a contract to replace stock absolutely, which might fall. *Barnard v. Young*, 17 Ves. jun. 44.

### 6. Miscellaneous cases.

1. A. agrees to lend B. 1000*l.*, and for that purpose, sells 1000*l.* stock, which being under par, produces only 923*l.*; he afterwards lends a farther sum of 1400*l.*, part of which being sold out in like manner, produces only 1182*l.* 5*s.* and takes mortgages for the two sums at 5 *per cent.*; in the former case, with a covenant to reduce the interest to 4 *per cent.*, if paid within one year, in

in the latter case, with a power to the borrower to replace the stock within two years. On a bill brought by A. for a foreclosure, the whole money having been allowed in the account by the master; held, that the transaction was usurious, and that equity would relieve, though the money had been paid. *Moore v. Battie*, 1 Eden, 273.; Amb. 371.

2. Vide 1 Rose, 168.

### III. ~~What~~ transactions are not usurious.

#### 1. General rules.

1. To constitute usury, there must be a loan: therefore, an agreement to purchase and pay rent, till the purchase money paid, is not usury. *Spurrier v. Mayoss*, 4 B. C. C. 28.

2. An advantage to be taken by a partner out of the trade, may be measured in any way agreed on, and will not be usurious. 2 Ves. 248.

3. Contract by A. to purchase houses from B. for 431*l.* 10*s.*, possession to be given, and 200*l.* paid immediately, the rest with interest at Michaelmas: but if not then paid, A. to pay "in lieu of interest upon the same, a clear rent of 42*l.* per annum," out of which was to be deducted interest for the 200*l.* paid: not usurious. *Spurrier v. Mayoss*, 1 Ves. 527.

4. Vide 1 Rose, 168.

#### 2. Commission upon agency.

1. A reasonable commission, beyond legal interest, for extra incidental charges, as upon agency in the remittance of bills; not usurious. *Baynes v. Fry*, 15 Ves. 120.

2. Charge by a bill-broker in the country, of 10*s.* per cent. commission, on discounting a bill payable in London; not usurious. *Ex parte Benson*, 1 Mad. 112.

#### 3. Leases — general rules.

1. When the rent is advanced by way of fine or foregift, it is not an usurious consideration for a lease. 1 Ball & Beatty, 129.

2. Rent may be reduced beyond legal interest, by way of fine; yet the transaction is not impeachable, unless attended by fraud. 2 Sch. & Lef. 470.

3. Vide 1 S. & L. 119.

#### 4. Leases — miscellaneous cases.

1. A lease containing a clause empowering the tenant to retain the rents, till a sum of money advanced to the landlord, at the time of granting the lease, was repaid; but for which no separate security was given, nor was the advance to bear interest. This lease is not impeachable on the grounds of being granted in consideration of a loan of money. *Prior v. Dumphy*, 1 Ball and Beatty, 27.

2. A lease at a stipulated rent, the landlord at the same time obtaining from the tenant a sum of money, two years rent, in which the tenant was secured by another lease of the same date for two years, at a nominal rent, the interest to be retained out of the first gale payable under the other lease. This is not a lease in consideration of a loan, as the relation of creditor and debtor did not exist, and the tenant could not by action recover the money. *Wilton v. Browne*, 1 Ball & Beatty, 125.

#### 5. Post-obit bonds.

Post-obit bonds, though upon terms of gross inequality, established; such securities not being liable to be impeached on the ground of usury. *Whar-ton v. May*, 5 Ves. 27.

#### 6. In the case of agreements respecting stock.

C. being indebted to G. in 1000*l.*, agreed to transfer within a given time

100*l. per annum* long annuities, at the then price, and in the mean time pay G. the dividends, and that the debt of 1000*l.* should constitute part of the purchase money. The stock was not purchased at the time, and there was a rise in the price of the stocks. The agreement held not to be usurious, or within the stock-jobbing act. *Clark v. Giraud*, 1 Mad. 511.

#### 7. Miscellaneous cases.

1. A. seized of the reversion in fee of premises which were let to E. for a term of years at 15*l. 8s.* yearly rent, agrees *bona fide*, to sell to B. the rent reserved by that lease for the residue of the term, for a sum, the principal and interest of which was to be reimbursed to B. in that time by the perception of the rent, supposing it punctually paid: and at the same time, A. being induced by the accommodation afforded him by B. in purchasing the rent, makes a lease for lives renewable for ever, to B. of the same premises, and at the same rent which E. paid, but not to commence or be payable until the expiration of E.'s lease; at which time the premises would be worth 20*l.* or 22*l. per annum*. This not impeachable at a lease coupled with a loan; the first transaction being a fair purchase of the rent; and the second, though induced by the first, yet not distinguishable from a lease made upon payment of a fine. *Lukey v. O'Donnell*, 2 Sch. & Lef. 466.

2. Bonds, though they necessarily carry interest, being given for instalments made up of principal and interest, being the consideration of a purchase, or assignment of real and personal estate, are not usurious. *Tarleton v. Backhouse*, Cooper, 231.

3. Vide 4 B. C. C. 648.; 1 Ves. 527.; 1 Rose, 168.

#### IV. A negotiable security tainted with usury, is bad in the hands of an innocent indorsee.

The principle of the doctrine.

The principle upon which it has been decided, that a negotiable instrument given for an usurious consideration, is bad in the hands of an innocent indorsee. *Ex parte Sanderson*, 2 Cox, 196.

#### V. Of the consequences of taking usurious interest under valid contracts.

The contract is not thereby invalidated.

If usurious interest is not contracted for, the security is not invalidated, by subsequently taking such interest. *Ex parte Jennings*, 1 Mad. 331.

#### VI. Jurisdiction of courts of equity to set aside instruments tainted with usury.

1. Distinction between the jurisdiction in equity and in bankruptcy.

Distinction between the jurisdiction in equity and in bankruptcy in setting aside securities affected by usury. In bankruptcy the party is not, as in the other case, left a creditor for what was actually advanced. 9 Ves. 84.

2. The terms upon which relief will be granted.

Relief against usury upon the terms of paying what is due. 16 Ves. 124.

### VESTING.

#### I. When an estate shall be vested.

1. Remainder subject to appointment, is vested liable to be divested.

2. Lease-



2. Leasehold estate, limited with freehold vests absolutely on the birth of the first tenant in tail, subject to the intention that they shall go together, as long as the rules of law and equity will permit.
3. Leasehold estate, limited with freehold vests absolutely on the death of the first tenant in tail, notwithstanding a power to sell and invest the money in real estate to the same uses.
4. Where an absolute property is given by will, and a particular interest is given in the mean time, it is not a condition precedent, but a description of the time, when possession is to be taken.
5. A devise was held immediate, and a child born after testator's death, not entitled to share.
6. The devisee was held to take a vested remainder for life, after an estate in the trustees, for so many years as his minority may last.
7. The tenant for life, under a trust-fund to be laid out in land, was held entitled to the interest from the end of the year after testator's death.

## II. When a charge shall be vested.

Charge upon land, payable at a future day, does not vest till the time of payment.

## III. When portions shall be vested.

1. Portions subject to appointment, are vested liable to be divested.
2. An appointment excluding one child, vested the portions in the others, born or to be born.
3. A case in which portions were held vested, by implication from the whole settlement, against express words.
4. A case in which a fund, with the accumulations from the death of the settlor, was held vested at twenty-one.
5. A case where portions were held to vest at twenty-one or marriage, in the life of the parents.
6. Portions held vested in children at twenty-one, who died in parents' lifetime.
7. A case in which it was queried, whether a child, attaining twenty-one, took a vested interest in the lifetime of the parent.
8. A case where, from the clear indication of intention, the portion was held not raisable during the lifetime of the mother.
9. A case where no interest was held to vest in children attaining twenty-one, and dying before the appointor.
10. A case where the settlement was held not to vest any thing in children who died before the surviving parent.
11. Construction of an inaccurate letter, the basis of a settlement.
12. Another case.

IV. Of ~~test~~ legacies payable out of personal estate.

1. Where the legacy is given "to be paid" or "payable" at a particular day, the legacy is vested.
2. Legacy payable at twenty-one or marriage, with interest, is vested.
3. Words apparently of condition, are frequently, upon circumstances, construed to designate only the time at which the interest should take effect in possession.
4. Exceptions to the rule that a legacy "to be paid" at twenty-one, is vested.
5. As not in the case of a common legacy, so much less in that of a residuary bequest, does a direction for payment at twenty-one, postpone vesting.
6. Residuary bequest to children, not to be divided till twenty-two, is vested.
7. A residuary bequest upon an uncertain event, is vested.
8. Where the whole of the intermediate interest is given to the legatee, the legacy is vested.
9. Where there is only a direction for maintenance out of the intermediate interest, the legacy is contingent.
10. The year allowed to the personal representative, does not prevent vesting.
11. Where it can be collected, that the direction for payment is blended with the very gift of the legacy, the legacy will not vest before the period for payment arrives.
12. Where the time is annexed to the substance of the bequest, the legacy is contingent.
13. Where the time of payment forms part of the description of the legatee, the legacy is contingent.
14. Cases of residuary bequests, where the word "if" did not unite the time of payment essentially with the bequest.
15. Where there is no gift, but by a direction to transfer from and after an event, the legacy is contingent.
16. Distinction between a legacy "at" twenty-one, and payable at twenty-one, borrowed from the civil law, but disapproved.
17. But a bequest "at" twenty-one, may be so controlled by the apparent intention, as that the possession only, not the vesting, may be postponed.
18. A case in which a bequest "at" twenty-one, was so controlled by the apparent intention, as that the possession only, not the vesting, was postponed.
19. Legacy at the ~~decease~~ of a person entitled to the fund out of which it is given, is vested.
20. The word "when" alone, is conditional, but may be controlled by circumstances.
21. Case of a bequest, where the word "when" did not unite the time of payment essentially with the bequest.
22. The doctrine upon the words "*cum*" and "*si*," is borrowed from the civil law.
23. Bequest in trust till A. attain twenty-one, then to A., is vested.

24. A bequest over in trust for A. till he should come of age, is vested.
25. A bequest over upon a contingency, will not of itself prevent the shares from vesting in the meantime, provided the words of bequest be in other respects sufficient to pass a present interest.
26. Where a legacy is given over upon a contingent event, which does not happen, it is vested.
27. When legacies are given at future periods which must arrive, in the nature of remainders, the interests of the first and subsequent takers will vest together.
28. In the case of contingent-executory bequests of personalty, the interests of the first and subsequent takers, vest *imo instanti*.
29. Exceptions to the rule of the interests of the first and subsequent legatees vesting *imo instanti*.
30. A power of appointment in the first life-interest, will not prevent the subsequent interests from vesting, subject to be divested.
31. Legacy to A. for life, and in default of his appointment, over; is contingent.
32. A legacy held vested, though subject to a contingent charge.
33. A case in which the event of the death of a child above twenty-one, not being within the survivorship expressed, his interest was held vested in his representative, subject to the ultimate contingent limitation.
34. A case where legacies were held vested from the only contingency being the chance of death in the mother's lifetime, whom testator outlived.
35. Where the event upon which a legacy is given over, is rendered conjectural by the obscurity of expression, it is vested.
36. The interest in a bequest may be vested in a legatee, and yet from the nature and circumstances of the gift, it may be considered personal, and determining with his life.
37. The analogy from cross-remainders applies only where the nature of the devise is such, as to raise the implication of a survivorship; not to the question, whether the shares do or do not vest.
38. A bequest held a vested interest; not a mere power of appointment.
39. Legacy held vested, as not comprised in the enumeration of other legacies, directed to lapse on a contingency.
40. A case where a contingency annexed to a bequest to a son, was held not annexed to portions for daughters.
41. Under words importing a tenancy in common, though combined with words of survivorship, the interests hold vested.
42. A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting.
43. A case in which a clause of survivorship was held not confined to testator's death.

- 44. The word "surviving" is synonymous with "others" in favour of the intention and of vesting.
- 45. A legacy held vested, from "or" being construed "and."
- 46. The case of a limitation over of the use, on legatee's bankruptcy.
- 47. Legacy of stock to A. to be laid out in an annuity for her life, is vested.
- 48. A case where a gift in the name of trustees, and not left to the executor to dispose of, was held to vest immediately in the trustees as against the executor.
- 49. A case in which interests were held not vested till the sale of the estate out of which, &c.
- 50. Another case.
- 51. In relation to interest.

**V. At what period a legacy payable out of personal estate, shall vest absolutely or become payable.**

- 1. A bequest to a particular description of persons at a particular time, vests in persons answering the description at that time exclusively.
- 2. Where a legacy is given to a person, not as *persona designata*, but under a qualification and description at any particular time, the person answering that description at that time, is the person to claim.
- 3. When given to children in proportions, as A. shall think they deserve.
- 4. A case in which the distribution was held to be among all the grandchildren living when the youngest attained twenty-one.
- 5. Legacy payable at twenty-one with proviso to go over, if legatee should at any time become seised of the real.
- 6. Another case.

**VI. Of vested legacies payable out of real estate.**

- 1. A legacy charged upon real estate, does not vest before the time of payment.
- 2. Cases of vested interests from the condition annexed to the legacy having respect to the circumstances of the estate, and not to the person of the legatee.

**VII. When other interests shall be vested.**

Interests in a partnership trade.

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**I. When an estate shall be vested.**

- 1. Remainder subject to appointment, is vested liable to be divested.  
Vide 1 Eden, 453. ; 3 Ves. 661. ; 13 Ves. 246. ; 1 B. & B. 53.
- 2. Leasehold estate limited with freehold, vests absolutely on the birth of the first tenant in tail, subject to the intention that they shall go together, as long as the rules of law and equity will permit.  
Vide 2 V. & B. 63.

3. Leasehold estate limited with freehold, vests absolutely on the birth of the first tenant in tail, notwithstanding a power to sell and invest the money in real estate to the same uses.

Vide 2 V. & B. 64.

4. Where an absolute property is given by will, and a particular interest is given in the mean time; it is not a condition precedent, but a description of the time when possession is to be taken.

Vide 4 Ves. 409.

5. A devise was held immediate, and a child born after testator's death, not entitled to share.

Vide 1 Cox, 68.

6. The devisee was held to take a vested remainder for life, after an estate in the trustees, for so many years as his minority may last.

Vide 16 Ves. 491.

7. The tenant for life, under a trust-fund to be laid out in land, was held entitled to the interest from the end of the year after testator's death.

Vide 6 Ves. 520.

## II. When a charge shall be vested.

Charge upon land, payable at a future day, does not vest till the time of payment.

Charge upon land payable at a future day, not vested till the time of payment. *Phipps v. Lord Mulgrave*, 3 Ves. 613.

## III. When portions shall be vested.

1. Portions subject to appointment, are vested liable to be divested.

1. Term to commence after the father's death, to raise portions for younger children, in such shares and proportions as he should appoint; for want of appointment equally, to sons at twenty-one, and to daughters at twenty-one or marriage, to be paid immediately after the decease of the father: with survivorship, in case of the death of a child before its portion should become *due and payable*. The father died without making any appointment. Held, that the portions vested at twenty-one or marriage, during his life. *Cholmondeley v. Meyrick*, 1 Eden, 77.

2. Sums of money appointed by deed and will to A. for life, and then for her daughters and younger sons, payable in such shares, &c. as she should appoint, &c.; and in default, in trust for all her daughters and younger sons in equal shares to be paid at their respective ages of twenty-one years; and in case any of them die before his or her portion become payable, to the survivors. Held, that the portions vested in the children at twenty-one, during the lifetime of A. *Earl of Salisbury v. Lambe*, 1 Eden, 465.; *Amb.* 383.

3. Covenant in marriage articles, that in case the father should happen to die, leaving issue male, and one or more younger sons or daughter, to raise portions; if but one *then living*, 1000*l.*; if two, 1200*l.*; if three, 1500*l.*; to be paid at their respective ages of twenty-one or marriage, in such proportions as the survivors of the father and mother should direct; in default of such direction, equally. Held, that the share of a son who attained twenty-one, was vested, though he died in the father's life time. *Rooke v. Rooke*, 2 Eden, 8.

2. An appointment excluding one child, vested the portions in the others, born or to be born.

By marriage settlement, 1500*l.* was provided for younger children, in such shares as the parents should appoint; in default of appointment, to all the children after the death of the wife: the parents afterwards made an appointment excluding one child: this deed vests the portions in the other children born or to be born. *Mayhew v. Middleditch*, 1 B. C. C. 162.

3. A case in which portions were held vested by implication from the whole settlement, against express words.

Portion vested in the case of parent and child by implication from the whole settlement, against express words; and a clause of survivorship upon the death of a child, before the portion should become payable, was upon the authorities construed, before it should be vested. *Hope v. Lord Clifden*, 6. Ves. 490.

4. A case in which a fund, with the accumulations from the death of the settlor, was held vested at twenty-one.

By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in trust to raise an annuity for the lives of the wife and her mother and the survivor: then reciting, that the remainder of the term might expire in the life of the wife or her children; therefore to make a provision for her and her children by her then, or any future husband, the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise after the deaths of the grantor and the mother of the wife, 100*l.* annually, to be placed out in the purchase of freehold lands or hereditaments, or leasehold estates, for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estate to estates so to be purchased, or the interest, produce, and profits, to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life; and after her decease to apply the said rents and profits or interest money towards the support and maintenance of such child and children of her, as should be living at her death, till the youngest should be twenty-one; and then to be possessed of such estates so to be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child or children, in such shares and proportions, payable at twenty-one, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof to the use of all such children, equally to be divided at their respective ages of twenty-one; but if she should die without leaving any child or children, or all should die under twenty-one, then to the use of the grantor, his heirs, executors, administrators, and assigns; and after paying the said annuities, to be possessed of all the surplus money arising from the said tolls, during the remainder of the term for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a year; and laid out in stock the sums received and the produce. One son was the only issue. He attained twenty-one in life of his mother, and survived her. The court would not invest the fund in land: but held it with the accumulations from the death of the grantor, and the future payments, a vested interest in the son at twenty-one; and as personal estate belonging to his administrator. *Swann v. Fonnereau*, 3 Ves. 41.

5. A case where portions were held to vest at twenty-one or marriage, in the life of the parents.

Vide 9 Ves. 300.

6. Portions held vested in children at twenty one, who died in parents' lifetime.

Vide 9 Ves. 438.

7. A case in which it was queried, whether a child attaining twenty-one, took a vested interest in the lifetime of the parent.

Portions by a marriage settlement, to be paid, transferred, or assigned to the sons at twenty-one, to the daughters at twenty-one or marriage, if after the death of their parents; with survivorship among them, if any should die before the share or shares should become payable, assignable, or transferable, and a limitation over; if there should be no child or children living at the death of the survivor of the parents, or, being such, all should die before the fund should become so as aforesaid payable, assignable, or transferrable. Whether a child attaining twenty-one takes a vested interest in the life of the parent, *quære*. . *Legh v. Haverfield*, 5 Ves. 452.

8. A case where from the clear indication of intention, the portion was held not raisable during the lifetime of the mother.

Vide 2 Eden, 26.

9. A case where, no interest was held to vest in children attaining twenty-one, and dying before the appointor.

A power to appoint a sum of money in such shares as the appointor shall think proper, amongst his children; the money so appointed to be paid to sons at twenty-one, and to daughters at that age or marriage; if the appointor should be then deceased, or if living, three months after his death. Two of the children having attained twenty-one, died before the appointor; and held that no interest vested in them. *M'Ghie v. M'Ghie*, 2 Mad. 368.

10. A case where the settlement was held not to vest any thing in children who died before the surviving parent.

Vide 2 Mad. 65.

11. Construction of an inaccurate letter, the basis of a settlement.

Construction of an inaccurate letter, the basis of a settlement as to the rights of the parties; and as to the subject, upon which the settlement was intended to attach. *Luders v. Anstey*, 4 Ves. 501.

12. Another case.

Vide 15 Ves. 500.

#### IV. Of vested legacies payable out of personal estate.

1. Where the legacy is given "to be paid" or "payable" at a particular day, the legacy is vested.

1. Legacy to be paid at a particular time is *debitum in presenti solvendum in futuro*, and vested. 3 Ves. 13.

2. Distinction between a legacy, given at a future time, and a legacy, given to be paid at a future time: the latter vested; and payment only postponed; the time being annexed, not to the legacy, but to the payment only. 13 Ves. 113.

2. Legacy payable at twenty-one or marriage, with interest, is vested.

Legacy to A., payable at twenty-one or marriage, with interest, is a vested legacy, and the executor having become a bankrupt, might have been proved under his commission; his certificate is therefore a bar to the recovery against him, and the residuary legatees are not liable. *Walcot v. Hall*, 2 B. C. C. 305.

3. Words apparently of condition, are frequently, upon circumstances, construed to designate only the time at which the interest should take effect in possession.

Words, apparently of condition, frequently construed to designate only the time at which the interest should take effect in possession; upon circumstances; though standing alone they import condition; as, where in the mean time it is to be employed for the benefit of the legatee; or, where it is by way of exception out of the bequest. 9 Ves. 229.

4. Exceptions to the rule that a legacy "to be paid" at twenty-one, is vested.

Vesting of a legacy postponed to the time of payment, and a limitation over in nature of a cross-remainder, implied from the general intention. *Mackell v. Winter*, 3 Ves. 236.

5. As not in the case of a common legacy, so much less in that of a residuary bequest, does a direction for payment at twenty-one, postpone vesting.

Direction for payment at twenty-one, does not postpone vesting even in the case of a common legacy, and still less in the case of a residue. *Skey v. Barnes*, 3 Mer. 344.

6. Residuary bequest to children, not to be divided till twenty-two, is vested.

Gift of a residue to children not to be divided till twenty-two, the interests are vested. *Dodson v. Hay*, 3 B. C. C. 404.

7. A residuary bequest upon an uncertain event is vested.

Residuary bequest to trustees upon trust to pay the dividends, &c. equally between the testator's two great nieces until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively; held a vested interest before marriage; being taken out of the general rule from the civil law, that *dies incertus in testamento conditionem facit*. One of the legatees being dead without having been married, the court directed one moiety to be paid to her executors; but would not permit the other moiety to be paid, but directed the interest and dividends of that moiety to be paid to the other legatee, with liberty to apply in case of her marriage or her death before marriage. *Booth v. Booth*, 4 Ves. 399.

8. Where the whole of the intermediate interest is given to the legatee, the legacy is vested.

1. Gift of all the interest is a ground for presuming an intention to vest the capital. *Secus*, where there is only a direction for maintenance out of the interest. *Leake v. Robinson*, 2 Mer. 386.

2. Though the gift of interest will vest a legacy, maintenance will not. *Pulsford v. Hunter*, 3 B. C. C. 416.

9. Where there is only a direction for maintenance out of the intermediate interest, the legacy is contingent.

1. The word maintenance is not equivalent to interest, for the purpose of vesting legacies. 3 B. C. C. 416.

2. Vide 2 Mer. 386.

10. The year allowed to the personal representative, does not prevent vesting.

The year allowed to executors and administrators only for convenience, and does not prevent vesting. 10 Ves. 13.



11. Where it can be collected, that the direction for payment is blended with the very gift of the legacy, the legacy will not vest before the period for payment arrives.

1. Bequest of the dividends of stock to A. for her life; and then to remain in the same stock till each of her children attain twenty-one, and then to be paid their equal share of the same; if any die before twenty-one to go to the survivors or survivor; and not to be under any claim or jurisdiction of their father or any husband A. may have. Of two children, one died in the life of her mother, married, and above twenty-one. Transfer of a moiety to her administrator, upon the mother's death, established: the other moiety vested in the surviving daughter, an infant, so far as to entitle her to the dividends; and a reference was directed as to her father's ability. *Reeves v. Brymer*, 4 Ves. 692.

2. Legacy to the testator's wife of the dividends of stock for her life; which he directs shall be continued in the same stock, and then to be shared equally share and share alike to his children that shall be then living; he also gave to his wife a leasehold house (of which fifty years were unexpired) for her life, and then to be let during the time of the lease to come, and the neat produce thereof to be equally placed in the stocks for the benefit of his children that shall be then living, equally; and as to the residue of his estate whatsoever and wheresoever the product he gave, &c., the same to be collected yearly to his wife and children equally share and share alike that are then living. In other dispositions the words "*then*" and "*then living*" were used with reference to some period expressed, viz. the age of twenty-one, or the death of the person to take for life. The stock and house vested at the wife's death in those children, who survived her: the residue vested at the testator's death in his wife and all the children equally. *Reeves v. Brymer*, 4 Ves. 692.

12. Where the time is annexed to the substance of the bequest, the legacy is contingent.

A legacy, not as an independent bequest, with a time for payment, or distribution, appointed afterwards; but the time annexed to the substance of the bequest: the interests do not vest before that period. *Sansbury v. Read*, 12 Ves. 75.

13. Where the time of payment forms part of the description of the legatee, the legacy is contingent.

Vide 5 Ves. 509.

14. Cases of residuary bequests, where the word "if" did not unite the time of payment, essentially within the bequest.

Residue of testator's estate, directed to be invested in government securities, and the interest paid to his wife, and after her death to be sold, and the money thereby arising to be divided amongst his daughters and grandchildren. Held, that the share of a daughter, dying in the lifetime of the wife, was vested. *Hatch v. Mills*, 1 Eden, 342.

15. Where there is no gift, but by a direction to transfer, from and after an event, the legacy is contingent.

Where there is no gift, but by a direction to transfer "from and after" a given event, the vesting must be postponed till after that event has happened, unless from particular circumstances a contrary intention is to be collected. *Leake v. Robinson*, 2 Mer. 387.

16. Distinction between a legacy "at" twenty-one, and payable at twenty-one, borrowed from the civil law, but disapproved.

Distinction between a legacy *at* twenty-one, and payable at twenty-one, borrowed from the civil law, but disapproved. 6 Ves. 245.

17. But a bequest "at" twenty-one, may be controlled by the apparent intention, as that the possession only, not the vesting, may be postponed.

Legacy, when the legatee shall attain twenty-one, may be so controlled by the apparent intention as to postpone the possession only, not the vesting; as, where it was to two children, when they shall attain twenty-one, to be equally divided between them, share and share alike; appointing their father in trust for the same, and trustee for them during their minority; and in case of the death of either, the survivor to take the whole; and in case both die in their minority, over. *Branstrom v. Wilkinson*, 7 Ves. 421.

18. A case in which a bequest "at" twenty-one, was so controlled by the apparent intention, as that the possession only, not the vesting, was postponed.

*Ibid.*

19. Legacy at the decease of a person, entitled to the fund out of which it is given, is vested.

Legacy at the decease of a person, entitled to the fund, out of which it is given, vested immediately; and payment only postponed. *Blamire v. Geldart*, 16 Ves. 314.

20. The word "when" alone, is conditional, but may be controlled by circumstances.

The word "when" in a will, alone and unqualified, is conditional: but it may be controlled by expressions and circumstances: so as to postpone payment or possession only, and not the vesting: as, where the interest of the legacy in the interval, was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately. *Hanson v. Graham*, 6 Ves. 239. Reversed on appeal. 11 Ves. 489.

21. Case of a bequest, where the word "when" did not unite the time of payment essentially with the bequest.

Bequest to daughters, equally to be divided among them, when they arrive at twenty-four years of age, is vested immediately, and only the payment postponed. *May v. Wood*, 3 B. C. C. 471.

22. The doctrine upon the words "*cum*" and "*si*" is borrowed from the civil law.

In the civil law the words "*cum*" and "*si*," as referred to legacies, are equivalent; and from that law this rule and most of our other rules upon legacies are borrowed. 6 Ves. 243.

23. Bequest in trust till A. attain twenty-one, then to A., is vested.

Bequest to A. for his second daughter, that he shall have born, for her education, till she shall attain the age of twenty-one; and after she shall attain the age of twenty-one, to her and her heirs for ever; she being christened Z.; and in default of such issue, over. Another bequest to A. till the said second daughter shall attain the age of twenty-one, and after she shall attain to the age of twenty-one, to her and her heirs for ever. Both vested in a second daughter, the third child, christened Z.: though she died under twenty-one; being an exception out of the generality of the bequest to her; and the time being not of the substance. *Lane v. Goudge*, 9 Ves. 225.

24. A

24. A bequest over in trust for A. till he should come of age, is vested.

Bequests of three *per cent.* annuities to the executors, to the use of A. and her daughter B., and the longer liver of them, then to the issue of B., (if he should have any such,) if not, to the use of C. till he should come of age. C. died, living B.: the fund vested in C., and the trust is only the mode. *Atkinson v. Paice*, 1 B. C. C. 91.

25. A bequest over upon a contingency, will not of itself prevent the shares from vesting in the mean time, provided the words of bequest be in other respects sufficient to pass a present interest.

1. Bequest to the testator's wife for life; and after her death, to be divided between his brothers and sisters, in equal shares: but in case of the death of any in the life of the wife, the shares of him, &c. so dying, to be divided between his, &c. children: vested, subject to be divested only by death in the life of the widow, leaving children. Therefore, the representative of one, who died in her life, never having had a child, entitled. *Smither v. Willock*, 9 Ves. 233.

2. Legacy to the children of A., to be equally divided among them; and if either of them die before twenty-one, their share to go to the survivors: a vested interest in the children living at the testator's death, subject to be divested in the event pointed out: after-born children, therefore, excluded. *Davidson v. Dallas*, 14 Ves. 576.

3. A devise over upon a contingency, does not of itself prevent the shares from vesting in the mean time, provided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances, to show that no present interest was intended to pass. *Skey v. Barnes*, 3 Mer. 342.

26. Where a legacy is given over upon a contingent event, which does not happen, it is vested.

A clear vested interest not divested; the express contingency, upon which it was to be divested, not having happened. *Harrison v. Foreman*, 5 Ves. 207.

27. When legacies are given at future periods, which must arrive, in the nature of remainders, the interest of the first and subsequent takers will vest together.

1. The testator gave the use of 800*l.* to his wife for life, and after her decease, disposed of part of the principal; he then gave to A. 100*l.* A. died; living the wife: this legacy to A. vested in him. *Monkhouse v. Holme*, 1 B. C. C. 298.

2. Testator gave 20*l.* each to the children of A. (after the death of annuitants): the legacies vested in all the children born, and also in one born after the death of the testator, but during the life of the surviving annuitant. *Attorney-general v. Crispin*, 1 B. C. C. 386.

3. Legacy to the children of the testator's sister at twenty-one, if any died before, to the survivor and survivors; a child born after the testator's death, but during the infancy of the others, shall take a share. *Gilmore v. Severn*, 1 B. C. C. 582.

4. Legacy to A. for life, remainder to B. and C., or in case one should die, living A.; then to the survivor: B. and C. both die; living A.: the legacy was vested, and shall go to the survivor. *Scurfield v. Howes*, 3 B. C. C. 90.

5. Legacy to A. for life: and after her decease, to her children; if she should leave none, to B. and C., share and share alike, or to the survivor: a vested interest in B. and C., upon the death of the testator, as tenants in common; A., though she survived them, dying without children. *Perry v. Wood*, 3 Ves. 204.

6. Legacy

6. Legacy in trust for testator's mother and sister for life; and after the death of the survivor, for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal at twenty-one; and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one: the payment only is postponed, not the vesting. *Wadley v. North*, 3 Ves. 364.

7. Vested interest in legatees, who died during a previous interest for life. *Lady Lincoln, v. Pelham*, 10 Ves. 166.

8. Bequest of the produce of the sale of a copyhold estate to A., the wife of B., for life; and after her death, to divide the principal among the children of B. and C. equally; and of the testator's reversionary interest in bank stock on the death of D., if, in his name at his decease, and if not, at D.'s death, equally among the same children. Vested interests in all the children; comprising those who died, and those who came into existence after the death of the testator, and during the lives of the tenants for life. *Walker v. Shore*, 15 Ves. 122.

9. Trust by will, subject to an interest for life, to pay and transfer to the testator's nephew and nieces, equally, at twenty-one, with survivorship, in case any should die, before his or their shares should become payable; and a limitation over, in case all should die, &c.: vested interest at the age of twenty-one, before the death of the tenant for life. *Hallifax v. Wilson*, 16 Ves. 168.

10. Testator gives his personal estate to trustees, upon trust, to pay the interest to his daughter E. S. for her life, and after her decease to pay and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment, to go to and be equally divided among them; and if but one, then to such only child: the portions of sons to be paid at their respective ages of twenty-one or marriage. If no issue, or all die before their respective portions become payable, then over. The shares are so given, as to vest immediately in the children of E. S., though liable to be divested by all dying under twenty-one, without issue. The share of a child so dying, was therefore held to pass to its representative. *Skey v. Barnes*, 3 Mer. 336.

28. In the case of contingent executory bequests of personalty, the interests of the first and subsequent taker vest *uno instanti*.

Bequests of the residue of personalty to testator's wife for life; if she die without issue, to the testator's two brothers, or if one of them be dead, then to the survivor: both the brothers died, living the wife; this is an executory devise vested in both, and transmissible to the executor of the survivor. *Barnes v. Allen*, 1 B. C. C. 181.

29. Exceptions to the rule of the interests of the first and subsequent legatees vesting *uno instanti*.

1. Power of appointment does not prevent the interest vesting, subject to be divested. 5 Ves. 748.

2. Legacy to A. for life, and to her children at her decease, vests in all the children, as they come *in esse*; but upon the circumstances of this case, it vested in those living at the death of their mother only. *Spencer v. Bullock*, 2 Ves. 687.

30. A power of appointment in the first life-interest, will not prevent the subsequent interests from vesting, subject to be divested.

Bequest to A. for life, with power on her marriage to appoint the interest to her husband for life, and a recommendation to dispose of the principal part after her own death, and the determination of the preceding trusts, among the children of B.: the recommendation being held an absolute trust, it is a vested interest in all the children, subject to be divested by appointment; and there being no appointment, children born after the death of the testator,

testator, and those who died in the life of A., are entitled with the rest. *Malm v. Barker*, 3 Ves. 150.

31. Legacy to A. for life, and in default of his appointment, over, is contingent.

Fund given to A. for life, with power of appointment during life, and after death, for want of appointment, over: it is not a vested interest till after death of tenant for life, the power subsisting upon it. 1 Ves. 309.

32. A legacy held vested, though subject to a contingent charge.

Construction of a will, giving a vested interest, though subject to a contingent charge; and creating a tenancy in common as to part of the property, and as to the residue a joint-tenancy; there being nothing to control the legal effect of the words. *Jackson v. Jackson*, 7 Ves. 534.

33. A case in which the event of the death of a child above twenty one, not being within the survivorship expressed, his interest was held vested in his representative, subject to the ultimate contingent limitation.

Bequest to the child or children of the testator's two daughters, in terms creating a tenancy in common, viz. equally to be divided, &c., to be paid at twenty-one or marriage of daughters; with survivorship upon the death of any, before his or their shares become payable: the accrued share to be equally divided and to be payable, &c. as the original shares: the issue of any dying in the lifetime of the two daughters to stand in the place of the parent; and a limitation over, in case his daughters die without issue; or having had issue, such issue should die in the lifetime of his daughters. The event of the death of a child above twenty-one not being within the survivorship expressed, his interest vested in his representative, subject to the ultimate contingent limitation. *Bayard v. Smith*, 14 Ves. 470.

34. A case where legacies were held vested from the only contingency, being the chance of death in the mother's lifetime, whom testator outlived.

Legacy of 3000*l.* stock to L. E., (testator's wife,) for life, and after her death, one-third part of the principal to testator's son I. E. if he shall be then living, and if dead, to his child or children; and a bequest, in the same manner, of one-third to each of his two daughters, M. A. E. and H. E., with a proviso, that if either of his daughters should die unmarried, and without issue, the surviving daughter to take both shares; and if both die unmarried and without issue, then the shares to go to his son I. E., if living, or if dead, to his children. He then gave the residue of his property, consisting of real and personal estate, to trustees; and, by codicil, certain other real estates, to convert the same into money, in trust, as to one-third, for his son I. E.; and the other two-thirds equally amongst his daughters, subject to such contingencies in favour of their issue, and with the like benefit of survivorship, as were before declared as to the 3000*l.* stock. L. E., the testator's wife, died. Held, that on her death, the daughters took vested interests in their shares of the 3000*l.* stock, and of the residue and produce of the real estates. *Laffer v. Edwards*, 3 Mad. 210.

35. Where the event upon which a legacy is given over, is rendered conjectural by the obscurity of expression, it is vested.

1. Residue to be divided by executors, on an indefinite term, vests at the death of the testator. *Stapleton v. Palmer*, 4 B. C. C. 490.

2. Legacy out of a fund in the East Indies, given over in case of death of legatee, before he might have received it, vested from death of testator. *Hutchin v. Mannington*, 1 Ves. 366.

3. Bequest to a A. for life; and after her decease to B. and C., in equal moieties.

moieties ; and in case of the decease of either in the life of A., the whole to the survivor of them living at her decease. B. and C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harrison v. Foreman*, 5 Ves. 207.

4. A residuary bequest upon the whole will vested only as the property was received : one of the residuary legatees therefore being dead, his representatives were entitled only to that part, which was got in before his death. *Gaskell v. Harman*, 6 Ves. 159. The declaration of the decree, upon the principle, that the residuary property vested only as it was received and converted into money, was reversed : the lord chancellor's judgment being, that such an intention, though if clearly expressed, it must, notwithstanding the inconvenience, be executed, was not the true construction upon the whole will ; and is not to be collected, unless clearly expressed. *Gaskell v. Harman*, 11 Ves. 489.

36. The interest in a bequest may be vested in a legatee, and yet from the nature and circumstances of the gift, it may be considered personal, and determining with his life.

1. Bequest of 1000*l.* to testator's sister ; and in case of her demise, 800*l.* to A., &c. ; 200*l.* to B. : the sister has a life-estate only, with vested remainders in A. and B. in the proportion. *Billings v. Sandom*, 1 B. C. C. 393.

2. Bequest of all the testator's estate to his wife ; in case of death happening to her, his executors to take care of the whole for his daughter : the wife has an estate for life, with a vested remainder in the daughter. *Nowlan v. Nelligan*, 1 B. C. C. 489.

3. Devise and bequest until a certain period from the nature of the purpose and circumstances, not transmissible to representatives. *Ex parte Davies*, 6 Ves. 147.

37. The analogy from cross-remainders applies only where the nature of the devise is such, as to raise the implication of a survivorship ; not to the question, whether the shares do or do not vest.

The analogy from cross-remainders applies only where the nature of the devise over is such, as to raise the implication of a survivorship ; not to the question, whether the shares do or do not vest. *Skey v. Barnes*, 3 Mer. 344.

38. A bequest held a vested interest, not a mere power of appointment.

Bequest to the testator's wife of 60*l.* a year for life, " and the sum of 300*l.*, to be disposed of as she thinks proper, to be paid after her death," and a leasehold house and furniture for life : an absolute interest in the 300*l.* transmissible to the administrator, not a mere power of appointment. *Hixon v. Oliver*, 13 Ves. 108.

39. Legacy held vested, as not comprised in the enumeration of other legacies, directed to lapse on a contingency.

Legacy to a female infant, with power to trustees in events to diminish it ; and comprised in a miscalculation of the number of legacies given over to the wife in case of legatees dying before becoming entitled, lapsed by the death of the legatee, though but for the superadded words of the legacy, it would have been vested. *Molesworth v. Molesworth*, 3 B. C. C. 5. Decree reversed. 4 Brown, 408.

40. A case where a contingency annexed to a bequest to a son, was held not annexed to portions for daughters.

Will, from its tenor construed to give vested legacies. *Stretch v. Watkins*, 1 Mad. 253.

41. Under words importing a tenancy in common, though combined with words of survivorship, the interests hold vested.

Under words importing a tenancy in common, though combined with words of survivorship, the interests vested at the death of the testator; and therefore vested in one of the legatees, who died between the death of the testator and the death of the person entitled for life. *Brown v. Bigg*, 7 Ves. 279.

42. A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting.

1. A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse; and did not prevent the legacies vesting. *King v. Taylor*, 5 Ves. 806.

2. Legacies to two sisters; with a direction in case of the death of each, reciprocally, to devolve to the other. That direction confined to the case of lapse by the death of either in the life of the testator; and did not prevent the vesting absolutely. *Cambridge v. Rous*, 8 Ves. 12.

3. The vesting of a legacy not prevented by a provision for survivorship among the legatees in case of the death of any under the age of twenty-one. *Deane v. Test*, 9 Ves. 146.

43. A case in which a clause of survivorship was held not confined to testator's death.

Bequest to the children of A. who should be living at the testator's decease, equally; with survivorship, in case of death without leaving issue; if, leaving issue, the issue to have the parent's share. The survivorship cannot be restrained to the period of the testator's death; as upon that construction the clause would be repugnant. *Shergold v. Boone*, 15 Ves. 370.

44. The word "surviving" is synonymous with "others" in favour of the intention and of vesting.

Bequest to three children in thirds respectively; with a discretion, that they should not be put in possession till their respective attainment of particular ages: and in case of the death of either of the above-named children before the ages mentioned, that third to be equally divided between the two surviving children; and in the event of the death of two before the respective ages above-mentioned, then the whole to devolve to the surviving child: but should all his children die, before they attain their said respective ages, then the whole of his estate was given over. One died having attained the age mentioned. Afterwards another died under that age. The share of the latter a vested interest in the child, who died first, and the survivor, attaining the age specified. *Wilmot v. Wilmot*, 8 Ves. 10.

45. A legacy held vested, from "or" being construed "and."

Bequest to A., her executors, &c. provided, that in case she should die under twenty-one or without leaving any husband living at her death, it shall go over, vested at twenty-one upon the intention: the word "or" being construed "and." *Weddell v. Mundy*, 6 Ves. 341.

46. The case of a limitation over of the use, on legatee's bankruptcy.

Legacy in trust for the testator's son, for his own use and benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it; the testator declaring his intention, his son's fortune being amply sufficient, by this fund to form a certain and permanent provision for him or his family: but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife, and children, as the trustees think proper, so long

as he shall labour under the effects of any misfortune in trade ; but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before,) to be paid to him : otherwise the interest to be continued to be paid for the support of him, his wife, and children, for his life ; and if at his death he shall be under any difficulty from misfortune or failure in business, in trust for his wife and children according to his appointment by will ; and, if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son in the twenty-eighth year of his age being discharged under a deed of composition, the legacy was decreed to him ; the trustees and his children not opposing it ; but the court observed, that if he should not be discharged, as, in case it should end in bankruptcy, the trustees would not be indemnified. *De Mierre v. Turner*, 5 Ves. 306.

47. Legacy of stock to A. to be laid out in an annuity for her life, is vested.

Legacy of stock to A. to be laid out in an annuity for her life ; A. died two days after the testator, and before any alteration of the stock : her administrator is entitled to a transfer. *Barnes v. Rowley*, 3 Ves. 305.

48. A case where a gift in the name of trustees, and not left to the executor to dispose of, was held to vest immediately in the trustees as against the executor.

Testatrix gave 1000*l.* to trustees to pay the interest to A. for life, then equally to be divided among her (testatrix's) brothers and sisters ; it vested at the testatrix's death, and the representatives of those who died in the lifetime of the tenant for life shall take with the survivors. *Roebuck v. Dean*, 4 B. C. C. 403.

49. A case in which interests were held not vested till the sale of the estate out of which, &c.

Devise to the testator's wife for life ; and as soon after her decease or refusal to release dower as conveniently, might be upon trust, to sell and divide the produce between five nephews at such time as the sale should be completed, if then living : if any should die in her life, or before the sale should be completed, his share to his children ; if none, to the survivors. The interests not vested till the sale. *Elwin v. Elwin*, 8 Ves. 546.

50. Another case.

Gift to testator's brother, without restriction as to his children, to whom he shall leave, before or after his death, such part of the testator's inheritance as their conduct shall deserye ; but if at the death of his brother there shall be no children, then to A., this is an executory devise, which if it took place, would defeat the interest of the children of the brother. *Lieutand v. Agassiz*, 2 B. C. C. 615.

51. In relation to interest.

Legacies to be paid out of money due on mortgage, "when recovered." The right to interest (at four *per cent.*, the mortgage producing five) does not depend upon the time when the money is recovered. *Wood v. Penoyre*, 13 Ves. 325.

V. At what period a legacy payable out of personal estate, shall best absolutely or become payable.

1. A bequest to a particular description of persons at a particular time, vests in persons answering the description at that time exclusively.

A bequest to a particular description of persons at a particular time, vests in



in persons answering the description at that time exclusively. Therefore an annuity being bequeathed over upon the death of the annuitant to the eldest child of A., there being at the death no child, an after-born child is not entitled. *Godfrey v. Davis*, 6 Ves. 43.

2. Where a legacy is given to a person, not as *persona designata*, but under a qualification and description at any particular time, the person answering that description at that time, is the person to claim.

J. D. gave 5000*l.* to purchase stock, the interest to M. for life, then to W. for life, at his decease the testator's godson S., and at his decease to be divided among his brothers equally; S. was dead at the time of the will made; A., son of W., who would have been a brother of S. had he lived, shall take a share in the 5000*l.* He also gave 4000*l.* to L. for life, and in case he had no children, to revert to W.'s children: a daughter of W. who was alive at the time of the codicil made, but died before W. had a vested interest, which was held transmissible to her representative. *Divisone v. Mello*, 1 B. C. C 537.

3. When given to children in proportions, as A. shall think they deserve.

Testator bequeathed a leasehold estate (after an estate for life) to his nephew A. and the heirs male of his body lawfully begotten, and in default of such heirs to one of the sons of his nephew of B., as A. shall direct by a conveyance in his life or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving, and that will make the best use of it, or to the children of his nephew C. if any such there are or shall be. A. dying in the testator's life, the bequest of the latter estate was established in favour of all the children. *Brown v. Higgs*, 4 Ves. 708. Affirmed on re-hearing, 5 Ves. 495; and on appeal, 8 Ves. 561.

4. A case in which the distribution was held to be among all the grandchildren living, when the youngest attained twenty-one.

Trust of real and personal estate by will, to apply rents and dividends for maintenance of all and every the children of the testator's daughters (except the eldest son) share and share alike, until the youngest of his said grandchildren should attain twenty-one; and in case of the death of any of his said grandchildren, before the youngest shall be twenty-one, having child or children, such child, &c. to receive the parent's share; and when the youngest of his said grandchildren living shall have attained twenty-one, one equal share of the capital, real and personal, to the use of such of his said grandchildren as shall be then living, and the children of his said grandchildren in case of the death of any leaving such issue, to have the share the parent would be entitled to, if living at the time of distribution; and to the heirs, executors, &c. of such his said grandchildren and great-grandchildren. The division is to be among all the grandchildren living, when the youngest attains twenty-one, including those born since the testator's death, and the children of those deceased; but the representatives of grandchildren dead, not leaving children, are not entitled. *Hughes v. Hughes*, 14 Ves. 256.

5. Legacy payable at twenty-one, with proviso to go over, if legatee should at any time become seised of the real.

Legacy payable at twenty-one, with proviso to go over, if legatee should at any time become seised of the real, to which he was entitled in remainder after an estate tail limited upon an estate for life subsisting, when he became

twenty-one: even supposing there is a contingency left, he must have the legacy at twenty-one: but it may be disputed afterwards upon the happening of the contingency. *Griffiths v. Smith*, 1 Ves. 97.

#### 6. Another case.

Bequest to the testator's three children to be equally divided between them, share and share alike, but in case of the death of any without being married and having children, the share of such child so dying to be divided between the surviving children, and so if one should only survive: one being married, and having a child; her share vested. *Ripley v. Waterworth*, 7 Ves. 453.

### VI. Of vested legacies payable out of real estate.

#### 1. A legacy charged upon real estate, does not vest before the time of payment.

1. Legacy charged on real estate, lapses if the legatee dies before the time of payment. *Harrison v. Naylor*, 3 B. C. C. 108.

2. Testator gives legacies to be raised by the means after pointed out; then directs an estate to be purchased, a sum to be paid for maintenance, and the residue of rents to be applied to raise legacies: the legacies are charges on the estate, and one of the legatees dying an infant, shall not be raised for the administrator. *Ibid*.

#### 2. Cases of vested interests from the condition annexed to the legacy having respect to the circumstances of the estate, and not to the person of the legatee.

1. Estate given to the testator's wife for life, and after her death, to her son and his heirs, charged with a legacy; the legatee survived the testator, but died in the lifetime of the wife: the legacy held to have vested, and to be charged on the estate. *Pawsey v. Edgar*, Dick. 531.

2. The estate was devised to testator's wife for life, and if there should be no issue between them, then to A., charged with two sums to B. and C.; afterwards B. being dead, the testator by codicil, ordered that legacy to be paid to C. and D.: C. died in the lifetime of the wife: the legacy was vested and transmissible. *Killet v. Dawson*, 1 B. C. C. 119.; *Lee Tunstal v. Bracken*, 1 B. C. C. 124. n.

3. Devise to A. (after death or marriage of the testator's wife), charged with 100*l.* to B., who died during the life of the wife: the legacy vested, and was transmissible. *Godwin v. Munday*, 1 B. C. C. 191.

4. Devise of real and personal estate to trustees to pay rents, &c. to wife for life; then to pay a legacy to the daughter: this is vested and transmissible. *Molesworth v. Molesworth*, 4 B. C. C. 408.

5. Devise to the devisor's wife for life, and from and after her decease to trustees, upon trust to sell, and among other bequests to lay out 500*l.* in an annuity for the life of his son. A vested interest in the son, surviving the devisor, but dying in the life of the wife: the period of enjoyment being deferred with reference to the circumstances of the estate, not of the legatee. *Bayley v. Bishop*, 9 Ves. 6.

### VII. When other interests shall be vested.

#### Interests in a partnership trade.

Interests in a partnership trade under articles to the widows of the partners for their respective lives, and after the decease of the widows, to and to be equally divided among their respective children: not vested in children, who died in the life of the mother; on account of the nature of the subject; the primary object being to constitute a partnership, and ascertain the succession; and a provision for the family only a secondary object through that medium. *Balmain v. Shore*, 9 Ves. 500.

## VISITOR.

**I. Of the visitatorial power in general.**

Power clearly given, to interpret and determine doubts upon the statutes, may itself constitute visitatorial power.

**II. Of the visitatorial power in particular instances.**

1. In the case of Trinity hall, Cambridge; there being no heir of the founder.

2. In the case of Ravensworth hospital.

**III. In relation to stat. 43 Eliz. c. 4.**

Of extending the statute to cases where the governors or visitors are the trustees, or are abusing their powers.

**I. Of the visitatorial power in general.**

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**II. Of the visitatorial power in particular instances.**

1. In the case of Trinity hall, Cambridge; there being no heir of the founder.

Petition to the lord chancellor as visitor of Trinity hall, Cambridge, there being no heir of the founder, to declare the election of a fellow void, and to order the petitioner to be admitted: the court of king's bench having in a similar case declined jurisdiction, the lord chancellor heard the petition, and upon the construction of the statutes, dismissed it. *Ex parte Wrangham*, 2 Ves. 609.

2. In the case of Ravensworth hospital.

No general appointment of visitor, excluding a commission of charitable uses under the statute 43 Eliz. c. 4. from special powers, that would fall within the general visitatorial power; as powers to the ordinary to interpret and determine doubts upon the statutes; of a motion and punishment, and of appointment, to the ordinary, and to the dean and chapter of York, in certain cases, &c. the whole visitatorial power, particularly as to the administration of the landed property, not being intended to be given to the ordinary, as visitor. *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305.

**III. In relation to stat. 43 Eliz. c. 4.**

Of extending the statute to cases where the governors or visitors are the trustees, or are abusing their powers.

Authorities for extending the act 43 Eliz. c. 4. to cases, where the governors or visitors are the trustees, or are abusing their powers; though an information would lie. 15 Ves. 314.

## VOLUNTARY CONVEYANCE.

## I. General rules and observations.

1. Of the necessary restrictions, in favour of creditors, over the power of alienating one's property.
2. What subjects are within the statute — personal property.
3. What subjects are not within the statute — copyholds.
4. What is or is not a consideration within the statute of fraudulent conveyances.
5. In relation to the distinction between contract and trust, with reference to the want of consideration.
6. Who is a creditor within the statute of fraudulent conveyances.
7. The motive of conveying, not of receiving, is the criterion of legality.
8. Inference of fraud from being indebted at the time of conveying.
9. Inference of fraud from retaining possession.
10. Inference of fraud from using the expression "for divers other good causes and considerations."
11. Effect of notice in a miscellaneous case.
12. Of the jurisdiction exercised by courts of equity, in the case of fraudulent conveyances.

## II. Voluntary conveyances are valid between the parties.

1. General rule.
2. Notwithstanding the maker retains possession of the deed.

## III. What conveyances are fraudulent against creditors.

1. Voluntary bond.
2. Settlement on marriage, under the circumstances.
3. Settlements after marriage.
4. Covenant, in marriage articles, in favour of a stranger.
5. Limitations in a marriage settlement to the brothers of the settlor.
6. Release from one brother to another, upon threats and misrepresentation.
7. Devise for legacies.
8. Another case.

## IV. What conveyances are not fraudulent against creditors.

1. Voluntary settlement in favour of strangers.
2. Limitations in a marriage settlement, in favour of the issue of a second marriage, by the settlor.
3. Limitation to the mother, in a marriage settlement.
4. Settlements after marriage.
5. Deed of separation.
6. Purchase by a married woman from her husband.
7. Conveyance for scheduled creditors, good against general creditors.
8. Provision by will for payment of creditors.

9. A provision for debts in a voluntary settlement, will support it against future creditors.

10. Purchase by nephew, for value, from insolvent uncle.

**V. What conveyances are fraudulent against purchasers.**

1. Purchaser with notice.

2. Voluntary settlement in favour of relations.

3. Miscellaneous cases.

**VI. What conveyances are fraudulent against legatery.**

Settlement after marriage.

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**I. General rules and observations.**

1. Of the necessary restrictions, in favour of creditors, over the power of alienating one's property.

No man has so absolute a power over his own property, as that he can alienate it, when such alienation tends to delay, hinder, or defraud his creditors, unless it be made on good consideration and *bonâ fide*. Partridge v. Gopp, 1 Eden, 167.; Amb. 596.

2. What subjects are within the statute — personal property.

An assignment of personal property for a consideration clearly inadequate, is fraudulent as against creditors, under 13 Eliz. But copyholds not being naturally subject to the debts, a conveyance of them cannot be fraudulent against creditors. Matthews v. Feaver, 1 Cox, 278.

3. What subjects are not within the statute — copyholds.

Ibid.

4. What is or is not a consideration within the statute of fraudulent conveyances.

1. In conveyances, blood is no consideration within the statute, 27 Eliz. Parry v. Carwarden, Dick. 544.

2. Slight consideration by a parent for a child, sufficient even against a purchaser. 2 Ves. 410.

3. In deciding whether a conveyance be voluntary, courts of law have always disavowed inquiring whether the consideration be equivalent; and if the transaction be honest, will not weigh it in very nice scales. Grogan v. Cook, 2 B. & B. 234.

4. A provision for debts in a voluntary settlement will support it against all future creditors. 9 Ves. 194.

5. Voluntary bond though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design; as by an insolvent to substitute a valid for an invalid security against creditors. *Ex parte Berry*, 19 Ves. 218.

6. Arrears, accrued under a voluntary bond; a valuable consideration, sustaining a conveyance against creditors. *Gilham v. Locke*, 9 Ves. 612.

7. If in consideration of marriage, an estate be limited in fee to A. by his father or other persons interested in making provision for the marriage; A. is a purchaser for valuable consideration, in respect of the marriage. *O'Gorman v. Comyn*, 2 Sch. & Lef. 147.

5. In relation to the distinction between contract and trust, with reference to the want of consideration.

The distinction between contract and trust, with reference to the want of consideration, has been acted upon under the same instrument. 18 Ves. jun. 99.

6. Who is a creditor within the statute of fraudulent conveyances.

Under a covenant upon marriage, by the husband with the trustees, in case his wife should survive him, to pay her a sum of money: she is a creditor within the statute against fraudulent conveyances. 13 Eliz. c. 5. *Rider v. Kidder*, 10 Ves. 360.

7. The motive of conveying, not of receiving, is the criterion of legality.

By the 13 Eliz. the only consideration as to the validity or invalidity of alienations, depends on the intent and conduct of the party making them, and not on the motive with which they are received. *Partridge v. Gopp*, 1 Eden, 167.; *Amb.* 596.

8. Inference of fraud from being indebted at the time of conveying.

A person being indebted at the time of making a voluntary conveyance, is an argument of fraud. *Grogan v. Cooke*, 2 B. & B. 234.

9. Inference of fraud from retaining possession.

1. Assignment of property, retaining possession, fraudulent against creditors. 17 Ves. jun. 197.

2. Where there is a conveyance, and possession is retained, towards all third persons the ownership is not divested; but where deeds are set aside between the party themselves and the heir of the party conveying, it must be upon actual fraud; and the retaining is only evidence; which with reasonable proof of weak capacity will be sufficient. 2 Ves. 292.

10. Inference of fraud from using the expression, "for divers other good causes and considerations."

The words "for divers other good causes and considerations," thrown into a deed of purchase, symptoms of fraud. 2 Sch. & Lef. 483.

11. Effect of notice in a miscellaneous case.

A., by a voluntary deed, assigned all the personal estate which he was then or might at any time afterwards be possessed of or entitled to, upon trust to pay the interest, &c. to himself for life, and after his decease to such persons as he should appoint by will for their lives, and subject thereto, to pay the principal to his next of kin, who should be living at his decease, his, her, or their executors, &c. Soon afterwards the testator by his will gave some legacies, and gave the residue to the persons by name, who were his next of kin at the execution of the deed and at his death; upon whose bill claiming under the deed an account of the trust-estate received by the trustees, and of the personal estate, &c. and to set aside the legacies, it was held, that the power was not executed by the will, but one of the plaintiffs being clearly affected with notice and acquiescence in the plan of giving the legacies instead of executing the power, the cause was ordered to stand over, with liberty to file a bill to establish the legacies: the court inclining, in case the other plaintiff could be affected with notice, at all events to apply the interest of the personal estate during the lives of the legatees in payment of the legacies. They were afterwards paid under a compromise. *Griffin v. Nanson*, 4 Ves. 344.

## 12. Of the jurisdiction exercised by courts of equity, in the case of fraudulent conveyances.

1. Purchase money cannot be laid hold of in favour of claims under a previous settlement, void under the statute 27 Eliz. c. 4. as being voluntary. 18 Ves. jun. 91.

2. Court of equity will not act in favour of a mere voluntary settlement; and therefore upon a subsequent purchase, with notice, and covenant to lay out the money to the same uses, will not lay hold of the money. *Ibid.* 93.

3. Distinction upon the want of consideration. Upon a contract merely voluntary, the court of chancery will do nothing; but takes jurisdiction upon a trust actually created, unless, perhaps, against a party having a right to put an end to it by his own act, under a sole power of revocation; by analogy to the distinction between the cases, where an entail can be barred by fine, and where a recovery is necessary. *Ibid.* 99.

4. No equity under a voluntary settlement to prevent a sale. *Ibid.* 112.

5. Distinction between a voluntary contract and a trust created within consideration; in the latter case the court acts; not in the former. *Ibid.* 149.

## II. Voluntary conveyances are valid between the parties.

### 1. General rule.

1. Voluntary settlement, void against creditors, good to other purposes. 12 Ves. 103.

2. Voluntary settlement good between the parties. 18 Ves. jun. 92.

### 2. Notwithstanding the maker retains possession of the deed.

A voluntary deed, once perfected, cannot be revoked at pleasure, even though the maker has retained it in his own custody. And where the deed is in execution of a power, the mere attempt to vary its dispositions, cannot of itself prove, that the omission of a power of revocation in the deed creating the power of appointment was occasioned by fraud or mistake. *Worrall v. Jacob*, 3 Mer. 270.

## III. What conveyances are fraudulent against creditors.

### 1. Voluntary bond.

Voluntary bond, though given under a strong moral obligation, a marriage contracted, and property received as husband, by a man, having a wife living at the same time, void as against creditors. *Gilham v. Locke*, 9 Ves. 612.

### 2. Settlement on marriage, under the circumstances.

Settlement on marriage, of freehold estates of inheritance, and leaseholds for lives and years, by a man not indebted or intending it in trade, to the use of himself for life, unless he shall embark in trade, and in the life of his wife become bankrupt, and from his decease or bankruptcy to secure an annuity for his wife; and subject thereto for his heirs, executors, &c. On his afterwards engaging in trade, and becoming bankrupt, void as against his creditors. *Higinbotham v. Holme*, 19 Ves. 88.

### 3. Settlements after marriage.

1. To impeach a settlement after marriage under the statute 13 Elizabeth, the husband must be proved to have been indebted at the time, and to the extent of insolvency. The creditor not producing any evidence, his bill was dismissed; with liberty to file another. *Lush v. Wilkinson*, 3 Ves. 384.

2. A deed of separation, the trustees indemnifying the husband against wife's future debts, not within statute. *Stevens v. Oliver*, 2 B. C. C. 90.

3. But

3. But a settlement after marriage, being voluntary, is fraudulent against a purchaser. *Evelyn v. Templar*, 2 B. C. C. 148.

4. Settlement after marriage, held to be voluntary, proof of its having been made in pursuance of a parol promise before marriage, failing; and court of opinion, that even if such promise had been proved to have existed, it would not have supported a settlement made after marriage. *Spurgeon v. Collier*, 1 Eden, 55.

5. Settlement after marriage, of stock standing in the name of the wife, the husband being insolvent, and soon after a bankrupt; set aside upon the bill of the assignees after the death of the husband: the stock did not survive; but was decreed to the assignees, subject to a provision for the widow. *Pringle v. Hodgson*, 3 Ves. 617.

6. Voluntary settlement void under the statute 27th Eliz. c. 11. against a subsequent purchaser for valuable consideration with notice, though a fair provision for a wife and children, an injunction, restraining the husband from selling, was refused; but a demurrer by the husband overruled, as covering too much; the plaintiff being entitled, until a sale, to an execution of the trust. *Pulvertoft v. Pulvertoft*, 18 Ves. jun. 84.

7. G., previous to entering into a partnership trade, executed a bond for 500*l.* to a trustee, upon trust, that upon his death, failure in trade, or bankruptcy, the interest should be paid to his wife for her life, with a power of appointment to her. G. and his partner became bankrupts. The bond was voluntary, and decreed not to be set up against the creditors; but to be paid in case of a surplus after payment of joint and several creditors. *Assignees of Gardiner v. Shannon*, 2 Sch. & Lef. 228.

8. A settlement after a marriage in Scotland, not supported against creditors in bankruptcy, as upon valuable consideration by a re-celebration of the marriage in England: but it was sustained as the consideration of an agreement to settle by the parent of the other party. *Ex parte Hall*, 1 Ves. & Beam. 112.

9. Whether a settlement after marriage, reciting a parol agreement before marriage, which had actual existence, can stand against creditors, *quære*. 12 Ves. 74.

#### 4. Covenant in marriage articles in favour of a stranger.

Covenant in marriage articles in favour of a stranger, held merely voluntary, and not to be supported by the marriage consideration. *Sutton v. Chetwynd*, 3 Mer. 249.

#### 5. Limitation in a marriage settlement to the brothers of the settlor.

Limitations in a marriage settlement to the brothers of the settlor, are not good against a subsequent purchaser, for a valuable consideration. *Johnson v. Legard*, 3 Mad. 283.

#### 6. Release from one brother to another, upon threats and misrepresentation.

Release from one brother to another of certain premises that had been devised to him by his father, executed in consequence of a threat to file a bill, and of assurances that a favourable opinion had been given by counsel, set aside in favour of creditors. *Peat v. Powell*, 1 Eden, 479.; *Amb.* 396.

#### 7. Devise for legacies.

The statute of fraudulent devises would prevent a devise for legacies to the prejudice of creditors by specialty; but not a devise for debts generally; though that might be the effect. 12 Ves. 154.

#### 8. Another case.

Receipt for a subscription to a navigation, with an indorsement, signed by the owner, declaring, that he thereby assigned to his daughter A. all his interest,



interest, found among the papers of his executrix: no evidence, that he ever parted with the paper; and a declared intention of satisfaction by a marriage portion. Bill for an assignment dismissed. *Antrobus v. Smith*, 12 Ves. 39.

#### IV. ~~What~~ convepances are not fraudulent against creditors.

##### 1. Voluntary settlement in favour of strangers.

A voluntary settlement in favour of strangers by one not indebted at the time, nor meaning a fraud, good against subsequent creditors. *Holloway v. Millard*, 1 Mad. 414.

##### 2. Limitations in a marriage settlement, in favour of the issue of a second marriage by the settlor.

Limitations in a marriage settlement in favour of the issue of a second marriage by the settlor, held good against a purchaser for a valuable consideration; such limitations being interposed between the limitations to the sons of the first marriage and the daughters of such. *Clayton v. Earl of Winton*, 3 Mad. 302. n.

##### 3. Limitation to the mother, in a marriage settlement.

On the treaty of marriage between A. and B., the father and mother of B., in consideration of the settlement to be made by A., joined in conveying a small estate (out of which the mother was dowable) to A. in fee; (but no fine was levied); and they also joined in settling another estate of which the father was seised in fee, on the father for life, remainder to the mother for life, remainder to the uses of the marriage. At the time of the settlement, the father was indebted by settlement. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within the statute of 13th Eliz., more especially as she had joined in conveying the small estate in fee to the husband. *Jones v. Boulter*, 1 Cox, 288.

#### 4. Settlements after marriage.

1. Settlement after marriage, by a person not indebted, is not within the statute of fraudulent conveyances. *Stevens v. Ollver*, 2 B. C. C. 90.

2. Settlement after marriage, fraudulent only as against creditors at that time. The settlement coming out in the answer to a bill by creditors, claiming under a devise for debts, they are entitled to an inquiry. *Williams v. Coussmaker*, 12 Ves. 136.

3. Settlement after marriage, of the wife's property, recited a parol agreement before marriage to make such settlement. The creditors of the husband cannot set aside such settlement. *Dundas v. Dutens*, 2 Cox, 235.

4. A voluntary settlement without fraud, by a husband not indebted, in favour of his wife and children, is valid against subsequent creditors. On a bill by the wife, the court established the settlement, no creditor attempting to impeach it, and there being no allegation that the husband was indebted at the time, without directing an inquiry on that subject. It seems that a recital in a settlement after marriage is not evidence against creditors of articles before marriage. *Battersbee v. Barrington*, *Swanst.* 106.

##### 5. Deed of separation.

A husband having lived in a state of adultery, a separation took place between him and his wife, and upon that occasion the husband settled real estates, to the amount of 300*l.* *per annum*, on the wife, for her separate maintenance, and on the children of the marriage. Under these circumstances, the settlement is not fraudulent as against creditors, under the statute of 13 Eliz. *Hobbs v. Hull*, 1 Cox, 445.

6. Purchase by a married woman from her husband.

A purchase by a married woman from her husband, through the medium of trustees for her separate use and appointment, may be sustained against creditors, if *bond fide*; though the husband is indebted at the time; and even though the object is to preserve from his creditors for the family the subject of the purchase: in this instance, ancient family pictures, furniture, and other articles, of a peculiar nature and value. The circumstances of the comparative value of the consideration, the continued possession, (according to the title, by the relation of the parties,) the degree of notoriety, the want of an inventory, the satisfaction of some debts out of the property, &c. though circumstances of evidence, are not conclusive as to the nature of the transaction. *Lady Arundell v. Phipps*, 10 Ves. 139.

7. Conveyance for scheduled creditors, good against general creditors.

A conveyance to A. and B. in trust, as to one moiety, for scheduled creditors, as to the other, for the debtor, is good against general creditors. *Cailland v. Estwick*, 2 Anst. 381.

8. Provision, by will, for payment of creditors.

A provision by will, effectual in law or in equity for payment of creditors, is not within the statute of fraudulent devises. 7 Ves. 323.

9. A provision for debts in a voluntary settlement, will support it against future creditors.

Vide 9 Ves. 194.

10. Purchase by nephew, for value; from insolvent uncle.

A purchase by a nephew from his uncle, who (unknown to the nephew) was insolvent, and died soon after the purchase, for a valuable consideration, the adequacy of which was disputed; held to be unimpeachable by creditors of the uncle. *Copis v. Middleton*, 2 Mad. 410.

V. *What conveyances are fraudulent against purchasers.*

1. Purchaser with notice.

1. Fraudulent conveyance set aside as against a purchaser with notice, notwithstanding a great length of time which had elapsed since the original transaction. *Alden v. Gregory*, 2 Eden, 280.

2. Notice of the contents of a voluntary settlement, has no effect even in equity, therefore notice of a covenant in a voluntary settlement, that the purchase money should be paid to trustees, to be laid out in other lands, to be settled to the same uses, held immaterial. 18 Ves. jun. 112.

2. Voluntary settlement in favour of relations.

Voluntary settlement, though free from actual fraud, and meritorious, as a provision for relations, void against a subsequent purchaser for valuable consideration, with notice, whether by conveyance or articles, specific performance decreed in the latter case. *Buckle v. Mitchell*, 18 Ves. jun. 100.

3. Miscellaneous cases.

A., by settlement after marriage, conveys to trustees to family uses, reserving a power to sell, but covenanting that the money shall be paid to the trustees for the same uses; A. sells to B., who has notice of the covenant, and pays the money to A.; B.'s representative shall not be obliged to pay the purchase money over again to the trustees to the uses of the settlement, which being voluntary, is fraudulent against a purchaser by the 27th Eliz. *Evelyn v. Templar*, 2 B. C. C. 148.

VI. *What conveyances are fraudulent against legatees.*

Settlement after marriage.

A. having by settlement secured to his wife an ample jointure, passed his  
bond

bond to her after marriage, to answer a particular purpose: this bond was declared to be voluntary, and set aside in favour of a legatee of the husband, against the representative of the wife. *Stratford v. Powell*, 1 Ball & Beatty, 1.

## WARD OF COURT.

### I. In relation to the marriage of a ward of court.

1. An unauthorized marriage in fact, is a contempt of court.
2. Of the punishment of a contempt in marrying a ward.
3. Discharge from commitment.
4. The form of giving consent.
5. The master reporting a marriage invalid, a second marriage was ordered.
6. Settlements.
7. Prevention of.
8. An infant plaintiff, a ward, having married, proceedings stayed till the husband shall appear.

### II. Of preventing the removal of a ward of court, out of the jurisdiction.

Whether an affidavit is necessary to obtain an order.

### I. In relation to the marriage of a ward of court.

1. An unauthorized marriage in fact, is a contempt of court.

In the case of a ward of the court, a marriage in fact is sufficient to ground the contempt. *Salles v. Savignon*, 6 Ves. 572.

2. Of the punishment of a contempt in marrying a ward.

1. Orders have been made for committing to close confinement for marrying a ward of the court. 8 Ves. 79.

2. Commitment for eloping with a ward of the court; and against another person for assisting: ignorance, that she was a ward of court, not admitted as an excuse. *Nicholson v. Squire*, 16 Ves. 259.

3. Upon the marriage of a ward of the court, both parties being foreigners, and the property abroad, and the marriage in Scotland on the day the bill was filed, the court took jurisdiction; but did not commit the husband; ordering him to attend from time to time, and to be at liberty to make a proposal. *Salles v. Savignon*, 6 Ves. 572.

4. Contempt on marrying a ward, by commitment, not sufficient; held to be a conspiracy, and an information recommended. *Schreiber v. Lateward*, Dick. 592.

5. Punishment for contempt by marrying a ward of court, by commitment, or, in a flagrant case, by directing a criminal prosecution for conspiracy, &c.; the subject of sound discretion; and though the right to interpose without complaint, is not affected by time, the exercise of it was dispensed with upon circumstances; no complaint made for eight years; the husband, though his conduct would have justified punishment on a recent application, not being a needy adventurer, but of equal family and fortune; having actually made a considerable settlement; under which the children had vested interests, and alleging misconduct by the wife. The interests of the children not to be affected: but the settlement varied as between the husband and

and wife, by increasing the pin-money, giving her some interest in future property, &c. *Ball v. Coutts*, 1 Ves. & Beam. 292.

6. Marriage of a ward of the court under gross circumstances, punishable, beyond commitment, by indictment, as a conspiracy. *Wade v. Broughton*, 3 Ves. & Beam. 172.

### 3. Discharge from commitment.

1. Husband committed for marrying a ward of the court, and discharged under particular circumstances, on undertaking to make a settlement; was held to that, and not permitted upon her consent to receive her whole fortune, viz. a rent-charge for life. *Stackpole v. Beaumont*, 3 Ves. 89.

2. Upon a marriage of a ward of the court, under flagrant circumstances, the husband obtaining a licence upon a false oath, that she was of age, the clergyman was ordered to attend, and reprimanded: the husband was committed, and ordered to be indicted. Being convicted, and having suffered the punishment, upon his petition to be discharged on executing a settlement, the lord chancellor would not approve a proposal giving him any farther interest than, in case of his surviving and no children, under her appointment; requiring the fund to be transferred to the accountant general, with a trust declared to pay the dividends to her separate use for life, from time to time, and not by way of anticipation: after her decease, the capital among all her children by any marriage: if none, and he survives, according to her appointment by will; if no appointment, to her next of kin; and if she survives, subject to her appointment, to her, her executors, &c. No costs to the husband. *Millet v. Rowse*, 7 Ves. 419.

3. Upon the marriage of a female ward of the court all parties concerned were ordered to attend; and the husband was committed; and restrained from receiving her visits; and she consented to quit her residence with a friend of his under an intimation from the court, that she would otherwise be compelled to do so. The husband after some time was permitted to propose a settlement. The lord chancellor would not admit a provision for children by a subsequent marriage, by way of absolute settlement, but only by a power to the wife to charge by way of appointment to each child a share not exceeding the share of each child by the first marriage. The husband to have some part of the income independent during coverture. The wife having by the proposed settlement a power of appointment in case of no children and the husband surviving, the limitation in default of appointment was directed to be to her next of kin, exclusive of the husband. The master finding, that the marriage was invalid, a marriage by banns was directed. The lord chancellor refused to discharge the husband on undertaking to execute the settlement. *Bathurst v. Murray*, 8 Ves. 74.

### 4. The form of giving consent.

Vide *Dick*. 801.

5. The master reporting a marriage invalid, a second marriage was ordered.

Vide 8 Ves. 74.

### 6. Settlements.

1. Settlement of the property of a married woman, a ward of the court, and of all the dividends and interest accrued, directed in opposition to an assignment by the husband for valuable consideration. *Like v. Beresford*, 3 Ves. 506.

2. Proposal for a settlement on the marriage of a female ward of the court, disapproved; as not providing sufficiently for the event of a future husband and children: viz. only by powers over her real estate; which during infancy she could not exercise; and all the property being her's. *Halsey v. Halsey*, 9 Ves. 471.

3. Dis-

3. Distinction upon contempt by marriage of a ward of court: a person of no property, whose only object is the fortune, is not permitted to touch it; and the whole is put in settlement: otherwise, when the husband of equal rank and fortune makes an equivalent settlement. 1 Ves. & Beam. 303.

4. Upon a proposal for a settlement under a commitment for marrying a ward of the court, a power was directed to be inserted, enabling the wife to settle the interest of a moiety of her fortune upon any future husband for life. The husband, on undertaking by his counsel to execute the settlement, was discharged. *Winch v. James*, 4 Ves. 386.

5. Upon a settlement of the fortune of a ward of the court, who had married a man of no property, the court took care to secure a provision for a future marriage. *Wells v. Price*, 5 Ves. 398.

#### 7. Prevention of.

Injunction upon affidavit of an intended marriage with a male infant, aged eighteen, restraining communication with him until farther order; and that service of the order at the house, which appeared to be the last place of abode, though apparently shut up, should be good service. *Pearce v. Crutchfield*, 14 Ves. 206.

8. An infant plaintiff, a ward, having married, proceedings staid, till the husband shall appear.

An infant plaintiff, a ward of the court, having married, proceedings staid, till the husband shall appear. *Brummell v. M'Pherson*, 7 Ves. 237.

### II. Of preventing the removal of a ward of court, out of the jurisdiction.

Whether an affidavit is necessary to obtain an order.

No affidavit necessary to obtain an order, that a child, a ward of court, shall not be taken out of the jurisdiction, even to Scotland. 10 Ves. 56.

## WASTE.

### I. What acts shall be accounted waste.

1. Legal waste.
2. Equitable waste.

### II. What acts shall not be accounted waste.

1. Legal waste.
2. Equitable waste.

### III. Of the rights of tenants, dispensable.

1. Extent of the right of tenant in tail, after possibility.
2. Bill by infant, tenant in tail in reversion, to have timber cut.
3. Difference between the powers of tenant for life, dispensable, and trustees, under the same words.
4. The power of tenant, for dispensable, not enlarged by implication.
5. Tenant for life restrained from felling ornamental or immature timber.
6. A case in which tenant for life was held not entitled to fell timber on the land, to be sold.
7. Right of tenant for life, impeachable, where lands are exchanged under acts of inclosure.

IV. *See*

**IV. For whom an injunction to restrain waste, shall be granted.**

Tenant for life.

**V. Against whom an injunction to restrain waste, shall not be granted.**

1. One in possession, claiming by adverse title.
2. A trespasser.
3. Tenant holding under covenant for perpetual renewal.

**VI. Practice relating to injunctions to restrain waste.**

1. The affidavit must go to acts, or threats, not merely to intention.
2. Injunction not prevented by appearance the day before the motion.

**VII. Account and application of the proceeds of timber improperly felled.**

1. The account goes upon the injunction.
2. Admission that any timber has been wrongfully cut, gives a right to an account.
3. Proceeds paid to the next taker of the inheritance, though there were intermediate remainders that might arise.
4. In the case of underwood cut and sold, under a power to cut but not sell.

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**I. What acts shall be accounted waste.****1. Legal waste.**

1. Injunction against ploughing up pasture upon a covenant to manage in a husbandlike manner. *Drury v. Molins*, 6 Ves. 328.
2. Waste by destruction of a dove-cote: not by removing presses, &c. unless fixed. *Kimpton v. Eve*, 2 Ves. & Beam. 349.

**2. Equitable waste.**

1. Injunction to restrain tenant for life, without impeachment of waste, from cutting timber or other trees planted or growing for shelter or ornament, and from cutting except in a husbandlike manner. *Lord Tamworth v. Lord Ferrers*, 6 Ves. 419.
2. Equitable waste by cutting trees, planted for ornament. 16 Ves. 132.
3. Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees, planted for the purpose of excluding objects from view. *Day v. Merry*, 16 Ves. 375.

**II. What acts shall not be accounted waste.****1. Legal waste.**

Cutting timber, where necessary for the growth of underwood, not waste. 16 Ves. 179.

**2. Equitable waste.**

1. Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental: viz. an extensive wood. *Burgess v. Lamb*, 16 Ves. 174.
2. Equitable waste not to be extended. *Ibid.* 185.

**III. &c.**

### III. Of the rights of tenants, dispunishable.

#### 1. Extent of the right of tenant in tail, after possibility.

Tenant in tail, after possibility of issue, extinct, having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, may, not only commit waste, but also convert to her own use the property wasted. Therefore, not to be restrained in equity, except for malicious waste. 15 Ves. 490.

#### 2. Bill by infant, tenant in tail in reversion, to have timber cut.

Bill by infant, tenant in tail in reversion, to have timber cut; the timber ordered to be felled, and the claims to be discussed when tenant in tail comes of age. *Mildmay v. Mildmay*, 4 B. C. C. 194.

#### 3. Difference between the powers of tenant for life, dispunishable, and trustees, under the same words.

Difference between the powers of tenant for life, without impeachment of waste, and trustees under the same words; the latter are bound to a provident execution of their powers. 6 Ves. 115.

#### 4. The power of tenant, for dispunishable, not enlarged by implication.

The power of tenant for life under the general words "without impeachment of waste," not enlarged by implication from more extensive powers given to trustees for special purposes after her death. *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107.

#### 5. Tenant for life restrained from felling ornamental or immature timber.

1. A. by will, made his wife tenant for life; by codicil, he gave her permission to cut timber during widowhood, at seasonable times: she shall be restrained from cutting ornamental or immature timber. *Chamberlyne v. Dummer*, 1 B. C. C. 166.

2. Tenant for life, with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be felled for timber. *Chamberlyne v. Dummer*, 3 B. C. C. 549.

#### 6. A case in which tenant for life was held not entitled to fell timber on the lands to be sold.

Devise of lands to be sold, and other lands to be purchased, in which A. should be tenant for life without impeachment of waste; the rents and profits of the estates to be sold, to be to the use of the persons who would be entitled to those of the estates to be purchased: the tenant for life cannot cut down timber on the land to be sold. *Plymouth v. Archer*, 1 B. C. C. 159.

#### 7. Right of tenant for life, impeachable, where lands are exchanged under acts of inclosure.

Where lands are exchanged, under acts of inclosure, tenant for life, impeachable of waste, cannot cut timber for the inclosure, but must raise money under the powers in the act. *Lee v. Alston*, 1 B. C. C. 194.

### IV. For whom an injunction to restrain waste, shall be granted.

#### Tenant for life.

Injunction against waste, in favour of tenant for life, particularly as to ornamental timber; not so much upon his interest as his enjoyment. 6 Ves. 787.

#### V. Against

**V. Against whom an injunction to restrain waste, shall not be granted.**

1. One in possession, claiming by adverse title.

To restrain waste not granted against defendant in possession, claiming by an adverse title. *Pilsworth v. Hopton*, 6 Ves. 51.

2. A trespasser.

Injunction against a trespasser, cutting timber by collusion with the tenant; without prejudice to the case of mere trespass. *Courthorpe v. Maplesden*, 10 Ves. 290.

3. Tenant holding under covenant for perpetual renewal.

Injunction in the nature of a writ of estrepement of waste, not granted against a tenant holding under a lease containing a covenant for perpetual renewal. *Calvert v. Gason*, 2 Sch & Lef. 561.

**VI. Practice relating to injunctions to restrain waste.**

1. The affidavit must go to acts, or threats, not merely to intention.

In the case of waste, it is not sufficient to swear to information of the intention. The affidavit must go either to an act or threats. *Hannay v. McIntire*, 10 Ves. 54.

2. Injunction not prevented by appearance the day before the motion.

Injunction against waste, not prevented by appearance the day before the motion. *Aller v. Jones*, 15 Ves. 605.

**VII. Account and application of the proceeds of timber improperly felled.**

1. The account goes upon the injunction.

In waste, the account goes upon the injunction. 9 Ves. 346.

2. Admission that any timber has been wrongfully cut, gives a right to an account.

Admission that any timber has been wrongfully cut, gives a right to an account. 1 Ves. 82.

3. Proceeds paid to the next taker of the inheritance, though there were intermediate remainders that might arise.

The money raised by sale of timber improperly cut by tenants for life, impeachable; ordered to be paid to the next taker of the inheritance, though there were intermediate remainders that might arise. Such tenant cutting timber will lead to an account, but where no more timber has been cut than charged by the bill, and admitted by the answer, the money shall be paid without costs. *Lee v. Aston*, 3 B. C. C. 38.

4. In the case of underwood cut and sold, under a power to cut, but not sell.

Testator devised his estate to his wife for life, "with liberty to cut timber and underwood for her own use, but not to sell." She cut underwood and sold it, and died: her estate is not accountable for the money produced, at least not to the next taker for life, impeachable for waste. *Piggot, v. Bullock*, 3 B. C. C. 539.



## WAY.

Presumptions between evidence of interruption acquiesced in and evidence of usage, on the question of a right of way.

In a question of a right of way, evidence of an interruption acquiesced in, is infinitely of more weight, than evidence of usage. 1 Ball & Beatty, 514.

## WEST INDIES.

1. Jurisdiction here upon contracts as to an estate in the West Indies.
2. Whether an action lies upon a bond after judgment thereon in a court in Jamaica.

1. Jurisdiction here upon contracts as to an estate in the West Indies.

Jurisdiction here, upon contracts as to an estate in the West Indies. Jackson v. Petrie, 10 Ves. 164.

2. Whether an action lies upon a bond after judgment thereon in a court in Jamaica.

Whether action lies upon a bond, on which judgment has been obtained in Jamaica, *quære*. 11 Ves. 357.

## WILL, TENANT AT.

- I. Of the time at which the tenancy may be determined.

General rule.

- II. Of the modes in which the tenancy may be determined.

1. By the death of either party.
2. By an agreement to purchase.

- I. Of the time at which the tenancy may be determined.

1. General rule.

Tenancy at will may be determined at any time, as to any new contract, not as to any thing, which during the tenancy remained a common interest. 16 Ves. 57.

- II. Of the modes in which the tenancy may be determined.

1. By the death of either party.

Generally the death of either party determines a tenancy at will. 9 Ves. 891.

2. By an agreement to purchase.

Tenancy at will determined by an agreement to purchase. 16 Ves. 252.

WITNESS.

## WITNESS.

## I. Of incompetency from interest.

1. A witness is disinterested who can gain nothing by the event of the suit.
2. Competency of a witness afterwards becoming interested.
3. An agent entitled to commission.
4. Competency of a son employed under, paid by, and accounting to, his father.
5. A bankrupt.
6. A bankrupt's creditor.
7. Incompetency of bond-creditors of testator to obtain a decree for payment of a legacy.
8. Competency of an executor in trust.
9. Incompetency of an executor in trust, in a suit respecting assets.
10. Incompetency of a remainder-man to prove payment of a legacy charged on the estate.
11. Miscellaneous.

## II. Of incompetency from relative situation.

1. Baron and feme.
2. Counsel and solicitor.
3. Executor of counsel or solicitor.
4. Competency of a parent to bastardize his issue.

## III. Of the examination of a party to the suit.

1. A plaintiff.
2. A co-plaintiff.
3. A defendant.
4. Effect of plaintiff examining defendant.
5. A guardian *ad litem*.

## IV. In relation to an attesting witness.

1. He cannot contradict his attestation.
2. Being abroad, his evidence was dispensed with.
3. Being insane, his evidence was dispensed with.
4. Being unknown, his evidence was dispensed with.

## V. Of the duty of a witness.

1. He should not disclose his evidence to the parties.

## I. Of incompetency from interest.

1. A witness is disinterested who can gain nothing by the event of the suit.
- Witness good, who can recover nothing in the suit.
2. Competency of a witness afterwards becoming interested.

Witness to a will not interested at the execution or death of the testator, is competent, though interested at his examination. *Brograve v. Winder*, 2 Ves. 634.

## 3. An agent entitled to commission.

The interest of an auctioneer from his commission, does not defeat his evidence. 13 Ves. 474.

## 4. Competency of a son employed under, paid by, and accounting to, his father.

Son employed under, paid by, and accounting to, his father, may be a witness; but is not accountable to his father's principal. *Cartwright v. Hately*, 1 Ves. 292.

## 5. A bankrupt.

1. A bankrupt's certificate must have passed the great seal before he can be examined as a witness. *Speidel v. Fuller*, Dick. 638.

2. A bankrupt plaintiff though he hath obtained his certificate and hath released, cannot be examined as a witness, as he is liable to costs. *Hewittson v. Tookey*, Dick. 799.

## 6. A bankrupt's creditor.

1. On the question, whether a commission of bankruptcy is or is not sustainable (e. g. whether the petitioning creditor had a sufficient debt to entitle him to petition), a creditor of the bankrupt is a competent witness to prove the negative. *In re Codd*, 2 Sch. & Lef. 116.

2. A creditor not a competent witness to the act of bankruptcy or trading. *Ex parte Osborne*, 2 Ves. & Beam. 177.; *Rose*, 387.

3. A creditor of the bankrupt, is not a competent witness to sustain a commission upon an issue directed to try its validity. *Ex parte Malkin*, 2 Rose, 27.

## 7. Incompetency of bond-creditors of testator to obtain a decree for payment of a legacy.

Evidence of bond-creditors of testator, not admissible to obtain a decree for payment of a legacy; as they must be preferred to legatees. *Jones v. Tuberville*, 2 Ves. 11.

## 8. Competency of an executor in trust.

An executor in trust is a competent witness at law. 1 Ball & Beatty, 100. 414.

## 9. Incompetency of an executor in trust, in a suit respecting assets.

1. Vide 1 B. & B. 96.

2. An executor in trust is an incompetent witness in equity, respecting the assets, being interested to increase the fund. *Mulorny v. Dillon*, 1 Ball & Beatty, 400.

## 10. Incompetency of a remainder-man to prove payment of a legacy charged on the estate.

A remainder-man is an incompetent witness to prove payment of a legacy charged on the estate. *Aldridge v. Lord Wallscourt*, 1 Ball & Beatty, 312.

## 11. Miscellaneous.

Upon a treaty of marriage between A. and B., the mother of A. being entitled to one-third of a farm and stock, of which A. was in possession, represented to the father of B. that the farm and stock belonged to A.; and that A. was not indebted to any body. The mother afterwards takes a bond from A. for the amount of her one-third part of the farm and stock, &c., which were settled on the marriage. Equity will relieve A. and B. against that bond, as being a fraud upon the marriage. The parent is not a necessary party to such a suit, but is a competent witness to prove the fraud on a bill filed by the husband and wife. *Scott v. Scott*, 1 Cox, 366.

**II. Of incompetency from relative situation.****1. Baron and feme.**

Husband and wife cannot give evidence for or against each other. 13 Ves. 144.

**2. Counsel and solicitor.**

1. Counsel or attorney cannot be called upon to reveal the advice given to the client. Demurrer therefore overruled as to the case; and allowed as to the opinion. 18 Ves. jun. 474.

2. Attorney, examined as a witness, must disclose acts done in his presence by his client; as, execution of a deed, &c.; not private confidential conversation with him, as the reasons for making it, &c. On motion to suppress the depositions, referred to see what part came to his knowledge, as confidential attorney, in order to have that suppressed. *Sandford v. Remington*, 2 Ves. 189.

3. A solicitor is bound to give evidence of his client's handwriting if required; it is no breach of the confidence reposed in him by his client. 1 Sch. & Lef. 226.

**3. Executor of counsel or solicitor.**

*Quære* whether the executor of an attorney can avail himself of the attorney's privilege not to disclose the concerns of his client. *Fenwick v. Reed*, 1 Mer. 114.

**4. Competency of a parent to bastardize his issue.**

A father coming to bastardize his own issue, is, though a legal, a very suspicious, witness. 1 Ves. 134.

**III. Of the examination of a party to the suit.****1. A plaintiff.**

The defendant had liberty to examine plaintiff as a witness. *Quære*. *Troughton v. Getley*, Dick. 382.

**2. A co-plaintiff.**

A co-plaintiff examined to prove a deed; to which he was the only surviving witness: allowed by consent. *Whately v. Smith*, Dick. 650.

**3. A defendant.**

After having replied to a defendant's answer, he is not to be examined, for it cannot be said, that he is not interested. *Winter v. Kent*, Dick. 595.

**4. Effect of plaintiff examining defendant.**

Plaintiff, by examining a defendant as a witness, precludes himself from obtaining any relief by decree against him; and if from the nature of the case, that defendant would be primarily liable to plaintiff, and another defendant only in a secondary degree, the plaintiff has lost his remedy altogether. *Thompson v. Harrison*, 1 Cox, 344.

**5. A guardian *ad litem*.**

It is of course to examine a guardian *ad litem* as a witness. *Walker v. Thomas*, Dick. 781.

**IV. In relation to an attesting witness.****1. He cannot contradict his attestation.**

Witness is not at liberty to contradict his attestation. In such a case, other evidence, from circumstances, admissible; as, where there is no witness, or the person does not exist, sealing and delivery may be presumed from proof of the handwriting. 10 Ves. 474.

**2. Being**

2. Being abroad, his evidence was dispensed with.  
A subscribing witness to a will, disposing of real estate, being in Jamaica, his evidence was dispensed with. Lord Carrington v. Payne, 5 Ves. 464.

3. Being insane, his evidence was dispensed with.  
A witness to a devise of real estate having become insane, proof of his handwriting was allowed. Bennett v. Taylor, 9 Ves. 381.

4. Being unknown, his evidence was dispensed with.  
Proof of one of the witnesses to an old will, of whom no account could be given, dispensed with. M'Kenzie v. Fraser, 9 Ves. 5.

### V. Of the duties of a witness.

He should not disclose his evidence to the parties.  
Witnesses ought not to disclose their evidence to parties. 5 Ves. 32.

## YEAR, TENANT FOR.

### I. Properties of the tenancy.

It is transmissible to representatives.

### II. How viewed by the courts.

The tenancy is favoured.

### I. Properties of the tenancy.

It is transmissible to representatives.

1. Interest from year to year transmissible to representatives, beneficially, or as trustees. 11 Ves. 393.

2. Tenancy from year to year is an interest transmissible to representatives. 15 Ves. 241.

### II. How viewed by the courts.

The tenancy is favoured.

Tenancy from year to year favoured. 16 Ves. 252.

## YORK.

**The custom of York upon the doctrine of advancement.**  
Custom of York as to advancement, barring the child's share of the customary estate. 9 Ves. 425.

THE END.



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